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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO RODRIGUEZ,

Defendant and Appellant.

E053408

(Super.Ct.No. RIF140773)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge.
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Garrett Beaumont and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

A gang member — along with his wife and his brother-in-law — was turned away from a party, apparently because two rival gang members were present and did not want him there. After a brief fistfight, he left; however, he soon returned, accompanied by friends and family members as reinforcements.

Defendant Alfredo Rodriguez was at the party, helping his brother, who was the disk jockey (DJ). Defendant took it upon himself to arm himself with a shotgun, to station himself just inside the entrance to the party, and to shoot the first member of the gang member's group who came in, killing him.

A jury found defendant guilty of first degree murder (Pen. Code, §§ 187, subd (a), 189), with an enhancement for personally and intentionally discharging a firearm and causing death (Pen. Code, § 12022.53, subd. (d)).

Defendant was sentenced to a total of 50 years to life, plus the usual fines and fees.

Defendant contends:

1. The trial court erroneously instructed that provocation cannot reduce first degree murder to second degree murder unless it meets the same objective standard as for voluntary manslaughter.
2. The trial court erred by denying defendant's motion for new trial, which was based on the testimony of a newly discovered witness that the victim was armed.
3. The imposition of punishment both for murder and for personally and intentionally discharging a firearm, causing death, violates double jeopardy.
4. The abstract of judgment should be corrected.

We find no prejudicial error. Hence, we will affirm.

I

FACTUAL BACKGROUND

On the night of December 15-16, 2007, a party was held in the back yard of a home on Inwood Drive in Riverside. Although it was a birthday party, it had been advertised via fliers, and there was a \$5 admission charge. Doorkeepers collected the money at a side gate to the back yard.

Jose Gutierrez arrived at the party with his wife, Maria Davila, and her brother, Mark Castillo. Defendant's brother, who was acting as the DJ at the party, had invited them.

Gutierrez was a member of a gang called Tokers Town.¹ His group paid their \$15, but the people at the gate would not let them in and would not give them their money back.

Octavio Zamudio and Martin Lopez started arguing with Gutierrez's group. Zamudio and Lopez were both members of a gang called the Anaheim Drifters. The Anaheim Drifters and Tokers Town are "rivals." Zamudio knew Gutierrez and blamed him for tagging Zamudio's house. Lopez and Gutierrez likewise had "past issues."

Zamudio tried to hit Gutierrez's wife, but Gutierrez stepped in and hit Zamudio in the face. Then "everybody started fighting." Somebody yelled, "Tokers Town."

¹ Castillo was a member of a gang called 5150.

Somebody else said, “Drifters.” Lopez “socked [Gutierrez’s wife] in the chest.”

Eventually, the fight broke up, and Gutierrez’s group drove away.

Defendant was at the party to help his brother with his job as DJ. After Gutierrez’s group left, witnesses saw defendant get a 12-gauge shotgun out of a van and place it in his own car (a green Honda Accord). Defendant said something like, “Don’t trip. I got the shotty right here if they come back[.]”

Meanwhile, Gutierrez’s group recruited a number of relatives and friends to go back to the party and “fight the guys.”² One subgroup of six people — including Gutierrez and Henry Robles (the eventual victim) — drove to the party in Gutierrez’s maroon Chevy Tahoe.³ One of the occupants of the Tahoe had a baseball bat. Another subgroup of three people drove in a black Chevy Silverado.⁴

Both vehicles arrived at about the same time. They drove past the party slowly, then turned around and parked. At this point, defendant retrieved the shotgun from his car.

Also at this point, Zamudio and Lopez were just leaving the party — either by coincidence or because they saw Gutierrez’s group coming. They got into Zamudio’s aqua Nissan Titan. The occupants of the Tahoe got out, ran over to the Titan, and started

² At trial, Gutierrez frankly admitted, “[W]e . . . wanted revenge.”

³ The occupants of the maroon Tahoe were Jose Gutierrez, Mark Castillo, Henry Robles, Claudia Robles, Daniel Correa, and Jose Correa.

