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IN THE COURT OF APPEAL IN THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALBERTO PERALES,

Defendant and Appellant.

F066528

(Kings Super. Ct. No. 11CM2251)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Michelle May Peterson, 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 Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant, a Sureño, was convicted of the deliberate and premeditated murder of a Norteño gang rival.

While acknowledging that there was substantial evidence he fired a gun at the victim, he nonetheless contends there was insufficient evidence of malice. (See Pen. Code, § 188.)¹ We conclude otherwise. “[T]he very act of firing a weapon ‘ “in a manner that *could have* inflicted a mortal wound ...” ’ is sufficient to support an inference of intent to kill. [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 742, italics added.)

Defendant then raises several claims of instructional error, primarily pertaining to the absence of instruction on voluntary or involuntary manslaughter. The instructional issues identified by defendant, even if error, were harmless.

We affirm the judgment.

BACKGROUND

Defendant was charged with the deliberate and premeditated murder of Aaron Garcia (count I - § 187, subd. (a)) and active participation in a criminal street gang (count II - § 186.22, subd. (a).) The information alleged defendant murdered Garcia to further the activities of a criminal street gang in which he was an active participant (§ 190, subd. (a)(22)) The information also alleged three firearm enhancements in relation to the murder count. (§§ 12022.5, subd. (a)(1), 12022.53, subs. (b), (d) & (e)(1).)²

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

² The information was amended in several respects prior to the verdict. This paragraph reflects the final charges and enhancements after the amendments.

A jury convicted defendant on both counts and found the firearm enhancements and gang special circumstance true. The court sentenced defendant to terms of life without the possibility of parole and 25 years to life.

TRIAL EVIDENCE

Mike Davis

On July 14, 2011, a “registered”³ Norteño named Mike Davis was with Cesar Montera, Miki Schell, Aaron Garcia and Salvador Sanchez at Lacey Park in Hanford. While the group was talking in the park, a black Honda arrived and stopped near the park on Florinda Street. Two people – one of whom was carrying a gun – jumped out of the car and ran towards Davis and his friends. Garcia began to run towards the southeast portion of the park, while Davis and his “buddies ran a different way,” towards the southwest corner of the park.⁴ Davis heard the gunman say, “[G]et that one,” and run towards Garcia. As Davis continued to run, he heard one gunshot. Davis did not see the shooter because he was running away.

Jose Contreras

Jose Contreras is an assistant principal at Dinuba High School. On the day of the shooting, he was standing in the parking lot of a Catholic church across the street from Lacey Park.⁵ Contreras observed three individuals chasing three other individuals in a

³ Davis testified that he registered as a Norteño with the “Gang Task Force” – presumably a reference to a unit with the local law enforcement authorities. Davis testified that his registration resulted from a prior conviction for contributing to the delinquency of a minor. Davis was at a “gang party” when the events underlying the conviction transpired. Davis testified that he does not consider himself a Norteño.

⁴ Davis appeared to contradict this testimony at a later point during his examination. At one point, Davis testified that no one ran with him, and that he did not know whether anyone ran away with Garcia.

⁵ Contreras did not recall the name of the park or the church. Contreras did note the church’s location on the map, which placed it across the street from Lacey Park.

southerly direction.⁶ The individuals were “crossing the street at the park.” “[S]hortly after they crossed the street,” while Contreras’ view of the individuals was blocked by a restroom,⁷ Contreras heard a gunshot.

When the pursuers returned, Contreras noticed that one of the individuals was wearing blue latex gloves⁸ and had a gun in his hand. The man with the gun said “something along the lines of ‘I got him.’ ”

The next day, Contreras was presented with a photographic lineup by Officer Pontecorvo. One of the photographs looked “similar” to the man with the gun. Pontecorvo later testified that Contreras had identified defendant’s photograph as the man who “could” have been the “guy with the gun.”

