Filed 11/8/12 P. v. Hill CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MAURICE MARQUETTE HILL, Defendant and Appellant.	D059510 (Super. Ct. No. FSB700402; Super. Ct. No. FSB700672)

APPEAL from a judgment of the Superior Court of San Bernardino County, Kyle S. Brodie, Judge. Affirmed as modified.

Maurice Marquette Hill (Hill) and his codefendant brother, Malcolm Vincent Hill, Jr. were charged with various crimes. A jury convicted Hill of attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664; count one); shooting at an inhabited dwelling (§ 246; count two); and possession of a firearm (§ 1202.1, subd. (a); counts three and five). As to the attempted murder charge, it found true allegations that a principal personally and

1 All statutory references are to the Penal Code unless otherwise stated.

intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)) and a principal used a firearm (§ 12022.53, subds. (b) & (e)(1)). It found true as to count three that Hill committed the crime for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(A).) The jury deadlocked on a charge of firearm possession by a felon (§ 1202.1, subd. (a)), and counts one and five gang enhancement allegations under section 186.22, subdivision (b)(1)(A). It also deadlocked on all charges against Malcolm Hill.

The court sentenced Hill to a prison term of 30 years eight months as follows: seven years on count one, plus 20 years for the count one gun enhancement, plus eight months on count three, and three years on the count three gang enhancement.

Hill contends the trial court erroneously: (1) permitted a gang expert to testify both that Hill possessed the gun used in the shooting and Hill specifically was motivated to commit attempted murder to benefit a criminal street gang; (2) prohibited Hill from arguing to the jury regarding third-party evidence; and (3) imposed a 20-year enhancement under section 12022.53, subdivisions (c) and (e)(1), despite the jury's failure to find the attempted murder was gang related. We modify the judgment to strike the 20-year enhancement under section 12022.53, subdivisions (c) and (e)(1). In all other respects, we affirm the judgment.

BACKGROUND

Prosecution Case

On January 6, 2006, Albert Dean Cain, Jr. was working on a car outside his son's residence in San Bernardino. A person he later identified as Hill fired several gunshots at

him from a moving vehicle, described as a black Yukon. Cain ducked behind a vehicle and afterwards started pursuing the Yukon, but police stopped him for erratic driving. At approximately 3:55 p.m., San Bernardino City Police Detective Travis Walker responded to the scene of the shooting and interviewed Cain, who identified Malcolm Hill as the driver of the Yukon, and Hill as a passenger in it. Almost two weeks later, Cain also identified the two Hill brothers from official photographs.

On February 20, 2007, Detective Walker and other police conducted surveillance on a funeral, and stopped a vehicle Nancy Clanton was driving; its vanity license plate was, "4EVRPIT." Michael Dunn sat in the front passenger seat, Theodis Simmons sat in the right rear seat, and Maurice Hill sat in the left rear seat. Detective Walker testified that all of the individuals in the vehicle were members of the 18th Street gang. Police found a .38-caliber revolver on Clanton's person, a loaded Baretta .380-caliber handgun in the front near where Dunn sat, as well as a Sig Sauer .357-caliber handgun and a Ruger .45-caliber handgun in the rear, underneath the front seat. Clanton claimed she owned all the weapons.

Detective Walker, over defense counsel's foundation objection, testified regarding the guns' ownership: "Based on the [guns'] position[s], we didn't assign a handgun to the two back passengers that day. However, upon getting a return from the crime lab, the Sig .357[-caliber] that we recovered was the same match to the . . . shots that were fired at Mr. Cain. When I reviewed that report and seen [*sic*] the named suspects were Maurice and Malcolm Hill, I deduced the .357[-caliber] Sig was [Maurice] Hill's." The court permitted an exhibit of Detective Walker's list of the different guns and his conclusion

regarding their possession to be admitted into evidence over defense objections it lacked foundation, was hearsay, speculative, and prejudicial under Evidence Code section 352.

