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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.

JULIO CEASAR HEREDIA,

Defendant and Appellant.

E053568

(Super.Ct.No. RIF129516)

OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed with directions.

J. Courtney Shevelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Karl T. Terp, and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

Defendant Julio Ceasar Heredia was charged with and convicted of seven criminal offenses, including murder, committed during two gang-related shootings in February and April 2006, when defendant was 18 years old. Defendant's crimes stemmed from a conflict between defendant's gang, 5150 Mexican Royalty or 5150 MR (5150), and a rival gang, Mad Down Locos or Mad Down (MD). The victims, however, were not gang members.

A court sentenced defendant to life without parole imposed for the special-circumstance murder, plus consecutive sentences of 95 years to life and 43 years of determinate time.

On appeal, with regard to the four crimes (counts 1-4) committed in February 2006, defendant contends the trial court violated his rights to due process under the Fifth, Sixth, and Fourteenth amendments by instructing the jury based on a flawed version of CALCRIM No. 301. The People concede the court committed two sentencing errors founded on sections 12022.53 and 654 and involving counts 5 and 7, crimes committed in April 2006. We correct the sentencing errors but reject the substantive contention and affirm the judgment.

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

II

PROCEDURAL BACKGROUND

Defendant was charged with the murder of Crystal Theobald (count 1; § 187) on February 24, 2006, the deliberate and premeditated attempted murders of Juan Patlan and Justin Theobald (counts 2 and 3; §§ 664, 187), and shooting into an occupied motor vehicle (count 4; § 246). All four counts charged that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). The murder count included an allegation that defendant personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), as well as a special-circumstance allegation that he intentionally killed while an active participant in a criminal street gang to further the gang's activities (§ 190.2, subd. (a)(22)). The attempted murder count as to victim Patlan also alleged the personal discharge of a firearm causing great bodily injury, as well as the infliction of such injury (§§ 12022.7, subd. (a) and 12022.53, subd. (d)). The attempted murder count as to victim Justin Theobald alleged personal discharge of a firearm (§ 12022.53, subd. (c)).

The primary charge from the second incident on April 8, 2006 was the deliberate and premeditated attempted murder of Lawrence Gonzalez (count 5; §§ 664, 187). Count 5 also alleged that defendant was a principal in the offense and that another principal personally and intentionally discharged a firearm during the commission of the crime (§ 12022.53, subs. (c) and (e)). Defendant was also charged in the second incident with shooting into an inhabited dwelling house (count 6; § 246) and with vicarious arming in the commission of that offense (§ 12022, subd. (a)(1)). Counts 5 and 6 both charged

gang enhancement allegations (§ 186.22, subd. (b)). The final charge, count 7, was that defendant was an active participant in the 5150 criminal street gang and assisted in that gang's felonious conduct (§ 186.22, subd. (a)).

The jury found the murder of Crystal Theobald was first degree and the gang-killing special circumstance was true. Three attempted murders were found to be willful, deliberate and premeditated, and the gang enhancement and gun-discharge allegations attached to counts 1 through 6 were all found true, as was the great bodily injury charge attached to the attempted murder in count 2.

The court sentenced defendant to life without possibility of parole on the murder count, plus 25 years to life for causing death by personally discharging a firearm. On each of the three attempted murder counts, the court imposed consecutive terms of life with 15-year minimums under section 186.22, subdivision (b)(5). The sentence for the attempted murder of Patlan in count 2 was enhanced by a consecutive term of 25 years to life for causing great bodily injury by personally discharging a gun. The life term on the attempted murder of Justin Theobald in count 3 was enhanced by a consecutive determinate term of 20 years for personally discharging a gun. The life term on the attempted murder of Lawrence Gonzalez in count 5 was also enhanced by a 20-year determinate term for discharging a gun by a principal other than defendant under section 12022.53, subdivisions (c) and (e). The court also imposed a consecutive three-year determinate term for the gang participation conviction in count 7. The life terms imposed under section 186.22, subdivision (b)(4), on the section 246 convictions in counts 4 and 6

were ordered stayed under section 654. The total combined sentence was for life without parole, plus consecutive sentences of 95 years to life and 43 years of determinate time.

III

STATEMENT OF FACTS

In the February 2006 incident, appellant was charged with shooting into a car driven by Patlan and occupied by Crystal Theobald and Justin Theobald. Crystal Theobald died as a result of the shooting and Patlan was wounded. Patlan and the Theobalds were not gang members. In the April 2006 incident, Lawrence Gonzalez was confronted outside his house by defendant and two or three other 5150 members. When Gonzalez disparaged 5150, defendant told one of the others to “kill” or “get” him. The other man opened fire but did not hit Gonzalez.

