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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY FORD LYMUEL, JR.,

Defendant and Appellant.

D059805

(Super. Ct. No. RIF137495)

APPEAL from a judgment of the Superior Court of Riverside County, Christian F. Thierbach, Judge. Affirmed in part and reversed in part.

INTRODUCTION

A jury convicted Gregory Ford Lymuel, Jr., of one count of first degree murder (Pen. Code,¹ § 187, subd. (a)) and two counts of attempted first degree murder (§§ 187, subd. (a), 664). As to the murder count, the jury found true the special circumstance allegation the murder was intentional and perpetrated by means of discharging a firearm at another person outside the motor vehicle with the intent to inflict death (§ 190.2, subd.

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

(a)(21)). As to all counts, the jury found true allegations Lymuel personally and intentionally discharged a firearm proximately causing great bodily injury or death (§§ 1192.7, subd. (c)(8), 12022.53, subd. (d)).

Consistent with the jury's determination during the penalty phase of the trial, the trial court sentenced Lymuel to life without the possibility of parole for the murder count. In addition, the trial court sentenced him to two consecutive terms of life with the possibility of parole for the attempted murder counts plus two consecutive terms of 25 years to life for the related firearm enhancements.

Lymuel appeals, contending the trial court violated his constitutional right to a fair trial by denying his request to list a key prosecution witness as a possible accomplice in an accomplice instruction. He also contends the trial court violated his constitutional right to a fair trial on one of the attempted murder counts by giving the jury an erroneous instruction on the kill zone theory. Finally, he contends we must strike the parole revocation fine the trial court imposed under section 1202.45 because his sentence does not include a period of parole.

The People concede the latter contention and we order the fine stricken. We conclude Lymuel's remaining contentions lack merit and affirm the judgment.

BACKGROUND

In December 2006 Roberta Fields (Roberta)² drove her Acura through Moreno Valley on her way to her daughter's house. Her 10-year-old son, Chris Fields (Chris), was in the backseat behind Roberta and her 20-year-old son, Floyd Fields, Jr. (Floyd), was reclined in the front passenger seat. Three cars, a green Camaro, a silver Honda, and a blue Scion, drove out of a shopping center and proceeded in the same direction as Roberta's Acura.

When Roberta arrived at the next intersection, she drove her Acura into the left turn lane and stopped for a red light. The three cars also stopped at the intersection. The Camaro was in the far right lane and the Honda and Scion were lined up in the lane between the Acura and the Camaro. Floyd heard loud voices coming from the three cars and glanced over at them a couple of times. He did not make eye contact with anyone.

The driver of the Camaro stuck his head out the window and looked toward the Acura. Roberta asked Floyd if he knew the person. He did not. The driver of the Camaro talked with and gestured at the occupants of the other cars. They were saying something about coming from a party. The driver's actions made Floyd nervous.

While Roberta waited for the light to turn green, Floyd removed his shoes and jeans and threw them in the backseat because he was hot. When the light changed and Roberta began to turn, at least four shots were fired at the Acura from the backseat of the Honda. Flying shrapnel hit Floyd under his right eye. One of the bullets, fired from a

² As is customary where multiple people share a surname, we use first names for clarity.

nine-millimeter semiautomatic weapon, hit Chris in the head. Chris later died from the wound.

Riverside County Sheriff's Detective Brett Seckinger was unsuccessful in discovering who fired the shots until approximately six months later when another officer arrested Allen Brim for attempted murder in a separate shooting case. Brim told the officer he had information about Chris's murder.³ Brim subsequently met with Seckinger and told Seckinger the driver of the Camaro was Rushey Huey, the driver of the Honda was Dane Hurd, and the shooter was Lymuel, who was also known as T-Zone.

A few weeks after the shooting in this case, Brim was with Hurd and others at a party. In defense of some remarks made against Lymuel, Hurd said, "Don't f—k with T-Zone. He be killin' little boys for no reason." A few months after the shooting in this case, Brim was talking with Lymuel at a party. Lymuel told Brim, "I feel bad." Brim asked, "Why, cuz?" Lymuel responded, "'Cause I shot that little boy on accident.' "

At trial, Huey,⁴ Hurd,⁵ Ballou,⁶ Jeremy Jennings,⁷ and Christopher Samuel testified in return for immunity agreements. Their testimony established that, on the

³ In exchange for his testimony in this case, Brim pleaded guilty to aggravated assault in the separate shooting case, received credit for time served, and was to be released from custody upon completion of his testimony. Brim admitted having prior convictions for arson to a person, robbery, and unlawful possession of a handgun.