Detective Walker opined as a gang expert regarding the Cain family's ties to San Bernardino gangs called Little Zion Manor and Gilbert Street Bloods. Detective Walker testified regarding some gangs' origins: "Macon Mafia is a criminal street gang that's primarily comprised of members of the Macon and Davis family. It's a gang that unless you're part of the family, you couldn't get into. [¶] But during the '80s and '90s, they resided in an apartment complex that's known as the Little Zions, which . . . it's located on the northeast corner of 19th Street and California Street in . . . San Bernardino. [¶] Since it was hard to become a member of the Macon Davis or Macon Mafia since you didn't have a bloodline, they created a criminal street gang by the name of Little Zion Bloods, which also spun off into another street gang called Gilbert Street Bloods, which was located on Gilbert Street just east of Medical Center Drive." Detective Walker testified regarding the respective turfs and gang associations of several other gangs, including Delman Heights, California Gardens Crips, The Projects, Five Time Hometown Crips, Magnolia Estates, Disneyland Gangsters, and Alley Boys. Detective Walker opined Hill was a member of the 18th Street Maze gang.

Detective Walker testified regarding the shooter's purpose in firing at Cain: "[T]his was another ongoing retaliation shooting from the murder that occurred back in 2003 of the Disneyland gang member, Mr. Albert, and several of the other shootings that we had involving Little Zion [gang] and 18th Street gang."

Defense Case

Toya Thornton, a friend of Hill's family, testified that on January 6, 2006, at approximately 12:00 p.m., a funeral for Hill's grandmother was held at the New Jerusalem Baptist Church, and Hill was a pallbearer. Afterward, the family drove to the burial site, and left there at approximately 3:30 p.m. A repass was held at Temple Baptist Church. Hill's cousin, Shaun Dawson, and Thornton both testified that upon leaving the burial site, Hill got into a Nissan Maxima, and Malcolm Hill got into a black Yukon truck. Dawson and two of Hill's aunts testified Dawson and Hill arrived at a family residence at approximately 4:05 p.m. when it was still light outside, and left at around 5:30 p.m., after it got dark.

Rebuttal

Detective Walker testified that Temple Baptist Church was a little over a minute's drive from the residence where Cain was shot.

DISCUSSION

I.

Hill contends the trial court violated his federal constitutional rights to due process and a jury trial by admitting Detective Walker's expert opinion regarding who possessed the Sig Sauer. Hill contends such evidence invaded the province of the jury and was not the proper subject of expert testimony because lay jurors were just as capable as Detective Walker of determining who possessed the guns. Hill argues the error was prejudicial in light of his alibi regarding the funeral and its aftermath, and other trial evidence; specifically, Clanton's testimony that she owned the guns and the fact she was a

gang member who was fond of dogs, giving her a motive to shoot at Cain because of his animal cruelty conviction. Finally, Hill challenges Cain's ability to identify him because Cain claimed he had ducked upon hearing the gunshots.

Assuming, without deciding, that the issue of who possessed the Sig Sauer was not a proper subject for expert testimony because the jury was competent to decide it, any error was harmless. "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Here, the jury was instructed with CALCRIM No. 2511 regarding firearm possession: "Two or more people may possess something at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person." We conclude that, in light of the instruction and the location of the weapons in the vehicle's confined space, it is not reasonably likely that the jury would have reached a different result absent Detective Walker's testimony. Rather, the jury most likely would have reached the same result based on the Sig Sauer's location under a seat where Hill could easily access it. Further, the fact Clanton claimed ownership of all the weapons in the vehicle is of no moment because more than one person can possess the same weapon.

We fail to see the overwhelming prejudicial impact of the expert's testimony as posited by Hill, which relates to other evidence by which the jury could have exonerated

him. At trial, the defense presented its case for Hill's innocence. But the jury evaluated all the evidence and elected to convict Hill. Because Hill is in effect challenging the sufficiency of the evidence, we point out it is not our role on appeal to reweigh the evidence or to second-guess the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Instead, we view the evidence in the light most favorable to the judgment. (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1277 (*Salas*).) Further, we see no constitutional error. As the California Supreme Court has concluded, application of the ordinary rules of evidence generally does not impermissibly infringe upon a defendant's constitutional rights. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.) Hill has not persuaded us that this case presents an exception to this rule.

II.

