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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN NICHOLAS ROA,

Defendant and Appellant.

G044460

(Super. Ct. No. 07CF0217)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed as modified.

Michael B. McPartland, 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, Gil Gonzalez and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Ruben Nicholas Roa of murder in the second degree and receiving stolen property, and found it to be true he committed the crimes in violation of Penal Code section 186.22, subdivision (b)(1). (All further statutory references are to the Penal Code.) He was also found guilty of street terrorism. The court sentenced him to a total of 15 years to life in state prison. He was sentenced to 15 years to life for the murder, and two years each to run concurrently for violating section 496, subdivision (a) and section 186.22, subdivision (a). The court struck the gang enhancement as to the murder for purposes of sentencing, but imposed three years for the gang enhancement as to the receiving stolen property conviction, three years was ordered to be served concurrently with the sentence for receiving stolen property.

On appeal, defendant argues the court erred in instructing the jury, a claim we reject. He also contends the court erred in punishing him twice for the same crime, and we agree with him. We order the judgment modified to stay imposition of sentence on defendant's conviction of street terrorism. In all other respects, the judgment is affirmed.

I

FACTS

Rito Guajardo, also known as Boxer, was killed on November 2, 2006, at approximately 8:00 a.m. in an alley near the intersection of Beach Boulevard and Cerritos Avenue in the City of Stanton in a "vehicle versus bicycle incident." The vehicle was "a large SUV." Police were not able to document any tire marks or skid marks at the scene.

The Stolen SUV

On October 15, 2006, Trinidad Saldana owned a white Mercury Mountaineer sport utility vehicle bearing the license number 5SRB668. On some date in

October 2006, the vehicle was not where it had been parked, and the owner went to the police and reported it missing.

Edgar Hernandez

Called by the prosecution, Edgar Hernandez said he understood he was testifying against defendant who was one of his homies and that he was going to be called a rat. In exchange for agreeing to testify, admitting he was an active participant in the 18th Street gang and for pleading guilty to a charge of receiving stolen property, Hernandez was to receive consideration in the case against him.

Hernandez admitted he was a member of the 18th Street gang and that his moniker was Sick One. He said Afton Reagan has 18th Street tattooed on her face and that her moniker was Manzana, Spanish for apple.

Hernandez's plea agreement was admitted into evidence. The factual basis states: "In Orange County, California, on 11/2/06, I along with Ruben Roa and Afton Reagan did willfully and unlawfully commit assault with a deadly weapon, a white Mercury Mountaineer SUV, upon the person of Rito Guajardo. I further admit I received and possessed stolen property, Mercury Mountaineer SUV, knowing it was stolen. I further admit I committed this crime while an active participant in the 18th Street criminal street gang with knowledge that 18th Street gang members engage in and have engaged in a pattern of criminal gang activity [unreadable] promote, further and assist in felony conduct by [unreadable.]"

While examining Hernandez, the prosecutor showed him a photograph of the victim and asked: "Is that the person that you and Mr. Roa and Ms. Reagan ran over back on November 2nd, 2006?" Hernandez responded: "Yes, sir." Hernandez said he knew the victim as Boxer, a member of the rival Big Stanton gang. He said the area where the killing occurred was claimed by both the 18th Street and Big Stanton gangs.

One day, defendant's girlfriend showed up with the white SUV. Hernandez believed it was stolen. Defendant, Reagan and Hernandez took turns driving it for about two weeks prior to November 2, 2006.

Hernandez related a previous incident between the victim, Guajardo, and defendant that occurred about two months prior to the incident here: "Mr. Roa's girlfriend came down and she parked in the back of the alley in — where I lived at. [¶] . . . [¶] . . . Boxer came back — came from a different apartment complex and pulled out a 12 gauge and started shooting and Mr. Roa started shooting back at him."

