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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY SALVADORE JIMENEZ, JR.,

Defendant and Appellant.

C065269

(Super. Ct. No.
08F07560)

A jury convicted defendant Tony Salvadore Jimenez, Jr. of discharging a firearm at an inhabited dwelling (Pen. Code,¹ § 246 [count one]) and two counts of assault with a semiautomatic firearm (§ 245, subd. (b) [counts two [Michael Ramirez] and three [Walter Bivins²]]), as well as multiple enhancements.³

¹ Further undesignated statutory references are to the Penal Code.

² Victim Bivins's last name is also spelled "Bivens" in the record; we use the spelling provided by Bivins himself when testifying at trial.

The trial court sentenced defendant to an aggregate term of 40 years to life in prison.

On appeal, defendant contends that: (1) the trial court prejudicially erred in failing to instruct on the lesser included offense of negligent discharge of a firearm (§ 246.3); (2) the trial court prejudicially misled the jury by instructing with CALCRIM No. 400; (3) the pretrial identification procedure was unduly suggestive; (4) the trial court erroneously imposed both a 25-year-to-life term and a 15-year-to-life term on count one; and (5) defendant's sentence constitutes cruel and unusual punishment.

As we will explain, we agree only with the fourth contention and decline to address the fifth. Accordingly, we shall affirm the judgment but must remand for resentencing.

FACTUAL AND PROCEDURAL HISTORY

Facts Adduced at Trial

On the night of July 15, 2007, there was a party at Nancy Gomez's house. Nancy Gomez's daughter, Alyssa Gomez,⁴ and Alyssa's boyfriend, Johnathon Vasquez, were present, as well as (future victims) Walter Bivins and Michael Ramirez.

The testimony about what happened that night was confused by claims of memory loss and intoxication, and much of the

³ The jury acquitted codefendant Michael Rojas on all charges against him. Rojas is not a party to this appeal.

⁴ As Nancy and Alyssa Gomez share the same last name, we shall refer to them by their respective first names for clarity.

evidence came from pretrial statements to peace officers.

We glean the following relevant facts by viewing the evidence in the light most favorable to the verdicts.

At some time during the party, a group of between five and seven young Latino males arrived uninvited. The men identified themselves to several people as "Diamonds" or "Norteños." They began harassing people at the door and otherwise tried to control the party. When asked to leave, they became violent, fired guns at and around the house, and ultimately one of the men shot Ramirez in the leg.

Although the eyewitnesses agreed that guns were fired and a shooting occurred soon thereafter, they disagreed on many details. As mentioned *ante*, most testified that they had forgotten the entire evening, let alone any details of the shooting, as well as any conversations they had with law enforcement about the party, the shooting, and the shooters' identities. The available evidence does show that at the time the shooting started, some party guests were on the front walkway of the house and on the front lawn, either mingled with the shooters or between the house and the shooters. At least three shooters were either on the front lawn, the sidewalk, or the street.

When Nancy arrived home very late in the evening, she turned off the music and attempted to shut down the party. When asked to leave, the uninvited men started a disagreement with Ramirez and were "trying to start fights."

Nancy remembered telling police she saw a young kid pull a gun, and then "they were just shooting guns, and then [Ramirez] got shot in the leg." On the night of the shooting, she told Sacramento Police Department (SPD) Officer Ben Spencer she heard more than one gun, and each gun had been fired multiple times. Nancy described the man whom she saw pull a gun as Hispanic, wearing a white or red T-shirt, in his early 20s, about 5'5", with short black hair. She described a second man, who had been "trying to start fights" as Hispanic, wearing a white T-shirt with red writing and gold chains around his neck, in his mid-20s, also with short, black hair.