Hill contends the trial court erroneously permitted Detective Walker to answer a question on direct examination regarding whether Hill had specifically committed attempted murder of Cain for the benefit of the 18th Street Maze gang. Hill contends the prosecutor was required to phrase the question as a hypothetical. Hill argues the error violated his constitutional rights to due process and jury trial, and was prejudicial under any standard of review.

Background

The prosecutor asked Detective Walker: "[A]s to Maurice Hill, do you have an opinion as to whether the attempted murder of Albert Cain was done for the benefit of 18th Street Maze?" The court overruled a defense objection that this question was "an ultimate issue reserved for the province of the jury" and "called for a legal opinion."

Therefore, Detective Walker was allowed to reply that the attempted murder of Cain would benefit Hill and his gang. This exchange followed:

"[Prosecutor:] Why would it benefit 18th Street Maze for Maurice Hill to shoot, attempt to murder Albert Cain?

"[Detective Walker:] Again, in the street gang culture, you earn your gang status. You elevate yourself within the gang based on crimes that are committed. Some could be selling narcotics. Some could be committing robberies. Some could be shooting at rival gang members. The status that you gain is greater for the more violent crimes that you commit. Shooting at gang members, shooting at rival gang members' families, murdering rival gang members or their family members, those gain you more status within the gang community. Committing robberies, selling narcotics, that can gain you individual status within your street gang. However, the more violent crimes that you commit within the community—within the community of criminal street gangs, it elevates your status not only within the gang, within the gang community. [¶] It creates a fear of that person, which is—is what a lot of gang members aspire to become. Again, that's how they gain status in their lifestyle.

"[Prosecutor:] So it is your opinion that the shooting, attempted murder at Albert Dean Cain, Jr.'s home would benefit Maurice Hill and elevate him within 18th Street Maze?

"[Detective Walker:] Yes."

Applicable Law

"Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' " (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "Expert testimony repeatedly has been offered to show the 'motivation for a particular crime, generally retaliation or intimidation,' and 'whether and how a crime was committed to benefit or promote a gang.' " (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

While this case was on appeal, the California Supreme Court decided *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), which addressed the "propriety of permitting the gang expert to respond to the hypothetical questions the prosecutor asked regarding whether defendants' assault on [the victim] was gang related." (*Id*. at p. 1044.) The court approved the use of hypothetical questions in such cases, explaining, "As applied here, this rule means that the prosecutor's hypothetical questions had to be based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Id*. at p. 1046.)

The issue Hill raises—whether a gang expert may testify about a specific defendant's actions, instead of through hypothetical questions—was left open in *Vang*: "It appears that in some circumstances, expert testimony regarding the specific defendants might be proper. [Citations.] The question is not before us. Because the expert here did not testify directly about defendants, but only responded to hypothetical

questions, we will assume for present purposes the expert could not properly have testified about defendants themselves." (*Vang*, *supra*, 52 Cal.4th at p. 1048, and fn. 4.)

The *Vang* court did offer some insight on the topic, however, as it clarified that expert testimony might be prohibited regarding specific defendants not because expert testimony might embrace the ultimate issue to be decided by the trier of fact, but because it does not assist the trier of fact, who is as competent as the expert witness to weigh the evidence and draw a conclusion on the issue of guilt. (*Vang*, *supra*, 52 Cal.4th at p. 1048.) The *Vang* court also noted there is a "critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves." (*Id*. at p. 1049.) The court explained the difference by reference to the trial court's jury instruction in that case: " '[T]he law doesn't allow the expert to come in and say exactly [what was in somebody else's mind]. All of the evidence is presented to you for you to make that decision.' " (*Ibid.*)

As noted, erroneous admission of expert testimony is governed by the *Watson* standard and requires reversal only if it is reasonably probable the verdict would have been more favorable to the defendant in the absence of the error. (*People v. Venegas* (1998) 18 Cal.4th 47, 93.)

Analysis

We conclude that the trial court did not err in overruling the objection that the expert's testimony dealt with the ultimate issue and invaded the province of the jury. "Despite the circumstance that it is the jury's duty to determine whether the prosecution has carried its burden of proof beyond a reasonable doubt, opinion testimony may

encompass 'ultimate issues' within a case." (*People v. Prince* (2007) 40 Cal.4th 1179, 1227.)