Cesar Montera

Montera’s Testimony

Cesar Montera was at Lacey Park the day of the murder. Miki Schell, Mike Davis, and Aaron Garcia also came to the park that day, and they were all at a bench under a gazebo. After they had been there around 30 minutes, a small car stopped on Florinda Street. Several⁹ people jumped out of the car and ran towards Montera’s group. One of the pursuers had a gun. Montera ran with Schell towards the intersection of Douty Street

⁶ It appeared to Contreras that the individuals might have been affiliated with a gang because “[s]ome of the colors” on their clothing. Contreras testified that some of the individuals “might have been affiliated with the blue gang, which would be Surenos.”

⁷ In his oral testimony, Garcia said the restroom was “southwest” of the gazebo. His identification of buildings on a map of the area marked as Exhibit 5, however, indicates that the restroom was north of the gazebo.

⁸ Contreras was not sure whether there was one latex glove or two.

⁹ Montera testified that between two and four people exited the vehicle.

and Elm Street on the southwest side of the park. Garcia ran towards the intersection of Harris Street and Elm Street.¹⁰

Montera heard one gunshot. At some point thereafter, he saw Garcia's body near the intersection of Harris and Elm streets.

Montera testified that he did not recall the gunman's clothing, appearance, or whether he was wearing a glove. Nor did Montera recall identifying defendant as the shooter with 98 percent certainty.

Montera yawned throughout his testimony and unsuccessfully tried to "plead the Fifth."

Montera's Police Interviews

July 15 Morning Interview

Officer Brian Toppa interviewed Montera three times after Garcia's death. The first interview took place the morning after the incident. Montera said that a small Honda vehicle drove up with four occupants. The driver and another passenger remained in the vehicle, while two others exited. The eventual shooter yelled "Sur" and "Duke"¹¹ before both occupants began chasing Garcia.

Montera described the shooter as an 18 or 19-year-old bald Hispanic wearing a white T-shirt, black Dickies pants, "blue Cortez's"¹² and gloves. Montera said he was "pretty sure" he would be able to identify the shooter again if he saw him.

¹⁰ Several exhibits showed that the intersection of Harris and Elm streets is located at the southeast corner of the park.

¹¹ Montera was somewhat equivocal about whether the shooter said "Duke." Montera said he was "pretty sure they said like Duke or something." A gang expert testified that the East Side Dukes is a Sureño subset that is well known throughout Hanford.

¹² Montera later explained that "Cortez's" are a type of Nike-brand shoe.

Montera said that Garcia had been a Norteño as shown by the “4 dots on his face.” Montera was “pretty sure” the shooting was retaliation for some prior interactions between the Sureño and Norteño gangs.

July 15 Afternoon Interview

Later on July 15, Officer Toppan again interviewed Montera. Toppan showed Montera two photographic lineups with six photographs each. Initially, Montera said he did not recognize anyone in the lineups. Later, Montera said he knew “this guy” – referring to defendant. Montera said he had had “problems” with defendant before. Defendant had caught Montera “doing things to” defendant’s sister. Montera also knew that defendant was a “scrap” because he arrived in a blue Honda.¹³ Toppan asked if defendant was the one who shot Garcia, and Montera replied that he did not know. Later, defendant said he was not sure, but “if anything that’s the closest one.”

July 17 Interview

On July 17, Officer Toppan again interviewed Montera. Montera said he could not identify a person if he did not know who they were, and that he did not want to send someone to prison unless he was 100 percent sure. Nonetheless, he identified defendant as the shooter with “98 %” certainty. Toppan offered to show Montera the lineup again. Montera declined and said, “I know his picture,” and that it was “not an image that just floats away”

Miki Schell

Schell’s Testimony

Miki Schell was with the group of people that included Montera. At the time of the shooting, she was dating Montera.

¹³ Contextually, it appears that “scrap” is a term used to reference Sureño gang members. (See also *People v. Zepeda* (2008) 167 Cal.App.4th 25, 32 fn. 5.)

Schell testified that at one point, a car pulled up on Florinda Street. Two men exited, and one of them was wearing gloves and holding a gun. The two men ran towards Schell's group. Someone said, "[R]un," so Schell began to run away from the gunman. She never looked back, but she did hear the gun fire once.