⁴ The occupants of the black Silverado were Samuel Gutierrez, Gerardo Gutierrez, and Ruben Gutierrez.

hitting and kicking it. One person threw a rock at it. Zamudio thought they were hitting it with sticks (though he later told the police that he did not actually see any sticks). The Titan sustained a “couple [of] dents” before it managed to “t[ake] off.”

Some of the occupants of the Tahoe then ran toward the side gate. Robles either walked or ran through the gate into the back yard. Castillo was a couple of feet behind him. Eyewitnesses disagreed on whether the gate was already open or Robles kicked it open.

Eyewitnesses’ testimony also varied with respect to whether Robles had a weapon. In general, members of his family testified that he did not. Gutierrez himself, however, had told the police that Robles had a stick.

Juan Serrato, a party guest, told the police that Robles did not have a weapon.

Irving Ceja, another party guest, testified that Robles had a nightstick or a black pipe. Ceja had not mentioned this to the police; however, they had not asked him about it.

Party guest Maria Mendoza saw three Mexican males with bats get out of a black truck, then get back into the truck and leave.

George Lopez (Martin Lopez’s brother) testified that one of the occupants of the Tahoe had a gun.

Adrian Moran, the host of the party, testified that people in Robles’s group had guns and sticks. However, he had told the police that none of them had a weapon.

Byron Mundy, another person at the party, testified that somebody holding a gun ran up to the gate. Somebody else (not the victim) had a pole or metal pipe.

Defendant was standing inside the side gate. He fired the shotgun three times. One shot hit Robles in the left side.⁵ Nine pellets entered his body, causing fatal injuries to multiple organs, including his lung, liver, and aorta.

The group from the Tahoe ran away, going east down the street. The group in the Silverado caught up with them and picked them up. Just then, the police arrived and stopped the Silverado.

A neighbor saw two male pedestrians (inferably former occupants of the Tahoe) run across the street, then hide behind a car. He heard them say, "Get down. They are going to get us." Just then, five or six people in a green four-door Japanese car (inferably defendant's Honda) drove by very slowly, with brights on, as if looking for somebody. A passenger was holding an object that could have been a gun. The pedestrians then ran east until they encountered some police.⁶

⁵ According to Castillo, the very first shot hit Robles; according to Gutierrez, both the first and second shots hit Robles. However, another witness told the police that defendant fired once into the air before firing a second time toward Robles.

⁶ The neighbor testified that the police also stopped the green car. The police never actually stopped such a car in connection with this case. Of course, he may have misperceived the stopping of the Silverado.

Between the party and the site of the stop, the police found an aluminum baseball bat.⁷ No other weapons were found. The shotgun was never found.

When the police questioned defendant, he admitted being at the party, but he denied seeing the shooting or having anything to do with it. He denied seeing anybody with any weapons. At one point, an officer said, “Just tell us if it was self-defense,” but defendant still denied everything.

Defendant took the stand in his own defense. He admitted a prior misdemeanor conviction for carrying a concealed firearm in a vehicle.

Defendant testified that he kept a loaded shotgun in his car for protection, because he and his brother had been the victims of an attempted robbery. He had placed it in the van temporarily when he left the party to pick up some friends.

When he got back, he heard there had been a fight involving gang members. He was concerned that they would come back. However, he denied saying anything like, “Don’t worry. If they come back, I got this.”

When the people got out of the Tahoe, defendant testified, “a few of them had bats,” and Robles had a metal pole. Defendant grabbed the shotgun from his car.

Defendant watched as the group from the Tahoe banged on the Titan. After the Titan sped away, they spotted defendant. Robles ran toward him, followed by a guy wearing a beanie (i.e., Castillo). Defendant ran inside the gate and shut it.

⁷ The prosecution conceded in closing argument that someone in the victim group discarded this bat.

Robles kicked the gate open. Defendant backed away. He was in fear for his life. He was also afraid that they would attack his brother and other people at the party.

Robles “skipped and launched at” defendant. Defendant “just shot.” He did not aim. He fired a second shot in the air, to scare them away. Someone fired two shots back at him. Defendant shot a third time.

Defendant then got into his car and drove away. He hid the shotgun at “this girl’s house.”

II

JURY INSTRUCTIONS ON PROVOCATION

Defendant contends that the trial court gave erroneous jury instructions on provocation.