Bivins told Officer Spencer that before the shooting, one of the uninvited men introduced himself as "Tiger" and said he was a "Diamond." As the uninvited men were leaving, on the walkway leading to the front lawn, Bivins saw one of them pull out a gun, point it "at the legs of the crowd" and try to shoot, but the gun jammed. That same man then shot at Bivins's feet, and then "almost all of the guys had guns and started shooting" as Bivins and others ran back toward the house. Bivins looked back and saw "one guy standing out in the street shooting up into the air."

Bivins described the first shooter as a Hispanic male who was about 5'5", 18-19 years old, and very slim with a thin mustache, a red and white backwards hat and a white T-shirt. He also described a man who had been "arguing and talking" as Hispanic, also 5'5", but chubbier and wearing a black T-shirt,

with a black hair cut in a flat top--Bivins was not sure whether this second man had a gun.

When he spoke again with the police about a year after the shooting, Bivins said the first gun was pointed directly at him when it jammed, and thus he had been focusing on the person holding it. A "few" of the men had guns, but Bivins was most focused on the first person, who he remembered from an introduction as "Tiger." When shown a photo lineup, Bivins pointed out defendant as someone at the party and remembered his "smirky little smile," but was only "50, 55" percent sure that defendant was a gunman.

Alyssa told SPD Officer Troy Hawley the uninvited men left by way of the front door, walking backwards. Three of them pulled out guns, one after the other. They each shot four to six times. The third shooter, who she thought was named "Tony" or "Tiger," shot toward Ramirez.

Alyssa described the three shooters, and told Officer Hawley that she got a good look at them because they had been flirting with her. The first shooter pulled a black semiautomatic pistol out of his waistband. He was a Hispanic male, 16-17 years old, 5'6" and 150 pounds, with a light complexion, a Mongolian style hair cut, no facial hair, and a chubby face, wearing a white T-shirt and red and white sneakers. The second shooter was a Hispanic male, 20-21 years old, 5'10" and 150 pounds, with a very dark complexion, short, black hair, bushy eyebrows, a thin black mustache and goatee, full lips, and a gold grill. He was wearing a white T-shirt with green, gold,

and black writing, blue jeans, and white sneakers. He also had diamond tattoos on his hand, and held a black semiautomatic pistol. She remembered the third shooter as "Tony" and "Tiger." He was a Hispanic male, 18-19 years old, 5'7"-5'8" and 130 pounds, with a black, Mongolian style haircut, a thin mustache and small goatee, brown eyes, bushy eyebrows, and a small mole on his left cheek. He was wearing a white T-shirt, blue jeans, and white sneakers. He had the same type of black, semiautomatic pistol as the others, and she saw him remove it from his waistband with his left hand and shoot it toward Ramirez. When police interviewed Alyssa a year later and showed her a photo lineup, she confirmed that defendant looked familiar, but could not say for sure he was at the party or had a gun.

Vasquez told SPD Officer Edward McCaulay that after the uninvited men were asked to leave, three of them lifted up their shirts to show gun butts, one pulled out a gun and fired it three or four times into the air, a second pulled his gun and fired several times into the ground, and a third fired his gun several times in the direction of the house, hitting Ramirez. A year later, Vasquez claimed not to recognize anyone from the photo lineup.

Officer Macaulay testified that he was sent to the house slightly after midnight on July 15, 2007, on a call of "four shots just fired." The police located a live .45-caliber bullet cartridge on the front lawn of the house and a spent .38-caliber bullet casing in the corner of one of the house's windows. They

also found Ramirez in the back yard of the house with a through-and-through bullet wound in his leg.

A gang expert identified defendant and codefendant Rojas as members of the Varrio Diamonds subset of the Norteño street gang.

Arguments

The People argued that identity was the main issue in the case, and that there were at least two shooters, as there were at least two guns used, given that both .45 and .38-caliber ammunition were recovered. They pointed out that Alyssa gave a detailed and accurate description of defendant that evening as the one who shot toward Ramirez and that Bivins also picked out defendant's picture as "Tiger," one of the shooters. They argued the jury need not find defendant was "the shooter," but instead could properly find defendant liable under the theory of aiding and abetting if defendant knew "that the person going to do the shooting intended to commit the crime" and if the evidence of the gang members' behavior at the party before and after the shooting demonstrated that all the gang members presented a "united front."