At trial, Schell denied that she identified defendant as the gunman.

Schell's Police Interview

Darren Matteson interviewed Schell before he retired as a detective with the Hanford Police Department. When Matteson showed Schell a six-person photographic lineup, she pointed to defendant's photograph and said he was the person running with the gun. She also said she was not "100 percent sure"¹⁴ about her identification.

Matteson testified that Schell told him that two "guys" ran up from a dark-colored Honda, one of whom was wearing blue gloves and was carrying a gun in his left hand. Schell also told Matteson that while she was running away, she heard someone yell: "Shoot that bitch."

Post-Homicide Evidence

Deborah Cervantes

On September 18, 2011, Officer Pontecorvo went to the home of defendant's mother, Deborah.¹⁵ Officer Pontecorvo told Deborah he was there to arrest defendant for murder. Before Officer Pontecorvo had mentioned when the murder occurred, Deborah volunteered that defendant had been working that day. Deborah appeared intoxicated.

¹⁴ This quotation comes from counsel's question, to which Matteson responded affirmatively.

¹⁵ Deborah's last name is identified in the record as, alternatively, "Arellano" and "Cervantes." We will refer to her by her first name to avoid any confusion.

Myses Cervantes

Myses Cervantes worked with defendant cleaning bounce houses for Mysès's father.¹⁶ Officer Pontecorvo interviewed Mysès. Pontecorvo testified that Mysès said defendant claimed to have killed somebody. Mysès did not believe defendant. At trial, Mysès denied having made these statements to Pontecorvo.

During his police interview, Mysès said Deborah had also told him defendant killed someone. Mysès told Deborah she should not be proud to tell people that her son had killed someone. At trial, Mysès explained that he was talking hypothetically, and that he had not actually told Deborah not to be proud that her son killed someone.

During his interview with Officer Pontecorvo, Mysès indicated that he once owned a blue Honda, but it had been repossessed.

Tania Garcia

Mysès's girlfriend, Tania Garcia,¹⁷ testified that she once overheard defendant arguing with his then girlfriend, Marisol Bonilla. Bonilla said defendant "thought he was all hard because he had killed someone." Defendant did not respond. Bonilla, who was no longer romantically involved with defendant by the time of trial, denied having such a conversation with defendant.

Tania testified that Deborah told her that defendant had killed someone in Hanford. Tania also said that Mysès told her defendant had killed someone. She was not sure when Mysès told her this, just that it was sometime around June or July.

¹⁶ Mysès used the term "jumpers," which is apparently a reference to bounce houses.

¹⁷ Because Tania shares a last name with the victim, we will refer to her by her first name.

Gilberto Cervantes

Gilberto Cervantes is Myses's father and Deborah's father-in-law. Gilberto owned a party supply rental business where defendant worked.

Gilberto's Interview with Police

On September 20, 2011, Officer Pontecorvo went to Gilberto's home to interview him. As he was driving up to Gilberto's home, Pontecorvo noticed that Deborah was leaving the home. When Pontecorvo entered the home, he noticed several contracts from Gilberto's business laid out on the table. He asked Gilberto whether Deborah had asked him to retrieve the contracts and he said, "[Y]es." The contracts pertained to various dates including July 3, 4, and 17. None of the contracts pertained to July 14. Gilberto told Pontecorvo that he does not keep records of employee work times. Gilberto said he could not tell Pontecorvo the whereabouts of defendant on July 14.

Midway through the interview, Myses joined the conversation. Officer Pontecorvo testified that at one point, he told Gilberto that defendant had told Myses he had killed someone. Gilberto became upset with Myses and spoke to him in Spanish. In Spanish, Myses confirmed to Gilberto that defendant had told him he killed someone. Myses added that he did not believe defendant when he first heard.

Gilberto's Trial Testimony

At trial, Gilberto testified that defendant worked for him on the morning of July 14, but that he had no documentation to prove it. Gilberto contradicted Officer Pontecorvo's account by denying that Myses told him defendant said he had killed someone during his police interview.