⁴ Huey admitted having prior convictions for domestic violence, vehicle theft, and receiving stolen property. He also admitted Michael Ballou was his accomplice in the vehicle theft case.

⁵ At the time of his testimony in this case, Hurd was in custody on a separate case for second degree burglary and receiving stolen property, and for a parole violation. The

night of the shooting, Huey, Hurd, and several others went to a party in Moreno Valley. After police broke up the party, groups left in separate cars. Hurd drove his mother's Honda. Jennings sat next to him and Lymuel sat in the backseat. Neither Hurd nor Jennings had a gun with them. Huey, Ballou, and Curtis Hewitt were in Huey's Camaro. No one in Huey's car had a gun. Samuel drove the Scion with his cousin as a passenger.

The Camaro, Honda, and Scion arrived at the intersection at the same time. Roberta then pulled her Acura into the left lane. Hurd glanced at Floyd and then looked back. The light turned green and suddenly several gunshots were fired at the Acura from the left backseat of Hurd's Honda. Roberta turned left while the three cars continued through the intersection.

Immediately after the shooting, Lymuel told Hurd, "I lit that car up." Hurd responded, "You made this car hot." Hurd stopped and ordered Lymuel and Jennings out of his car. They complied and got into Huey's car.

When Hurd arrived home, he searched the Honda for a gun and bullets. He found several casings under the back side of the driver's seat. He put the casings in a sock and

prosecutor dismissed the separate case with prejudice to ensure Hurd had no ground to refuse to testify in this case. On cross-examination, Hurd admitted being involved in a string of second degree burglaries, including one with Ballou. He also admitted being part of the Southside Mafia, a group he characterized as a "clique."

⁶ Sometime before his testimony in this case, Ballou pleaded guilty to second degree burglary in a separate case. His accomplice, Hurd, also pleaded guilty. (See fn. 4, *ante*.)

⁷ Jennings admitted to having a prior conviction for vehicle burglary.

threw the sock in a dumpster near his apartment building. The next day, Hurd visited Lymuel and asked him why he shot at the Acura. Lymuel laughed and said, "I lit that car up, huh?"

At a subsequent social function, Lymuel talked to Huey about the shooting. Lymuel said, "They ain't got no evidence on me 'cause they ain't got no shells." On another occasion, Lymuel told Huey, "People that look at me . . . are gonna get it."

Several months after the shooting, Hurd returned the Honda to the company that financed it. Samples taken from the driver's side rear headliner a few months later, after the finance company had detailed the car, contained gunshot residue particles.

Although the murder weapon was never recovered, the prosecution presented the following evidence showing Lymuel used a Springfield Armory nine-millimeter semiautomatic handgun belonging to his former stepfather, Willard Barrett (Willard). Approximately four months before the shooting, Huey visited Lymuel at Willard's house. Lymuel told Huey that Willard kept a gun in the trunk of his car, opened the trunk, and showed it to Huey. Approximately five months after the shooting, Lymuel's half-sister, Shaniece Barrett (Shaniece), had a gathering at Willard's home. Huey, Brim, and others went into Willard's bedroom and stole two or three guns, including the Springfield handgun.

When Willard discovered the guns were missing, he confronted Brim about the theft. Willard found a picture of the Springfield handgun on Brim's cell phone. The police took statements from Willard and Brim, but never recovered the Springfield

handgun.⁸ Within 30 minutes after Willard's confrontation with Brim, Lymuel telephoned Brim and asked him if he had the Springfield handgun. Brim said he did not. Lymuel told Brim, "If you got it, get rid of it. That's that gun right there."

DISCUSSION

I

Accomplice Instructions

A

The trial court instructed the jury with CALCRIM No. 334 as to the murder charge.⁹ This instruction informed the jury how to determine whether a person is an accomplice and what the prerequisites are for using the person's testimony if the person is an accomplice. (CALCRIM No. 334.) In addition, this instruction informed the jury it should view accomplice testimony with caution, but may not arbitrarily disregard it. (*Ibid.*) This instruction also informed the jury the defendant has the burden of proving a person is more likely than not an accomplice. (*Ibid.*)

The trial court determined Hurd and Jennings should be listed as possible accomplices in these instructions because they were in the same car as Lymuel. Defense counsel requested the trial court also list Huey as a possible accomplice because of

⁸ According to Brim, it had been sold to a third party by then.

⁹ The trial court instructed the jury with the virtually identical CALCRIM No. 707 as to the special circumstance allegation. Although Lymuel's appellate arguments are only directed at the CALCRIM No. 334 instruction, our analysis of Lymuel's arguments applies equally to both instructions.