Nonetheless, under current California Supreme Court case law, it appears that, as a general matter, the better course is for the trial court to require the prosecutor to phrase the question as a hypothetical. "The traditional method of taking the opinion evidence of an expert is the hypothetical question. This may be framed on any theory that can be deduced from the evidence, and the questioner may assume any facts within the limits of the evidence and omit any facts not deemed material." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 194, p. 258, quoted in *Vang*, *supra*, 52 Cal.4th at p. 1046.) By contrast, "[A]n expert's opinion that a defendant is guilty is both unhelpful to the jury—which is equally equipped to reach that conclusion—and too helpful, in that the testimony may give the jury the impression that the issue has been decided and need not be the subject of deliberation." (*Prince*, *supra*, 40 Cal.4th at p. 1227.)

However, we conclude that any error here was harmless. The expert was asked specifically about whether Hill's shooting at Cain's house would elevate Hill in the 18th Street Maze gang, and his short response was "yes." His follow-up response did not specifically elaborate on Hill's motivation or guilt. Rather, he limited himself to generally discussing status in gang culture. Therefore, we conclude that the expert did not direct the jury to find Hill guilty. Further, the jury was instructed regarding how to interpret expert testimony: "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In

evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

As the *Vang* court noted in reference to *People v. Valdez* (1997) 58 Cal.App.4th 494, 507 (*Valdez*), "It appears that in some circumstances, expert testimony regarding the specific defendants might be proper."[2] We conclude such testimony was proper in this case. In light of the fact that two brothers were codefendants at trial, it appears the prosecutor asked the expert the specific questions about Hill merely to distinguish between the two brothers, and not for any other reason. Further, in light of the network of different gangs and family ties that the expert had testified to, the prosecutor referenced the specific 18th Street Maze gang to differentiate it from several other gangs

---

[2] The *Valdez* court stated, "Given the unique facts and [the gang expert's] expertise in evaluating the history, customs, and behavior of Hispanic gangs in general, and Norteno gangs in particular, we cannot say the trial court abused its discretion in finding that an expert opinion about whether the participants acted for the benefit of each and every gang represented by the caravan would be of assistance to the jury in evaluating the evidence and determining whether the prosecution had proved the enhancement allegation. Such an opinion was not tantamount to an opinion of guilt or, in this case, that the enhancement allegation was true, for there were other elements to the allegation that had to be proved." (*Valdez*, 58 Cal.App.4th at p. 509.)

operating in San Bernardino. In that regard, the expert's testimony was helpful. (Accord, *Valdez*, at p. 509.)

Finally, we note that despite the expert's response to the challenged question, the jury deadlocked on the enhancement allegation related to that question, which was whether Hill committed attempted murder "for the benefit of the gang." Therefore, any error was harmless and it is not reasonably probable Hill would have obtained a more favorable result absent the objected-to question.

III.

Hill contends the trial court erroneously barred him from making closing arguments about Clanton's third party culpability, thus violating his federal constitutional rights to due process.

Defense counsel argued to the jury, "Now let's think about this. It's not too hard of a leap. But think about this. Mr. Cain has a conviction for animal cruelty. He admitted to it. Ms. Clanton, I would submit, is a dog lover." The prosecutor objected that this matter had been resolved in pretrial motions.[3]

---

[3] Specifically, defense counsel had moved in limine to impeach Cain with details regarding his conviction for animal cruelty, but the court ruled that defense counsel's proposal invited the jury to speculate about whether Cain maimed, mutilated tortured or wounded a living animal. Therefore, the court ruled, "I'm going to find that saying that Mr. Cain has been convicted . . . of . . . cruelty to animals is sufficient to impeach him in this case. And that further going into the specific statutory options invites a whole subtrial about which of those possible acts he might have undertaken. So, I'm going to sustain the [Evidence Code section] 352 objection to that, as well." Hill does not challenge that ruling on appeal.