Defense counsel argued the evidence of identity was largely circumstantial and inadequate, and the photo lineup was suggestive and inappropriate.

Verdicts

The jury convicted defendant of discharging a firearm at an inhabited dwelling (§ 246 [count one]) and two counts of assault with a semiautomatic firearm (§ 245, subd. (b) [counts two

[Michael Ramirez] and three [Walter Bivins])). In connection with all counts, the jury found that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). In connection with count one, the jury found that a principal personally used and intentionally discharged a firearm, causing great bodily injury (§ 12022.53, subds. (b), (c), (d), (e)(1)). In connection with counts two and three, the jury found that defendant personally used a semiautomatic handgun (§ 12022.5, subd. (a)). The jury did not find the great bodily injury allegation (§ 12022.7, subd. (a)) to be true in connection with count two.

Sentencing

The trial court sentenced defendant to an aggregate term of 40 years to life in prison--15 years to life on count one (§§ 246, 186.22(b)(1)) plus a consecutive term of 25 years to life for the firearm use enhancement. It stayed the gang enhancements in connection with counts two and three, and imposed concurrent terms on the remaining charges.

DISCUSSION

I

Lesser Included Offense

Defendant contends the trial court prejudicially erred in failing to instruct *sua sponte* on the lesser included offense of negligent discharge of a firearm (§ 246.3). We are not persuaded.

A. *The Law*

A trial court must instruct the jury on a lesser included offense when it is supported by the evidence, "but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 154.) This duty to instruct is warranted when there is "substantial evidence," that "a reasonable jury could find persuasive." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 414.)

Section 246.3, subdivision (a) (§ 246.3(a)), is a lesser included offense of section 246. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985; *People v. Overman* (2005) 126 Cal.App.4th 1344, 1358 (*Overman*).) The elements of section 246.3 are: "(1) the defendant unlawfully discharged a firearm; (2) the defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person." (*Overman, supra*, 126 Cal.App.4th at p. 1361; *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538.) The only difference between sections 246.3 and 246 is the latter's heightened requirement of "conscious disregard" for the probability of injury or death to persons, rather than gross negligence. (*Ibid.*)

B. *Analysis*

Defendant argues there was substantial evidence that he did not shoot or aid and abet a shooting at an occupied residence, but instead was either a gunman or the aider and abettor of a gunman described by witnesses as having a lesser role, namely, the gunmen described by at least one eyewitness as shooting into

the air and ground. As we explain immediately *post*, we conclude that under this particular set of facts, any and all of the shooters described by witnesses that evening necessarily violated section 246, whether or not they were *also* engaging in conduct, or aiding and abetting conduct, described by section 246.3(a), the lesser included offense.

California courts have interpreted section 246 to include not only shooting *directly* at an occupied dwelling, but also shooting "in such close proximity to the target that [defendant] shows a conscious indifference to the probable consequence that one or more bullets will strike the target or person in or around it." (*Overman, supra*, 126 Cal.App.4th at p. 1356; see also *People v. Chavira* (1970) 3 Cal.App.3d 988, 993.) This broad interpretation of section 246 "only requires a shooting under facts or circumstances that indicate a conscious disregard for the probability that [striking a building, killing or injuring] will occur." (*Overman, supra*, at p. 1357.)

Defendant cites testimony that some of the shooters were described as firing into the air or at the ground and not specifically at the victims or the house. However, even assuming that defendant fired a gun only into the air or ground, the evidence placed all of the shooters near the house and the party-goers milling about in the front yard. Under these specific circumstances, defendant's actions would still constitute a violation of section 246. Violations of this statute are not limited to shooting directly at a proscribed target, nor does it require a specific intent to strike the

target--any shooting in such close proximity to the occupied dwelling that conscious disregard for the consequences can be inferred is sufficient. (*Overman, supra*, 126 Cal.App.4th at p. 1356.) Determining this proximity does not involve a distance or direction requirement. Rather, "defendant's conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act." (*Overman, supra*, at pp. 1356-1357.)