Hernandez related another incident, this one between Guajardo and Reagan, which occurred a few days prior to the instant one. Guajardo was "supposedly trying to peace treaty between 18 and Stanton." Reagan was upset and accused Guajardo of lying. Hernandez also described disagreements among the two gangs about territory. The prosecutor asked: "Isn't this what this whole thing with Boxer [is] about, a turf battle between 18th Street and Big Stanton?" Hernandez responded: "Yes."

On November 2, 2006, Hernandez, Reagan and defendant left their apartment complex between 7:30 and 8:00 in the morning in the white SUV. Defendant was driving, Reagan was in the front passenger seat and Hernandez was in a rear seat. At some point, they went down a narrow alley between Chestnut and Court Avenue and they saw Guajardo riding a mountain bike. Hernandez said: "Mr. Roa accelerated on the car and he missed him and he sped up on Cerritos and turned right and then turned another right on Court and went back again to the alley." This time around, they again saw Guajardo and defendant "accelerated more and he hit him." Guajardo flipped onto the hood of the SUV, hit the passenger side of the vehicle and then was crushed and "pinched . . . between the car and the light pole." After he hit Guajardo, defendant "sped off and turned right and we left Stanton." The three had to go to drop off some speakers at a friend's house.

Afterwards, they went “to a car wash and cleaned the front grill and the fingerprints inside.” They “ditch[ed] [the SUV] in a mobile home park” and had another gang member drive them to Santa Ana where they threw the keys out the window.

Reconstruction

A large dent was found on the hood of the 1999 white Mercury Mountaineer sport utility vehicle, license number 5SRB668. There were scuff marks and dents along the driver and rear passenger doors and scratches and abrasions on both doors on the passenger side. Both the tires and the braking system were in good condition. Police were able to turn the steering wheel. An officer who is an accredited accident reconstructionist explained the Mountaineer pushed the bicycle out from underneath the rider and then the bicycle flipped over the hood of the car. He said there were no skid marks, no indication of swerving and there was no indication the Mountaineer’s brakes had been applied. The likely speed the vehicle was traveling when it hit the bicycle was a minimum of 37 miles an hour.

Forensic Pathologist

A forensic pathologist testified the cause of death was “multiple traumatic injuries.” The decedent’s autopsy revealed most of both the internal and external injuries were on the right side of his body.

Stipulation

The parties stipulated: ““On November 3rd, 2006, Orange County Sheriff’s Department Deputy M. Alsobrook took possession of a white Mercury Mountaineer sport utility vehicle, license number 5SRB668, from the P.P.I. Guys towing yard located at 952 North Batavia in the City of Orange. Alsobrook impounded the vehicle [¶] . . . [¶]

The buccal samples from Roa, Reagan and Hernandez were submitted to the Orange County Sheriff's Department's DNA crime lab [¶] . . . [¶] The deduced major DNA profile from the interior driver's side door handle is the same as Ruben Roa's DNA profile. [¶] . . . Roa, Reagan, and Hernandez could not be eliminated as contributors to [the DNA collected from the interior dash buttons and levers]. [¶] The DNA profile of the major contributor in the swab from the driver's side interior door handle is the same as Ruben Roa's DNA profile. [¶] The DNA profile of the major contributor on the hair band recovered from the passenger side exterior rearview mirror was the same as that of Afton Ann Reagan.”

Interview of Defendant

Andre Spencer is a homicide detective with the Orange County Sheriff's Department. He was assigned to investigate the death of Rito Guajardo. As part of his investigation, Spencer interviewed defendant.

In an interview room, Spencer told defendant he was investigating a murder and that “Boxer was run over and killed on November 2, 2006.” Defendant said “Oh, shit” and then “I heard something about that.”

Defendant told Spencer he was not the driver of the car or even in the car that hit Boxer. He was shown a photograph of a white Mountaineer and denied ever being inside a car like that. After being shown a photograph of Boxer, defendant said he did know him.

When defendant was asked where he was at the time of the killing, he first said he didn't know, but was either at home in Santa Ana or in Los Angeles. Later he said he spent the night of November 1 at Erika's house and that he and Erika went together to a church in Long Beach to her uncle's funeral the morning of November 2.