The facts are not much disputed by the parties, except for the question of whether defendant was threatened by the victims’ car and whether a set of gunshots were heard before defendant fired on the victims. Therefore, we adopt most of defendant’s recitation of the facts.

A. The Shooting on February 24, 2006

1. The Accounts of William Lemus and Manuel Lemus

The prosecution’s gang expert testified that in February and April 2006 appellant was a member of the 5150 criminal street gang. The expert asserted that both shootings were done for the benefit of 5150.

Two of defendant’s accomplices and fellow members of the 5150 gang—William Lemus and his brother, Manuel—related how the shooting occurred. Manuel spent the day

of February 24, 2006, consuming drugs and alcohol and then went to sleep. William spent the day of February 24, 2006, smoking marijuana and getting high, before planning a drug deal with 5150 member Daniel Correa. William and Correa were chauffeured by William Sotelo, driving a white Ford Expedition SUV.

William, Correa and Sotelo were in the SUV at the Lemus house when Jesse Esquibel and his girlfriend, Carla Fernandez (not a 5150 member), drove up in a Toyota. Esquibel exited the Toyota and began screaming and yelling profanities about something that had happened to him, “[s]ome shit went down.” After Correa talked to Esquibel, both vehicles drove to the house of Elizabeth Reyna, whose son was a 5150 member.

Three more 5150 members, who were at the Reyna residence, were roused by defendant and his brother, Joey Campana, to “go take care of some shit.” They gathered up various weapons – a fireplace poker, a bat, a pipe, weights, crowbars, and bricks – and put them in Fernandez’s Toyota.

Defendant entered Sotelo’s SUV. The SUV and the Toyota returned to the Lemus residence and the 5150 members split up between the two vehicles. In the SUV were Sotelo, the driver; defendant in the front passenger seat; Campana, Ramiro Casillas and Frankie Contreras in the second row; and William and Manuel in the third row in the back. Carla Fernandez drove the Toyota with Jesse Esquibel as the front passenger and with Correa, Ernie Esquibel and Ruben Moya in the back seat. The people in the SUV discussed beating up someone.

The two vehicles entered the territory of the MD rival gang to look for an MD member named “Troubles” to question him about what happened to Jesse Esquibel and to

“smash” him. Defendant and Casillas went to a residence and talked to “Striker,” a 5150 “main man.” When the SUV left Striker’s house, Sotelo was driving and defendant was the front seat passenger; the other passengers were Campana, Casillas, Joseph Gutierrez, and William and Manuel. The occupants of the Toyota remained the same.

The Toyota took the lead, so that Fernandez could point out houses that were MD “kick it” spots, and the SUV followed. Defendant commented about it being “mission” time, a more serious word that indicated something was really going to happen. William knew there were weights and bats in the SUV and that defendant had a gun. William had also heard there was a gun in the Toyota. The vehicles drove back into MD territory to look for a girl named “Fannie,” who lived with MD members.

The vehicles finally entered the Riverside neighborhood² where the shooting occurred. As the 5150 members drove northwest on Begonia Circle, they observed an occupied white SUV—which they thought might be an MD vehicle—parked on the street. Sotelo made a U-turn at the T-intersection where Begonia meets Geranium Place and drove back towards the other SUV. By the time the Toyota and Sotelo’s SUV had turned around, the other SUV had sped away toward Geranium, almost hitting them and hitting the curb. Manuel testified the other SUV appeared to try to ram them.

The 5150 members continued to drive around the neighborhood. On Geranium, Fernandez pointed out a house on the west side of the street near the intersection with

² The streets of Geranium Place, Begonia Circle, and Greenpoint Avenue form a right-angle triangle with Begonia Circle as the hypotenuse running northwest to southeast.

Begonia. A girl outside was screaming and yelling. They yelled back “5150” to identify their gang. Sotelo’s SUV and the Toyota continued south on Geranium to Greenpoint Avenue where the SUV turned right and stopped one-house length from the stop sign. The Toyota turned left and parked. People in Sotelo’s SUV said the girl that yelled at them was Fannie from MD and they thought MD members would come out after them. Sotelo’s SUV was parked at a diagonal, slightly blocking the intersection. No one exited either vehicle at that point.