The court cautioned defense counsel, "I'll just remind you to confine yourself to the evidence actually presented at trial." The court later elaborated on its ruling: "[Defense counsel] was intending to advance the argument that . . . Clanton might have had a motive for the shooting because she was a dog lover as evidenced by the pictures of the dogs on her—what appear to be a bracelet. And given Mr. Cain's conviction for animal cruelty, she may have wanted to fire the shots presumably because she wasn't happy with his treatment of animals. The People objected to that as unsupported by the evidence. I sustained that objection on the basis that there was no evidence to establish that . . . Clanton, in fact, knew that . . . Cain had been convicted of animal cruelty. [¶] Not very much of an inference that she's a dog lover although maybe the bracelet might suggest that, but even assuming that to be true, there's no evidence she would have had a motive based on his conviction for animal cruelty." The court concluded the defense argument was "based only on the barest of speculation."

"A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citations.] This right is not unbounded, however; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark." (*People v. Marshall* (1996) 13 Cal.4th 799, 854-855.)

We conclude the trial court did not abuse its discretion in restricting defense counsel's argument. On appeal, Hill has not pointed to any evidence in the record that Clanton knew Cain had been convicted of animal cruelty, and that because of her love for animals she was motivated to harm Cain. "[I]t is improper to state facts that are not in

evidence during summation, with certain narrow exceptions such as commonly known matters." (*People v. Farmer* (1989) 47 Cal.3d 888, 922, overruled on another ground as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) We perceive no constitutional violation.

IV.

Hill contends the trial court violated his federal due process rights by erroneously imposing a 20-year enhancement on count one under section 12022.53, subdivisions (c) and (e)(1) because the jury did not find he personally discharged a firearm; rather, it found a principal did so. Further, the jury deadlocked on whether he committed attempted murder for the benefit of a gang under section 186.22, subdivision (b)(1)(A).

In sentencing Hill, the court stated, "Regarding Mr. Hill's sentence in prison, on Count 1, the Court imposes the middle term of seven years in state prison for attempted murder. Consecutive to that sentence, the Court imposes a 20-year prison term pursuant to . . . section 12022.53[, subdivisions] (c) [and] (e)(1), that's for personal discharge of a firearm. The Court does not impose a sentence under subdivision 'b' of that same section."

Section 12022.53, subdivision (c) provides that any person who commits, inter alia, attempted murder, shall be punished by an additional and consecutive 20-year term. Section 12022.53, subdivision (e)(1) provides that the enhancements under that section shall apply to "any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. (B) Any principal in the offense committed any act specified in

subdivision (b), (c), or (d)." Under section 12022.53, subdivision (e)(2), a defendant's sentence may not be enhanced under both the criminal street gang provision, in this case section 186.22, and under section 12022.53, subdivision (e), the gun use enhancement, "unless the person personally used or personally discharged a firearm in the commission of the offense." (§ 12022.53, subd. (e)(2).)

We agree with Hill that the jury did not find that he personally used a firearm as required under section 12022.53, subdivision (e)(1)(A). Here, the jury was instructed with CALCRIM No. 1402 regarding "someone who was a principal in the crime personally used and/or discharged a firearm during the commission or attempted commission of the attempted murder." As in *Salas*, the jury here was "never instructed that defendant must personally use a firearm in order for any enhancement to be returned. Rather, the jury was instructed only that a 'principal' must use a firearm." (*Salas*, *supra*, 89 Cal.App.4th at p. 1279.) Hill correctly notes that the jury deadlocked on the section 186.22 enhancement.

As explained in *Salas*, "Section 12022.53, subdivision (e)(1) creates an exception to the *personal* use requirement of section 12022.53, subdivisions (b) through (d) in a prosecution where findings have been made pursuant to section 186.22." (*Salas*, 89 Cal.App.4th at p. 1281.) But "as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm. In the present case, the jury never found that defendant personally used a firearm. The only findings made by the jury were that a principal in the

commission of the offense personally used a firearm." (*Salas*, at pp. 1281-1282.) Here, because there was no finding Hill personally discharged a weapon, the trial court incorrectly imposed both the criminal street gang enhancement and the gun use enhancement on count one. Accordingly, the criminal street gang enhancement must be stricken.

DISPOSITION

The portion of the judgment that imposes a 20-year sentence enhancement under Penal Code section 12022.53, subdivisions (c) and (e)(1) is stricken; as so modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Rehabilitation and Corrections.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.