Defendant told Spencer that after the funeral service, he and Erika drove to the gravesite together. Defendant said he went back home after the funeral.

Gang Expert

Brian Thomas primarily works with Hispanic street gangs. He supervised inmate housing units at Theo Lacy men's jail for seven years. For the two years before he testified at trial, he worked with the sheriff's gang unit. Thomas said when an inmate is brought into the jail facility, the person is identified with a gang if they are gang members. He said on a daily basis, he spoke about gangs with people being processed.

Thomas described numerous characteristics of street gangs. About the 18th Street gang, he said: "In the 1960's in the L.A. Rampart area there was a local gang known as Clayton Street. Only allowed hundred percent Mexican nationality to join the gang. There were a number of residents in the area that were of mix nationalities, not allowed into the gang. So 18th Street developed as a rival to that gang to allow mixed nationality participants in. [¶] So as the gang developed through heavy and aggressive recruiting, they grew rapidly in the L.A. Rampart area. As local participants moved out of the area, they planted little seeds of this gang throughout the whole country. [¶] So in the 1980's Flaco Moreno moved down to Orange County and he started the West Side 18th Street Malditos. The ones we know today, the one we're talking about."

Other 18th Street factions are their allies. Their rivals are "every other Hispanic street gang." The area where the instant killing occurred is claimed by both the West Side 18th Street gang and the Big Stanton gang. Because of an approximate mile square area in Stanton, there is animosity between the two gangs.

As of November 2, 2006, the primary activities of the West Side 18th Street gang were "felony assault, robbery and stolen vehicles." Josue Escobar, born March 1982, was an active participant of the gang when he committed robbery and street

terrorism on September 16, 2004. Juan Acosta, born November 1980, another active 18th Street gang member on the date of the crimes he committed, committed robbery and street terrorism on October 30, 2004. Jaime Gonzalez, born February 1978, committed assault with a firearm on July 14, 2002, while he was an active member of the gang.

On both November 4, 2005 and April 27, 2006, field interview cards about defendant were prepared by the Orange County Sheriff's Department. Defendant said he was from the West Side 18th Street gang and that his moniker was Miget. On November 29, 2006, defendant was served with a notice under the "Street Terrorism Enforcement [and] Prevention Act of 1988" which put him on notice that the gang he was affiliating with is considered to be a criminal street gang. Thomas also reviewed six prior police reports which stated defendant had contact with police while he was with other West Side 18th Street gang members. The expert also described defendant's tattoos as well as letters written to numerous people by defendant which contained indications of his gang affiliation. For example, one included the words: "Ain't nothing sweeter than an 18th Streeter."

Thomas opined that both Hernandez and Reagan were also members of West Side 18th Street gang. He also said Guajardo had the moniker of Boxer and was an active participant of the Big Stanton criminal street gang on November 2, 2006.

The prosecutor posed a hypothetical question which mirrored the facts in the evidence in this case, and asked Thomas whether or not the crimes were committed for the benefit of, at the direction of, or in association with the 18th Street gang. Thomas said the hypothetical crimes were committed for the benefit of and in association with the gang. He explained he based his decision on the hypothetical factors that there were three gang members in a stolen vehicle and a rival gang member was killed in disputed territory. He said all of those factors would send a message of fear and intimidation to the rival gang in particular, and would gain respect for the gang committing the crime.

He described a rat as “somebody who cooperates, talks to or assists in the prosecuting of fellow gang members.” He said a rat is “targeted for assault or to be murdered.”

II

DISCUSSION

Alleged Dewberry Error

Defendant argues: “The trial court prejudicially erred when it failed to instruct the jury that if they had a reasonable doubt about whether the offense was murder or manslaughter, they had to give [defendant] the benefit of that doubt and find him guilty of manslaughter rather than murder.” The Attorney General says the instructions given were those requested by the parties, and that, as a whole, they complied with the requirements of *People v. Dewberry* (1959) 51 Cal.2d 548.