A. *Additional Factual and Procedural Background.*

At defense counsel’s request, the trial court gave CALCRIM No. 522, “Provocation: Effect on Degree of Murder,” which stated:

“Provocation may reduce a murder from first degree to second degree and may reduce a murder to a manslaughter. The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed murder, but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.”

The trial court, apparently on its own motion, also gave CALCRIM No. 570, “Voluntary Manslaughter: Heat of Passion — Lesser Included Offense,” which stated, as relevant here:

“A killing that would otherwise be murder is reduced to a voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

The defendant killed someone because of a sudden quarrel or in the heat of passion if:

No. 1, the defendant was provoked; 2, as a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and 3, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

[¶] . . . [¶]

“It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts[,] would have reacted from passion rather than from judgment.”

B. *Analysis.*

Provocation is an element of “heat of passion” voluntary manslaughter. “[T]he factor which distinguishes the “heat of passion” form of voluntary manslaughter from

murder is provocation. . . .’ [Citation.]” (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.)

To reduce a murder to voluntary manslaughter, the provocation must meet an objective standard of reasonableness. “Objectively, the victim’s conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citation.]” (*People v. Enraca* (2012) 53 Cal.4th 735, 759.)

However, it has long been held that “the ““existence of provocation which is not ‘adequate’ to reduce the class of the offense [from murder to manslaughter] may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation” — an inquiry relevant to determining whether the offense is premeditated murder in the first degree, or unpremeditated murder in the second degree. [Citation.]” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) Although the court has no sua sponte duty to instruct on this principle, a defendant may be entitled to an instruction on it on request. (See *People v. Rogers* (2006) 39 Cal.4th 826, 877-880.)

As this rule suggests, the provocation necessary to reduce first degree murder to second degree murder does *not* have to pass an objective test. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.) “The issue is whether the provocation precluded the defendant from deliberating. [Citation.] This requires a determination of the defendant’s *subjective* state.” (*Id.* at p. 1295, italics added.)

In this case, the trial court gave CALCRIM No. 522; thus, it properly instructed that provocation may reduce first degree murder to second degree murder. Defendant argues, however, that by giving CALCRIM No. 522 together with CALCRIM No. 570, it effectively *misinstructed* that provocation must meet an objective test, even when used for this purpose.

CALJIC No. 8.73 — the forerunner of CALCRIM No. 522 — was much clearer on this point. It stated, “If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, *but the provocation was not sufficient to reduce the homicide to manslaughter*, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.” (Italics added.)

We need not decide, however, whether the trial court erred. We also need not decide whether (as the People contend) defendant forfeited this contention by failing to request a modification. There was simply no evidence that defendant committed the homicide as a result of provocation that met a subjective standard but failed to meet an objective standard. Accordingly, there was no need for an instruction on this point.

Defendant’s own testimony was aimed at establishing reasonable or unreasonable self-defense, not provocation. (See *People v. Moyer*, *supra*, 47 Cal.4th at pp. 552-554 [defendant’s testimony that victim attacked him with baseball bat showed self-defense, not “heat of passion” voluntary manslaughter].) Even the prosecution’s evidence had some tendency to establish self-defense. The victim was in a group of nine people —

including at least two gang members — who were seeking revenge. His group attacked the Titan, hitting it, kicking it, and throwing a rock at it, until it sped away. The victim then entered the back yard, followed by Castillo.

However, these were all factors that would *objectively* tend to interfere with deliberation. There was no evidence that defendant was unusually susceptible *subjectively* to provocation by the victim. The instruction that “[t]he defendant is not allowed to set up his own standard of conduct” and that the jury should “consider whether a person of average disposition, in the same situation and knowing the same facts[,] would have reacted from passion rather than from judgment” would not have prevented the jury from considering all of the evidence of provocation in determining whether defendant did, in fact, deliberate and premeditate.

At the same time, there was crucial evidence of premeditation and deliberation. First, defendant got the shotgun out of a van and stashed it in his car, while saying, “Don’t trip. I got the shotty right here if they come back[.]” Later, he retrieved the shotgun and stationed himself inside the side gate. If the jury viewed this as premeditation at all, it necessarily would have concluded that defendant was not *subjectively* provoked.

