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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MANUEL BAUTISTA,

Defendant and Appellant.

F062916

(Super. Ct. No. F09900642)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J. and Franson, J.

Luis Manuel Bautista is serving a life sentence without the possibility of parole for the murder of Jesus Torres. This is his second appeal to this court. In the first appeal (*People v. Bautista* (Feb. 4, 2011, F058176) [nonpub. opn.], we affirmed the convictions for murder (Pen. Code, § 187, subd. (a)),¹ kidnapping (§ 207, subd. (a)), and robbery (§ 211). We reversed the conviction for arson causing great bodily injury (§ 451, subd. (a)) because it was not supported by substantial evidence. However, we ordered the trial court to enter a conviction for the lesser included offense of arson of property (the arson count) (§ 451, subd. (d)). We remanded the matter for resentencing on the arson count.

The trial court imposed an aggravated term of three years to run consecutively for the arson count. Bautista argues the trial court abused its discretion in doing so. We affirm the judgment. We will, however, remand the matter to the trial court to issue a corrected abstract of judgment.

FACTUAL AND PROCEDURAL SUMMARY

A jury convicted Bautista and his brother, Gustavo Bautista (collectively, defendants), of first degree murder, kidnapping, robbery, and arson causing great bodily injury.² In addition, the jury found true the allegation that the murder was committed while Bautista was engaged in a robbery and kidnapping and found true the enhancement that Bautista personally used a firearm, causing death in the commission of the crime.

In the first appeal, we concluded there was insufficient evidence to support the arson causing great bodily injury count because there was no evidence that Torres, whose body was found in the trunk of the vehicle, was alive when his vehicle was set on fire. We ordered the count reduced to arson of personal property (§ 451, subd. (d)) and

¹All statutory references are to the Penal Code.

²Before trial, defendants' cousin, Guillermo Villalba, pled guilty to various charges arising out of the same incident.

remanded the matter for resentencing on that count. The remainder of the judgment was affirmed, including Bautista's sentence of life without the possibility of parole for the murder.

On remand, the trial court imposed an aggravated sentence of three years on the arson count.

DISCUSSION

Bautista argues the trial court abused its discretion when it imposed the aggravated term on the arson count. Bautista's arguments are based on a single sentence from the resentencing hearing, which does not fairly reflect the proceedings. The trial court stated: "For that offense, and that count, the Court will fix the upper term or aggravated term of three years. In the Court's view, the factors in aggravation outweigh those in mitigation. *This crime involved a great, if not the greatest, form of callousness, i.e., the torching of a vehicle containing the body of the victim who had been shot multiple times.* This conduct indicates a serious danger to society versus only one circumstance in mitigation of no prior record. The factors in aggravation clearly and conclusively preponderate." (Italics added.)

Bautista argues the italicized portion of the trial court's comments suggests the court may have thought Torres was alive when the vehicle was set on fire. According to Bautista, the trial court therefore abused its discretion because it imposed an aggravated term because of a fact this court determined was not proven.

We disagree for two reasons. First, the record makes it clear the trial court understood the effect of our prior opinion. The trial court began by noting that only count 4 had been reversed, and the matter was remanded for resentencing on that count. The probation report recommended the trial court impose an aggravated term. Bautista's counsel admitted he had received a copy of the report and argued the only issue was whether the term should be imposed concurrently or consecutively. He urged the trial court to impose a concurrent term.

The prosecutor argued the trial court should impose a consecutive term because of the callousness of the crime.

After the prosecutor finished his comments, Bautista's counsel stated he thought the prosecutor had suggested that Torres was alive when the car was burned. He pointed out that this court concluded there was insufficient evidence to support that finding.

The prosecutor agreed there was insufficient evidence that Torres was alive when the vehicle was burned and apologized if he had suggested otherwise.

The trial court agreed there was no evidence that Torres was alive when he was burned, and "that was in a sense the essence of the Appellate Court inserting 451(d) in lieu of 451(a)." This portion of the record establishes that the trial court understood it was required to sentence Bautista on the basis that Torres already was dead when the vehicle was burned.

The second reason we disagree with Bautista is that the language used by the trial court did not suggest it thought Torres was alive when the vehicle was burned. The trial court stated the vehicle was burned while the body of the victim was in the trunk. If the trial court had believed Torres was alive when the vehicle was burned, it would have stated that the victim was in the trunk. A body is defined as:

"1.a. The entire material structure and substance of an organism, esp. of a human being or an animal. b. The physical part of a person as opposed to the mind or spirit. c. A corpse or carcass." (Webster's II New College Dict. (2001) p. 124.)

This definition makes clear that a body does not refer to a living human being. Accordingly, the statement that referred to the "body of the victim" clearly acknowledged that Torres was dead when the vehicle was burned. There is no merit to this argument.

Bautista next argues the trial court's sentence must be reversed because the trial court erroneously concluded the crime involved "a great, if not the greatest, form of callousness, i.e., the torching of a vehicle containing the body of the victim who had been shot multiple times." According to Bautista, the act of setting a vehicle on fire with a

dead body in the trunk is not, as a matter of law, “a great, if not the greatest, form of callousness.”

This argument is a futile exercise in semantics. There is no law that establishes the “greatest form of callousness.” Nor was the trial court attempting to create such law. It is clear from the record that the trial court found Bautista’s actions to be extremely callous, a conclusion with which we agree. He beat a man he did not know, shot and killed him, and finally, in an attempt to eliminate evidence, he burned the victim’s vehicle while the dead body was in the trunk. His actions showed no regard for human life or the victim’s family. The trial court’s comments were proper.

Finally, Bautista points out, and the People concede, the abstract of judgment for the determinate term is erroneous in two respects. First, in item No. 1, the description of the arson conviction states that Bautista was convicted of “Arson Causing [Great Bodily Injury].” We reversed the great bodily injury finding in the previous appeal. The description needs to be corrected to arson of property.

Second, the abstract reflects in item No. 8 that the total indeterminate term was nine years. This is incorrect. After resentencing, the total prison sentence was three years. We will remand the matter to the trial court to correct these two errors.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court to issue a corrected abstract of judgment.