Gang Expert

A gang expert testified that it was important for defendant to wear blue gloves because it openly displayed that a Sureño was committing the crime.

Garcia's Gunshot Wound

An officer who observed Garcia’s body in the hospital said he had an entry or exit wound in his “lower left back area.” The pathologist who performed the autopsy opined that the cause of Garcia’s death was a single gunshot wound to the back. During the autopsy, it was determined that the bullet slug penetrated Garcia’s sternum.

DISCUSSION

I. THERE WAS SUBSTANTIAL EVIDENCE OF EXPRESS MALICE

Defendant’s first contention on appeal is that there is insufficient evidence to support the jury’s finding of express malice.¹⁸

“ ‘ “When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] We determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.] In so doing, a reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.] [Citation.]” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104, original italics.)

“ ‘Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.’ (§ 187, subd. (a).) Malice aforethought may be express or implied. (§ 188.)” (*People v. Beltran* (2013) 56 Cal.4th 935, 941–942.) “Malice is *express* when the killer harbors a deliberate intent to unlawfully take away a human life. Malice is *implied* when the killer lacks an intent to kill but acts with conscious disregard for life,

¹⁸ Because we ultimately conclude there was substantial evidence of express malice, we need not address defendant’s contention that there was insufficient evidence of implied malice.

knowing such conduct endangers the life of another.” (*People v. Lasko* (2000) 23 Cal.4th 101, 104.)

Here, there was substantial evidence of express malice. Specifically, there was evidence defendant fired a gun at the victim in a manner that *could have* inflicted a mortal wound. From this evidence the jury could have reasonably inferred an intent to kill. Indeed, in *People v. Smith, supra*, 37 Cal.4th at p. 733, our Supreme Court held that “the very act of firing a weapon ‘ “in a manner that *could have* inflicted a mortal wound ...’ ” is sufficient to support an inference of intent to kill. [Citation.]” (*Id.* at p. 742, italics added.) There is no dispute that substantial evidence supported an inference that a gunman¹⁹ purposefully fired a weapon at Garcia and actually inflicted a mortal wound. Nothing more was required to raise an inference of intent to kill. (See *ibid.*)²⁰

Defendants’ counter-arguments on this issue boil down to the claim that some evidence (e.g., the single shot, the entry wound) is also consistent with an intent to merely injure. Having concluded that the jury’s finding of express malice was supported by substantial evidence, we reject these contentions. “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Here, reversal is not

¹⁹ Defendant correctly concedes on appeal that there was substantial evidence he was the gunman.

²⁰ Defendant focuses on the alleged “lack of evidence on the ... distance of the one shot.” While *People v. Smith, supra*, 37 Cal.4th 733, involved a “close range” shooting, and the opinion mentions that fact several times, its underlying reasoning is not limited to close range shootings. “Contrary to the argument advanced on this appeal, the evidence need not show in every instance a firing at point-blank range before the trier of fact may conclude that the shooter unambiguously intended to kill....” (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.)

warranted merely because the evidence in this case could conceivably be reconciled with an intent to merely injure Garcia. (See *ibid.*)

II. THE TRIAL COURT DID NOT PREJUDICIALLY ERR IN FAILING TO INSTRUCT ON INVOLUNTARY MANSLAUGHTER

Defendant also contends “his first degree murder conviction was improper because the jury was not instructed on involuntary manslaughter....” (*People v. Polley* (1983) 147 Cal.App.3d 1088, 1091.) Such a claim “is normally without merit.” (*Ibid.*) Defendant’s contention in this case is no exception.

Here, the jury convicted defendant of first degree murder. This shows that the jury necessarily “found express malice, i.e., the intent to kill” (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 22.) “[H]aving reached this factual conclusion, the jury could not have found the defendant guilty of involuntary manslaughter. [Citation.]” (*Ibid.*) Therefore, even if the failure to give an involuntary manslaughter instruction was erroneous, that error was harmless.²¹ (*Ibid.*; see also *People v. Polley, supra*, 147 Cal.App.3d at pp. 1091–1092.)