A white or gray sedan drove toward them on Geranium and went right on Greenpoint around them. Defendant started to exit the SUV because there were three to four gunshots as the sedan approached. Defendant said he did not feel comfortable in the car because he was a sitting duck and had to get out. A second car came down Geranium and turned left. At that point, defendant was in front of the SUV, near the driver’s side, and was brandishing a gun.

A third car, a small greenish sedan, came down Geranium and turned right on Greenpoint. Defendant was in front of Sotelo’s SUV at the corner of the driver’s side. The sedan slowed and defendant walked towards the middle of the street yelling “5150.” The three or four people inside rolled down the window and yelled what sounded like “MD.”

When defendant was behind the greenish sedan, he fired a warning shot in the air. The sedan reversed and tried to run over him. Defendant jumped and threw himself off the sedan, ending up towards the front passenger side, and then fired between three and

five shots at the sedan. No one in the car shot at defendant. The sedan then drove west on Greenpoint. Defendant returned to Sotelo's SUV and they drove away.

According to Manuel, the greenish sedan came speeding down the street, made a fast turn onto Greenpoint and almost hit defendant who began screaming. Then the sedan reversed back into defendant and Manuel heard a second volley of six shots. Some neighbors near the intersection of Geranium and Greenpoint also heard two sets of gunshots.

Police found five .45-caliber cartridge cases at the crime scene. Juan Patlan was driving the Honda that defendant fired upon; Crystal and Justin Theobald were riding in the front seat. Crystal was shot in the back of the head and killed. Patlan was shot once in the stomach. Justin was not injured.

2. The Account of Juan Patlan

Crystal Theobald's mother, Belinda Lane, lived near the T-intersection of Geranium and Begonia. Patlan and Crystal had been visiting Lane. As Patlan and Crystal stood in front of the duplex, saying goodbye to Lane, Patlan saw an SUV—two-toned, white on top and black or copper-colored on the bottom travel north on Geranium toward Begonia. Patlan also saw an all-white SUV that he thought was a Ford Expedition moving west on Begonia toward Geranium without lights and traveling about 35 to 40 miles per hour. Patlan also saw a sedan that he thought was a black or charcoal gray Nissan Maxima following the all-white SUV on Begonia.

The two-toned SUV pulled up in front of Begonia and stopped blocking the road so the all-white SUV had to swerve around it and almost hit Patlan's mother's Honda as

the all-white SUV turned left and headed southbound on Geranium. The sedan behind the all-white SUV stopped at the intersection because the two-toned SUV blocked its way, and Patlan heard its occupants telling the people in the two-toned SUV to hurry up and get out of the way. The two-toned SUV backed up, made a U-turn, and headed southbound on Geranium with the sedan following it. Patlan believed all three vehicles turned right at Greenpoint. Nobody yelled at anyone else.

Patlan left with Crystal and her brother, driving south on Geranium to the intersection with Greenpoint. As Patlan made a right turn onto Greenpoint, he thought he saw all three of the vehicles that had driven past. He drove wide around a car and then noticed there were at least three people in the street toward the front of the SUV, talking and waving their hands around. As Patlan started around the vehicles, a man who was walking in the street toward the back of the SUV lifted up his shirt, pulled out a gun and started shooting. Patlan heard six to eight shots coming from the passenger side of his vehicle from the man's direction, and he saw one muzzle flash. He stepped on the gas, drove to the corner and turned left on Lake Street, heading toward a hospital. He realized he had been shot in the stomach and Crystal was slumped over.

3. The Accounts of Belinda Lane and Nick Mariotti

Lane and her son, Nick Mariotti, offered somewhat different versions than Patlan. Lane testified that, when she was outside her house, she saw her son, Robert Lane, leave his friend Matt's house just around the corner on Begonia and enter his white Expedition SUV parked at the curb. Another white Expedition heading westbound on Begonia came flying up next to him and an occupant brandished a weapon. Her son drove off fast

around the corner and onto southbound Geranium, almost hitting Patlan's car. Just before, Lane had noticed the other SUV go north on Geranium and turn eastbound on Begonia but she did not think anything of it until she saw it come back westbound on Begonia and pull up next to her son's car. The second SUV chased her son's car until both cars turned right on Greenpoint and disappeared.