Floyd's testimony about Huey talking and gesturing from his car while it and the other cars were stopped at the intersection. The trial court declined defense counsel's request, finding there was no evidence Huey shared Lymuel's intent because there was no evidence Lymuel or anyone in Hurd's car communicated back to Huey or anyone in Huey's car.

Lymuel contends the trial court violated his right to fair trial by failing to list Huey as a possible accomplice in the accomplice instruction. We disagree.

B

1

"Section 1111 provides: 'A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense' Under section 1111, an accomplice is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' An accomplice must have ' "guilty knowledge and intent with regard to the commission of the crime." ' [Citations.] 'If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony.' " (*People v. Gonzales* (2011) 52 Cal.4th 254, 302 (*Gonzales*).

Here, the trial court properly found there was insufficient evidence as a matter of law to characterize Huey as an accomplice because there was no evidence Huey acted "with knowledge of [Lymuel's] criminal purpose and with the intent to encourage or facilitate the commission of the offense." (*People v. Carrington* (2009) 47 Cal.4th 145, 191.) Although there is evidence Huey may have been talking to and gesturing at the occupants of Hurd's car while stopped at the intersection, this evidence does not establish Huey: (1) knew Lymuel had a handgun, (2) knew Lymuel intended to fire the handgun at the occupants of the Acura in response to a misperceived threat by Floyd or for some other motive, and (3) intended to encourage or facilitate Lymuel's actions. As the People point out in their brief, any such inference "is at best highly speculative." (*People v. Sully* (1991) 53 Cal.3d 1195, 1228.) Accordingly, we conclude the trial court did not err by declining to list Huey as a possible accomplice in the CALCRIM No. 334 instruction.

2

Even if the trial court had erred, the error was harmless. " 'A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record.' [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.' [Citation.] The evidence is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' " (*Gonzales, supra*, 52 Cal.4th at p. 303.)

Other evidence in this case sufficiently connected Lymuel to the shooting to corroborate Huey's testimony. This evidence included the gunshot residue found in the

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area of Hurd's car where Lymuel was sitting at the time of the shooting, Samuel's testimony about seeing the shots fired from the left side of Hurd's car, and Brim's testimony about Lymuel's admission to being the shooter and to the Springfield handgun being the murder weapon. Accordingly, we conclude the trial court's failure to list Huey as a possible accomplice in the CALCRIM No. 334 instruction does not require reversal of Lymuel's convictions.¹⁰

II

Kill Zone Theory Instruction

A

As part of its instructions on attempted murder, the trial court informed the jury of the kill zone theory of specific intent included in CALCRIM No. 600, which the trial court tailored to this case. Specifically, the trial court informed the jury, "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or kill zone. [¶] *In order to convict the defendant of the attempted murder of [Roberta] and [Floyd], the People must prove that the defendant not only intended to kill someone in the car being driven by [Roberta], or intended to kill everyone within the kill zone. [¶] If you have reasonable doubt whether the defendant*

¹⁰ Lymuel asserts we should assess any error under the "harmless beyond a reasonable doubt" standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). The California Supreme Court, however, has recently confirmed the standard we are using is the appropriate one under the circumstances. (*Gonzales, supra*, 52 Cal.4th at pp. 303-304.) We are bound by the Supreme Court's decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

intended to kill [Roberta] or [Floyd] or [Chris], then you must find the defendant not guilty of the attempted murder of [Roberta] or [Floyd]." (Italics added.)¹¹

The parties specifically discussed this instruction during the jury instruction conference and defense counsel did not object to it or point out any errors in it. However, on appeal, Lymuel contends we must reverse his conviction for the attempted murder of Roberta because the italicized language misstated the law and misled the jury into believing it could convict Lymuel if it found he intended to kill anyone in the car, even if it did not correspondingly find he attempted to kill everyone within a kill zone.

" 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant.' " (*People v. Solomon* (2010) 49 Cal.4th 792, 822.) We conclude Lymuel has not met this burden in this case.

¹¹ The unmodified portion of CALCRIM No. 600 explaining the kill zone theory reads: " [A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>*, the People must prove that the defendant not only intended to kill *<insert name of primary target alleged>* but also either intended to kill *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>*, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>* or intended to kill *<insert name or description of primary target alleged>* by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>*."] "

B

The California Supreme Court first articulated the kill zone theory in *People v. Bland* (2002) 28 Cal.4th 313. The Supreme Court started from the premise that "[t]o be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Id.* at p. 328.)

The Supreme Court then explained, "the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' "The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, . . . consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in

A's immediate vicinity to ensure A's death. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." (*People v. Bland, supra*, 28 Cal.4th at pp. 329–330.)