For the same reason, the trial court did not prejudicially err in failing to instruct on the unitary crime of manslaughter. The factual issue that would have been tendered by a manslaughter instruction is whether defendant acted with malice when he shot Garcia. (*People v. Rios* (2000) 23 Cal.4th 450, 460 [the “distinguishing feature” between murder and manslaughter is malice].) The jury necessarily resolved the issue of whether defendant harbored malice when it convicted defendant of first degree murder rather than

²¹ “ ‘[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836 [299 P.2d 243]].’ [Citations].” (*People v. Beltran, supra*, 56 Cal.4th at p. 955.)

acquitting him. Thus, even if the trial court erred in failing to instruct on manslaughter, that error was not prejudicial.²²

III. THE TRIAL COURT DID NOT ERR IN GIVING THE CALCRIM 520 INSTRUCTION

The trial court instructed the jury on implied malice as follows:

“The defendant acted with implied malice if, one, he intentionally committed an act; two, *the natural and probable consequences of the act were dangerous to human life*; three, at the time he acted he knew his act was dangerous to human life; and four, he deliberately acted with conscience [*sic*] disregard for human life.” (Italics added.) (See CALCRIM 520.)

Defendant claims that this instruction conveyed an impermissibly low threshold for finding implied malice. He takes issue with the portion of the instruction that describes implied malice as occurring if defendant “intentionally committed an act ... *the natural and probable consequences of [which] were dangerous to human life...*” (Italics added.) Defendant contends that this language fails to convey that the defendant’s act

²² Defendant also contends that the trial court was obligated to instruct on an admittedly erroneous theory of voluntary manslaughter referenced in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), disapproved by *People v. Bryant* (2013) 56 Cal.4th 959, 970 (*Bryant*). In 2008, the Second District Court of Appeal “conclude[d] an unlawful killing during the commission of an inherently dangerous felony, *even if unintentional*, is at least voluntary manslaughter.” (*Garcia, supra*, 162 Cal.App.4th at p. 31, italics added.) In 2013, the Supreme Court disapproved this notion, holding that “voluntary manslaughter requires either an intent to kill or a conscious disregard for life.” (*Bryant, supra*, 56 Cal.4th at p. 970.)

Defendant acknowledges *Bryant*’s disapproval of *Garcia*. Nonetheless, he argues the trial court was required to instruct according to *Garcia*’s erroneously broad definition of voluntary manslaughter because *Bryant* had not yet been decided when the trial court instructed the jury in this case. The quickest way to resolve this unusual contention is to observe that the failure to instruct on *Garcia*’s formulation of voluntary manslaughter – even if it had been error at the time – is obviously harmless in light of *Bryant*.

must “involve[] a *high degree* of probability that it will result in death....” (*People v. Thomas* (1953) 41 Cal.2d 470, 480, (conc. opn. of Traynor, J.), italics added.)

People v. Nieto Benitez (1992) 4 Cal.4th 91 (*Nieto Benitez*), is instructive. In that case, as here, the defendant argued the trial court “misstate[d] the law because [its] instructions omit[ted] a requirement that defendant commit the act with a *high probability* that death will result. [Citation.]” (*Id.* at p. 111, italics in original.) The Supreme Court disagreed and held that “the two linguistic formulations – ‘an act, the natural consequences of which are dangerous to life’ and ‘an act [committed] with a high probability that it will result in death’ are equivalent” (*Id.* at p. 111.)

The “linguistic formulation” used by the trial court in this case is very similar to the one upheld in *Nieto Benitez*. Here, the trial court instructed the jury that the defendant’s act must be such that its “natural and probable consequences” are “dangerous to human life.” This is virtually identical to the instruction in *Nieto Benitez* which required an act, “ ‘the natural consequences of which are dangerous to life’ ” (*Nieto Benitez, supra*, 4 Cal.4th at p. 111.) We see no reason to distinguish the holding of *Nieto Benitez*.

DISPOSITION

The judgment is affirmed.

Poochigian, Acting P.J.

WE CONCUR:

Peña, J.

Oliver, J.*

* Judge of the Superior Court of Fresno County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.