After Lane got in her car and left, Patlan, Crystal and Justin followed behind her in Patlan's car. When Lane arrived at the stop sign at Geranium and Greenpoint, she saw defendant wearing a ball cap and jacket. He opened his jacket and pulled out a gun. He was the shooter. She saw the Expedition that had chased her son Robert turn around at the intersection of Greenpoint and Lake Street and come back at her. She panicked, hit the gas as hard as she could and turned left. Another carload of people came at her in a mini-truck, tried to block her and started shooting, then the Expedition boxed her in and the driver jumped out and stood by his door. Lane ducked down, continued turning onto Greenpoint and drove away. When she made the turn, she looked back and saw flashes coming from defendant's gun.

Nick Mariotti, Lane's youngest child, testified he came out of their house as his mother and Patlan were driving off. He saw them reach the end of the street and saw Patlan's Honda turn right, then heard shots. He testified at trial he did not see anyone do the shooting. However, in an interview with the lead investigator on March 1, 2006, Mariotti said he had heard tires screeching and a single gunshot before he exited the house and, once outside, saw a white SUV heading toward Greenpoint with his mother behind it going the same direction and with Patlan's Honda behind her. He had started

toward the intersection when he heard shots and said he saw the gunman shoot into Patlan's car as it turned right onto Greenpoint. He picked defendant's photograph from a photographic lineup and said he felt 95 percent sure he was the shooter.

B. The Shooting on April 8, 2006

In 2000, Lawrence Gonzalez moved from Orange County to Riverside with his family. Gonzalez had been part of a gang in Orange County, but was no longer connected to it after the move, although he pled guilty to a gang-related assault in 2005. He met defendant in 2006 through his younger brother, and defendant told him he was from 5150. Members of 5150 had challenged Gonzalez over gang affiliation 10 to 15 times as he walked near where he lived; he would tell them he was not from anywhere.

On April 8, 2006, Gonzalez dropped his grandfather off at Auto Zone and was driving home when two teenagers threw gang signs and made faces at him. He thought they were 5150 members and knew something was going to happen. After he got home, he told his nephews to go inside. While Gonzalez was in front of his house, a black Honda Accord drove up. Defendant was sitting in the back seat and was the only one in the car Gonzalez recognized. Defendant and two or three other males got out of the car and words were exchanged. Defendant asked Gonzalez where he was from, and Gonzalez said "from nowhere." Defendant was angered and asked why they were disrespecting him. Defendant threw a beer bottle at Gonzalez and said "[f]uck you." Gonzalez again said he was "from nowhere" and said, "Fuck you guys and fuck 5150." Defendant said "kill him" or "get him" to the man next to him. That man grabbed a gun from the back of the Honda and fired, missing Gonzalez. Gonzalez froze, then ran inside

as he heard more shots. Four .380-caliber shell cases were recovered at the crime scene, and bullet holes were found in a gate post and in a stucco wall that enclosed a courtyard at the residence.

IV

CALCRIM NO. 301

Defendant claimed he acted in self-defense or in imperfect self-defense when he fired at Patlan's car. William Lemus and Manuel Lemus testified defendant fired into Patlan's vehicle only after everyone heard shots fired and after Patlan's vehicle drove at defendant in reverse, forcing him to jump away to avoid injury.

For defendant to prevail on a claim of self-defense, the jury had to find beyond a reasonable doubt that, when defendant shot into the victim's car: (1) he actually or reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; (2) he actually or reasonably believed that the immediate use of deadly force was necessary to defend against the danger; and (3) he used no more force than was reasonable necessary to defend against that danger or at least one of these beliefs was unreasonable. (CALCRIM Nos. 505 and 571.)

Based on CALCRIM No. 301, the trial court instructed the jury the testimony of the Lemus brothers, as accomplices, required supporting evidence:

"Except for the testimony of William & Manuel Lemus, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

Defendant contends “[t]he glaring defect in this instruction was that it told the jurors that the brother[s’] testimony was insufficient by itself to prove that [defendant] did not shoot at the green Honda until after he had heard shots fired and after the car backed up at him in an apparent effort to run him over. This was the testimony on which [defendant] relied to create reasonable doubt that he acted in self-defense.”

Respondent claims that any error was cured by the trial court also giving an instruction based on CALCRIM No. 335:

“If the crimes charged in Counts 1 through 4 were committed, then William & Manuel Lemus were accomplices to those crimes.

“You may not convict the defendant of the crimes charged in Counts 1-4 based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if:

“1. The accomplice’s testimony is supported by other evidence that you believe;

“2. That supporting evidence is independent of the accomplice’s testimony;

“AND

“3. That supporting evidence tends to connect the defendant to the commission of the crimes.

“Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the

commission of the crime.

“The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice.

“Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.”

Both instructions appear to contemplate the use of accomplice testimony primarily to *convict* a defendant. Whereas here defendant argues the instructions discouraged the jury from finding in favor of defendant’s claims of self-defense because a finding that defendant, reasonably or unreasonably, believed he faced imminent danger depended entirely on the testimony of the Lemus brothers that defendant’s life was imminently threatened when Patlan’s Honda came at him in reverse. We disagree.

The testimony of a single witness in support of a criminal defendant’s defense is legally sufficient to prove any fact whether the witness is a prosecution witness or a defense witness, a rule that clearly applies to the testimony of the Lemus brothers. (*People v. Turner* (1990) 50 Cal.3d 668, 695-697.) Defendant was entitled to the protection of this rule with respect to the brothers’ testimony that he was physically threatened when Patlan’s car came at him in reverse. Having reviewed the record, however, we conclude there was supporting evidence-however slight-to support a finding of self-defense.

Notably some neighbors described hearing two sets of shots-offering credibility to the brothers' testimony that defendant reacted to a perceived imminent threat. Although no other witness described a car reversing to threaten defendant, all the witnesses who testified described a confusing situation in which numerous and similar cars were driving too fast around the triangulated neighborhood streets of Begonia, Geranium, and Greenpoint, threatening other vehicles and pedestrians. Additionally, there was express testimony that defendant was outside the SUV and brandishing a gun before the Honda may have threatened him. Although such additional evidence did not support every fact about which the Lemus brothers testified, it tended to connect the defendant to the commission of the crime. Therefore, in conformity with CALCRIM No. 335, we acknowledge there was at least slight evidence supporting defendant's claim that Patlan's Honda reversed in an effort to run down defendant.

A fundamental precept of appellate review is that jurors are presumed to follow the trial court's instructions. Nothing in the record rebuts the presumption that the jurors dutifully followed the clear directions of the versions of CALCRIM Nos. 301 and 335 given them. (See *Richardson v. Marsh* (1987) 481 U.S. 200, 206 [it is the "almost invariable assumption of the law that jurors follow their instructions"].) It is not reasonably likely the jury misinterpreted CALCRIM Nos. 301 or 335 as proposed by defendant. (*People v. Kelly* (1992) 1 Cal.4th 495, 525.)

Using defendant's own language in framing the issue, we reach the following conclusions. It is reasonable to conclude that "the jurors would have read the version of CALCRIM No. 301 together with the accomplice instruction as laying out the following

principles of law all of which they were bound to follow: (1) that *no* fact could be proved by the Lemus brothers' testimony without supporting evidence; (2) that this rule applied to bar any conviction based on the brothers' testimony if there was no supporting evidence tending to connect the defendant to the commission of the crime; and (3) that any testimony from the brothers that tended to incriminate [defendant] should additionally be viewed with caution." The trial court instructed that the Lemus brothers' testimony about any fact needed only slight support and the record offers such support. Therefore, we reject defendant's claim of error based on a strained interpretation of CALCRIM Nos. 301 and 335.

V

MODIFICATION OF COUNTS 5 AND 7

Respondent concedes that section 12022.53, subdivision (e)(2), barred imposition of both an alternative penalty for the attempted murder under the provisions of section 186.22 and a 20-year enhancement under subdivisions (c) and (e)(1) of section 12022.53. (*People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1425-1427; see also *People v. Brookfield* (2009) 47 Cal.4th 583, 593-595.) Under subdivision (j) of section 12022.53, the appellate remedy for the trial court's error in imposing both punishments is an order to the trial court to amend the abstract of judgment to delete the 20-year determinate enhancement imposed as part of the sentence on count 5. (*People v. Gonzalez, supra*, 180 Cal.App.4th at p. 1428.)

Respondent concedes, based on the Supreme Court's recent decision in *People v. Mesa* (2012) 54 Cal.4th 191, that the trial court should have applied section 654 to stay

the consecutive three-year sentence imposed on count 7 for active participation in a criminal street gang. The appropriate appellate remedy is for this court to order the three-year sentence stayed.

VI

DISPOSITION

The trial court's version of CALCRIM No. 301 did not deny defendant a fair trial on counts 1 through 4. The trial court is ordered to delete the 20-year vicarious gun discharging enhancement imposed on count 5 and to apply section 654 to stay the three-year determinate term imposed on count 7. Subject to these modifications, we affirm the judgment.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.