The Supreme Court subsequently clarified the existence of an identifiable primary victim is not necessary for the kill zone theory to apply as "[t]he mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being." (*People v. Stone* (2009) 46 Cal.4th 131, 134.) Thus, a person can be guilty of attempted murder if the person purposely creates a kill zone intending to kill, not a specific target, but anyone present within the kill zone. (*Id.* at p. 140 [describing, as an example, a terrorist who places a bomb on a commercial airliner intended to kill as many people as possible without knowing or caring who they are].)

C

Based on foregoing authorities, we note two possible applications of the kill zone theory to the attempted murder charge involving Roberta: (1) Lymuel intended to kill Floyd by killing everyone in the Acura; or (2) Lymuel intended to kill a nonspecific target in the Acura by killing everyone in the Acura. Although the prosecutor ultimately argued only the first possibility,¹² it appears from the state of the evidence and the trial

¹² The prosecutor principally argued Lymuel specifically intended to kill both Floyd and Roberta. As to Roberta, the prosecutor alternatively argued, "[I]f you believe, well, the defendant intended to kill Floyd, but Roberta gets shot at too, okay, which is entirely plausible, he could be guilty of attempted murder based on what I'm going to talk about now which is the kill zone theory. What is that? . . . Let me tell you about that. [¶]"

court's modifications to CALCRIM No. 600, the trial court endeavored to instruct the jury on both possibilities. The parties agree, albeit for different reasons, the trial court's efforts were inartful.

Nonetheless, inartful wording in an instruction does not necessarily render the instruction legally incorrect. We determine the correctness of jury instructions " ' "from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Solomon, supra*, 49 Cal.4th at p. 822.)

The trial court's instruction on the kill zone theory was part of the larger instruction on the law of attempted murder. (CALCRIM No. 600.) The larger instruction informed the jury the prosecutor must prove Lymuel intended to kill Roberta for Lymuel to be guilty of the attempted murder of her. (*Ibid.*) The first sentence of the kill zone portion of the instruction then informed the jury a person may concurrently intend to kill a specific victim and everyone within a kill zone. The second sentence, to which Lymuel objects, informed the jury it could not convict Lymuel of the attempted murder of Roberta unless the prosecutor proved Lymuel intended to kill someone in Roberta's car or everyone within the kill zone. However, the third and final sentence of the kill zone instruction informed the jury it must find Lymuel not guilty of the attempted murder of Roberta if it reasonably doubted Lymuel intended to kill her *or* Floyd *or* Chris (i.e., it reasonably doubted Lymuel intended to kill everyone in the Acura). Thus, collectively

What it basically requires is that the defendant shoots in an area intending to kill one person and that there is another person within that kill zone who gets shot at. And if you find that to be the case, the defendant would be liable for attempted murder on Roberta as well. All right? And I invite you to obviously read that instruction in the back as well."

and consistent with applicable law, the instructions informed the jury it could not convict Lymuel of the attempted murder of Roberta unless it found Lymuel: (1) specifically intended to kill Roberta; or (2) specifically intended to kill someone in her car while concurrently intending to kill everyone in her car. Nothing in the prosecutor's closing argument to the jury (see fn. 11, *ante*) contradicted these instructions. Thus, we conclude it is not reasonably likely the jury misconstrued the instructions in the manner Lymuel claims.

Further, the undisputed evidence shows Roberta was driving the Acura and was seated next to Floyd when someone fired at least four gunshots toward the front of the car. The jury found true allegations Lymuel was the person who fired the gunshots, he intentionally fired them, and he intended to kill when he did so. Based on the undisputed evidence and the jury's true findings, we conclude beyond a reasonable doubt the jury's verdict as to the attempted murder of Roberta would have been the same absent the claimed error in the trial court's instruction. (*Chapman, supra*, 386 U.S. at p. 24; *People v. Lamas* (2007) 42 Cal.4th 516, 526.)

III

Parole Revocation Fine

At the sentencing hearing, the trial court imposed a parole revocation fine of \$10,000 under section 1202.45. Lymuel contends, the People concede, and we agree section 1202.45 does not apply and the fine must be stricken because Lymuel's sentence does not include the possibility of parole. (*People v. Oganessian* (1999) 70 Cal.App.4th

1178, 1185.) We will, therefore, order the fine stricken and the abstract of judgment modified. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380.)

DISPOSITION

The parole revocation fine imposed under section 1202.45 is stricken. The trial court is directed to modify the abstract of judgment accordingly and forward a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

McINTYRE, J.