In the instant case, the nature and circumstances of defendant's actions demonstrated a conscious indifference to the probability that people in or around the house would be injured or killed. This is true whether defendant shot directly toward the house or merely into the air or the ground or merely aided and abetted the shooters. By all accounts, defendant and his cohorts began shooting as they were leaving the house, while surrounded by many people on the front lawn and on the walkway leading to the front door of the house.

Defendant and his cohorts were certainly aware of their proximity to an occupied dwelling and many party guests when they fired their guns. At the farthest possible position, considering all the evidence, some shooters were in the street after having just left the house by way of the front yard, where multiple party guests were located. The evidence showed that the shooters shot at, toward, or in the vicinity of the house where the guests were fleeing or milling about, such that they demonstrated conscious disregard for the possibility of injury or death.

For these reasons, the trial court had no duty to instruct *sua sponte* on the lesser included offense of negligent discharge of a firearm. There was no error.⁵

II

Aiding and Abetting Instruction

Defendant contends the trial court erred by instructing that a perpetrator and an aider are "equally guilty[.]" As we explain, the claim is forfeited; further, any error was harmless. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1120 (*Lopez*).) The introductory instruction to the series of instructions on aiding, CALCRIM No. 400, as given to defendant's jury in this case, provided in part as follows:

"A person may be guilty of a crime in two ways: One, he or she may have directly committed the crime. I'll call that person the perpetrator. Two, he or she may have aided and abetted the perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."⁶

Defendant is correct that in some cases, an aider may be convicted of a different offense, whether greater or lesser, than the actual perpetrator. (*People v. Yang* (2010) 189 Cal.App.4th 148, 157.) In those cases, CALCRIM No. 400, as given above, may be misleadingly incomplete. (*People v. McCoy*

⁵ Finding no error, we need not discuss defendant's due process argument.

⁶ CALCRIM No. 400 has been amended to remove the "equally guilty" language. (1 CALCRIM (2011 ed.) p. 167.)

(2001) 25 Cal.4th 1111, 1114-1122.) Generally, however, a person who is found to have aided another person to commit a crime is "equally guilty" of that crime. (§ 31; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122-123.) Defendant claims the "equally guilty" language was misleading and prejudiced the defense in his case, requiring reversal of all counts of conviction.

However, because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on defendant to request a modification if he believed it was required. His failure to do so forfeits the claim of error. (*Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119.)

Looking beyond the forfeiture, we see no prejudice. Defendant contends the jury may have found he only violated section 246.3(a) as an aider, had it not been misled by CALCRIM No. 400. However, whether he was an actual perpetrator or an aider, defendant was not entitled to an instruction on section 246.3(a). Rather, as we explained *ante*, under the facts of this case, even if defendant only aided and abetted the perpetrator of the crimes described by the eyewitnesses, he necessarily violated section 246 and therefore was "equally guilty" when compared to the perpetrator.

To the extent defendant argues the instruction reduced the People's burden of proof by eliminating the need to prove defendant's intent, we disagree. Other instructions elaborated on the required intent to violate section 246 as an aider. CALCRIM No. 401, as given in this case, provided in part:

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: 1) The perpetrator committed the crime; 2) The defendant knew that the perpetrator intended to commit the crime; 3) Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime AND 4) The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

We presume the jurors followed the court's instructions, considered the requirements of CALCRIM No. 401, and did not blindly decide that "no matter what [defendant] had done, he was equally guilty to whomever had fired shots at the dwelling," as defendant urges. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; see *Lopez, supra*, 198 Cal.App.4th at p. 1119.)