Defendant’s real argument is that, if the jury rejected provocation for purposes of voluntary manslaughter, the instructional error required it also to reject provocation for purposes of second degree murder. In the limited context of the facts in this case, however, there was nothing wrong with this.

In closing argument, the prosecutor stated that, to reduce murder from first degree to second degree, provocation had to be “significant” rather than “marginal.” Defendant now claims that this “compounded the instructional error.” The prosecutor’s comment, however, related to a different point than whether the provocation had to meet an objective, reasonable-person test. It was appropriate argument.

We therefore conclude that the trial court did not err by giving CALCRIM No. 522 and No. 570.

III

MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE THAT THE VICTIM WAS ARMED

Defendant contends that the trial court erred by denying his motion for new trial, which was based on the testimony of a newly discovered witness that the victim was armed.

A. *Additional Factual and Procedural Background.*

Defendant filed a motion for new trial based on newly discovered evidence. In support of the motion, he offered the declaration of one Gregorio Vargas.⁸

According to the declaration, Vargas was at the party, in the back yard, when the shooting occurred. He saw “a bald chubby Hispanic male . . . [¶] . . . charging at the gate and attempting to jump over it.” The man was holding “a silver metal object.” In

⁸ The declaration was not properly sworn (Code Civ. Proc., § 2015.5), but the People did not object to it.

Vargas’s opinion, it was “obvious” that he was “going to . . . attack[]” The gate swung open, and defendant fired. Vargas ran from the scene, and the police never interviewed him.

The trial court denied the motion for new trial, ruling that the proffered evidence was cumulative.

B. *Analysis.*

A trial court may grant a motion for new trial when (among other things) “new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.” (Pen. Code, § 1181, subd. 8.)

““In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ““1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.””

[Citations.]’ [Citation.]” (*People v. Howard* (2010) 51 Cal.4th 15, 43.)

““““The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.”” [Citations.]”” (*People v. Howard, supra*, 51 Cal.4th at pp. 42-43.)

As the trial court noted, multiple witnesses testified at trial that Robles (or some member of his group) was armed.

Gutierrez himself told the police that Robles had a stick. At trial, he claimed not to remember one way or the other, but he admitted that his statement to the police had been truthful.

Party guest Irving Ceja testified that Robles had a nightstick or a black pipe.

Claudia Robles — the victim's widow — admitted that one of the occupants of the Tahoe had a baseball bat.

Party guest Maria Mendoza saw three Hispanic men with bats get out of a black truck.

Party guest George Lopez testified that one of the occupants of the Tahoe had a gun.

Party host Adrian Moran testified that people in Robles's group had guns and sticks.

Finally, party guest Byron Mundy testified that one of the occupants of the Tahoe had a metal pole or pipe and tried to fight his way in through the gate. First, he testified that three of them had guns; later, however, he testified that only one of them had a gun and that that person shot *Robles*.

Defendant argues that the newly discovered evidence was not cumulative because, unlike Vargas, each of these other witnesses was biased or otherwise impeached. But not so. First, Gutierrez's testimony on this point was highly credible. It actually went

counter to his bias; he instigated the entire revenge expedition, and Robles was his brother-in-law. Although he claimed to have forgotten by the time of trial whether Robles had a stick or not, he admitted that whatever he told the police was reliable. Defendant points out that Gutierrez also testified that he was “high off drugs” Gutierrez claimed that this made him forget some things; however, he did not claim that it made him remember things that did not actually happen.

Claudia Robles’s admission that somebody in the Tahoe had a baseball bat similarly ran counter to her bias. Also, again, it was borne out by the bat that the police found at the scene.

Maria Mendoza was not impeached. Defendant claims that she made inconsistent statements about whether she knew his brother. Actually, she consistently stated, both to the police and at trial, that she did not know an “Andrew Rodriguez,” but she did know the DJ at the party, under his nom de guerre of “DJ Smok.e” [*sic*].

Irving Ceja was impeached only in very minor respects. Although he had not told police about the weapon, he added that the police had never asked him about it. He considered himself a friend of defendant’s brother, but he had not seen defendant’s brother for about a year before trial. At worst, he had falsely told the police that he did not see the initial fight.