Defendant does not separately challenge the sufficiency of the evidence to support his conviction for violating section 246. We have already rejected his argument that defendant's actions could have constituted only a violation of section 246.3(a) and, having concluded CALCRIM No. 400 was not misleading here, we need not discuss these points further.

III

Pretrial Identification

Defendant challenges the pretrial identification procedure, claiming it was unduly suggestive. Defendant does not claim

that he moved to exclude or objected to testimony related to the photo lineup. Accordingly, his claim is forfeited.

(*People v. Cunningham* (2001) 25 Cal.4th 926, 989; see *People v. Ochoa* (1998) 19 Cal.4th 353, 411-413; *People v. Leung* (1992) 5 Cal.App.4th 482, 496-498.)

Defendant does not raise ineffective assistance of counsel for failure to move to exclude the photo lineup as unduly suggestive, nor would any such claim have merit. The record reflects that defense counsel's own use of the photo lineup to support the defense of misidentification was reasonable.

IV

Sentencing

Defendant contends the trial court erroneously imposed both a 25-year-to-life term and a 15-year-to-life term for the firearm use enhancement and the criminal street gang enhancement⁷ imposed in connection with count one. The People concede error. After a thorough review of the record and applicable law, we agree with the parties.

The jury convicted defendant of shooting at an inhabited dwelling (§ 246; count one) and found that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), defendant was a principal, and that at least one

⁷ Although we refer to the enhanced penalty provided for violations of section 246 that are found to be committed for the benefit of a criminal street gang as an "enhancement" for ease of reference, it is actually an allegation justifying imposition of a life term under the penalty provision of section 186.22, subd. (b)(4), based on street gang participation.

principal personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), (d), (e) (1)).

Section 246 is punishable by a term of three, five or seven years, but when the offense is committed for the benefit of a street gang, the penalty is life imprisonment with a minimum term of 15 years. (§ 186.22, subd. (b) (4); *People v. Brookfield* (2009) 47 Cal.4th 583, 591 (*Brookfield*).) To apply a gang-related firearm enhancement under section 12022.53, the jury only had to find that a principal (other than defendant) intended to, and did, discharge a firearm during the violation of section 246, resulting in great bodily injury to another person. However, section 12022.53, subdivision (e) (2) provides: "An enhancement for participation in a criminal street gang . . . shall not be imposed . . . in addition to an enhancement under Penal Code section 12022.53 for firearm use unless the defendant "*personally used or personally discharged* a firearm in the commission of the offense."

Here, the jury did not find that defendant *personally* used or discharged a firearm *in connection with count one*. The jury found only that at least one principal did so. Thus defendant's sentence on count one should not have been increased under *both* sections 186.22 and 12022.53. (*Brookfield, supra*, 47 Cal.4th at pp. 591-597; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282.) *Brookfield* held that for the purposes of sentencing

under section 12022.53, subdivision (e), the sentencing scheme in section 186.22, subdivision (b) functions as an enhancement for participation in a criminal street gang, not an alternative penalty. (*Brookfield, supra*, at p. 592.) Accordingly, the imposition of increased terms under both sections 12022.53 and 186.22 is unauthorized.

“In choosing which of those two provisions to apply, the trial court must, consistent with section 12022.53’s subdivision (j), choose the provision that will result in a greater sentence.” (*Brookfield, supra*, 47 Cal.4th at p. 596.) The 25-year-to-life term is the greater sentence. Thus, the 15-year-to-life term for count one imposed pursuant to section 186.22, subdivision (b)(4) must be stricken. We will remand to the trial court to choose a determinate term on count one; on remand, the trial court is free to reconsider the sentence on all counts.⁸ (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258; *People v. Hill* (1986) 185 Cal.App.3d 831, 834.)

DISPOSITION

The judgment is affirmed. The sentence is vacated and the

⁸ Because we are remanding for resentencing, we decline to address defendant’s claim that his original sentence constituted cruel and unusual punishment.

case remanded to the trial court for resentencing in accordance with this opinion.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.