Admittedly, George Lopez, Adrian Moran, and Byron Mundy were each impeached to a greater or lesser extent. Interestingly, however, these were the *only* witnesses who stated that any occupants of the Tahoe had *guns*. In any event, Moran and

Mundy (though not Lopez) stated that the occupants of the Tahoe also had sticks. Even if these statements lacked credibility standing alone, they still served to corroborate the similar statements of other, more reliable witnesses.

Defendant claims we must assume that Vargas could not have been impeached, because there was no evidence impeaching him before the trial court. This overlooks the fact that, on a motion for new trial, the verdict is presumed correct. (*People v. Fuiava* (2012) 53 Cal.4th 622, 729.) Accordingly, it was defendant who had the burden of proof. (See. e.g., *People v. Soojian* (2010) 190 Cal.App.4th 491, 521.)⁹ And defendant failed to show that Vargas was not open to impeachment.

In any event, even assuming that Vargas was a credible witness, the trial court did not abuse its discretion by concluding that his testimony was cumulative. The trial court therefore properly denied defendant's motion for new trial.

IV

PUNISHMENT FOR BOTH MURDER AND THE FIREARM ENHANCEMENT

Defendant contends that the imposition of punishment both for murder and for personally and intentionally discharging a firearm, causing death, violates double jeopardy.

⁹ We also note that there was no evidence as to how defendant's posttrial counsel had located Vargas. Thus, there was no evidence that trial counsel could not, with reasonable diligence, have called Vargas to testify at trial. For this reason, too, the motion for new trial had to be denied.

Defendant relies on the principle that the federal double jeopardy clause “protects against multiple punishments for the same offense.” (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [89 S.Ct. 2072, 23 L.Ed.2d 656], fn. omitted.) The United States Supreme Court defines the “same offense” by applying the “same-elements” test. (*U.S. v. Dixon* (1993) 509 U.S. 688, 696 [113 S.Ct. 2849, 125 L.Ed.2d 556].) “The same-elements test, sometimes referred to as the ‘*Blockburger*’ test, inquires whether each offense contains an element not contained in the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.” (*Ibid.*)

Defendant essentially reasons that, because the enhancement applies only to a person convicted of one of a list of specified offenses (Pen. Code, § 12022.53, subd. (a)), including murder (*id.*, subd. (a)(1)), murder is a “lesser included offense” of the enhancement.

As defendant concedes, however, the California Supreme Court has held that enhancements are not treated as crimes or offenses for purposes of the multiple conviction aspect of double jeopardy. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, and cases cited.) He indicates that he is raising this issue “to preserve it for later review.” That is his privilege. At this stage, however, we must reject it.

In addition, even assuming that a conduct enhancement could violate double jeopardy, Penal Code section 12022.53 does not. “In *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), the Supreme Court made clear that the protection against multiple punishments for the same offense did not necessarily preclude

cumulative punishments in a single prosecution. The key to determining whether multiple charges and punishments violate double jeopardy is legislative intent.

[Citation.] When the legislature intends to impose multiple punishments, double jeopardy is not invoked. [Citation.]

“Here, the language of California Penal Code § 12022.53 is clear. Subsection (d) provides for a 25 year enhancement when a ‘firearm is used’ to commit murder. There is, therefore, no question as to what the California legislature intended. . . . [T]he California legislature has simply determined that ‘a criminal offender may receive additional punishment for any single crime committed with a firearm.’” (*Plascencia v. Alameida* (9th Cir. 2006) 467 F.3d 1190, 1204.)

We therefore conclude that the sentence did not impose multiple punishment in violation of double jeopardy.

V

CORRECTION OF THE ABSTRACT

Defendant asks us to correct two clerical errors in the abstract of judgment. First, it fails to reflect the fact that defendant was entitled to 1,215 days of presentence custody credit. Second, it erroneously states that he was sentenced pursuant to Penal Code section 667.61.

We take judicial notice that the trial court, at the request of defendant’s appellate counsel, has already corrected both errors. Accordingly, this issue is moot.

VI
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.