During trial in *People v. Dewberry, supra*, 51 Cal.2d 548, “[t]he court explained that there are two degrees of murder and that if the jurors were convinced beyond a reasonable doubt that defendant had committed the crime of murder but entertained a reasonable doubt as to the degree, they should give defendant the benefit of the doubt and find him guilty of second degree murder. The jury was also instructed that if they were in doubt as to whether the killing was manslaughter or justifiable homicide, defendant was to be acquitted. Finally, the court instructed the jury that defendant was presumed innocent of any crime until the contrary had been proved, and in case of reasonable doubt, was entitled to an acquittal, and that the presumption of innocence attaches at every stage of the case and to every fact essential to a conviction.” (*Id.* at p. 554.) Dewberry contended to the California Supreme Court that “instructions on manslaughter were not accompanied with the further instruction that in the case of a reasonable doubt as between second degree murder and manslaughter, defendant was to

be found guilty of manslaughter, the jury was given the impression that the rule requiring a finding of guilt of the lesser offense applied only as between degrees of murder.”

(*Id.* at p. 555.)

The *Dewberry* court held: “The proposed instruction should have been given. It went directly to the defense of reasonable doubt of defendant’s guilt of second degree murder; it was clearly responsive to an issue raised by the evidence [citations]; and it was essential to cure the misleading effect of its absence in the light of the other instructions given. Under these circumstances there exists ‘such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result,’ and accordingly the error is prejudicial. [Citation.]” *People v. Dewberry, supra*, 51 Cal.2d at pp. 557-558.)

Under *People v. Dewberry, supra*, 51 Cal.2d 548, the jury must be instructed if the jury has a reasonable doubt as between second degree murder and manslaughter, defendant is to be found guilty of manslaughter. Defendant argues the instructions given here were inadequate because they did not contain the required language. He points to CALJIC No. 8.72, which he says does contain the required language, and which the court did not give to the jury: “If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.” (CALJIC No. 8.72 (7th ed. 2005).)

““[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citations.]” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

“There is no error in a trial court’s failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at

trial. As long as the trial court has correctly instructed the jury on all matters pertinent to the case, there is no error. The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. [Citations.]” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.) While it is the court’s duty to give instructions on the general principles of law involved, it is the defendant’s responsibility to request instructions that “pinpoint” a theory of the defense. (*People v. Silva* (2001) 25 Cal.4th 345, 371

Here the court gave the following instructions to the jury:

CALCRIM No. 220: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt.”

CALCRIM No. 520: “The defendant is charged in count 1 with murder in violation of Penal Code section 187. To prove that the defendant is guilty of this crime the People must prove that [the court then listed the elements of the crime].”

CALCRIM No. 521: “If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. [¶] The defendant is guilty of first degree murder if the People prove that he acted willfully, deliberately and with premeditation. . . . [¶] . . . [¶] All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.”

CALCRIM No. 580: “Penal Code 192(b), involuntary manslaughter, is a lesser crime to count 1, Penal Code section 187, murder. [¶] When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter. The difference between other homicide offenses and involuntary manslaughter depends on whether the person was

aware of the risk of life that his actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another and without conscious disregard of that risk is murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter. [¶] [The court then listed the elements of the crime.] [¶] . . . [¶] In order to prove murder, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with a conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder.”

Defendant’s argument is not persuasive. The Supreme Court said the facts in *Dewberry* were “close.” The facts here are not close. In *Dewberry*, the court found the instructions as a whole were misleading in that they left the impression that, while the jury had to give the defendant the benefit of the doubt as between first and second degree murder, there was no such requirement as between second degree murder and manslaughter. Here we do not have misleading instructions. In *Dewberry*, the defendant requested a special instruction. Here defendant did not request the instruction he now claims was necessary to his defense. If he wanted an instruction similar to CALJIC No. 8.72, he should have requested it.

The instructions given by the court here, when viewed as a whole, told the jury it could not convict defendant of murder unless it was convinced beyond a reasonable doubt that defendant acted with malice. Jurors were also instructed they could find defendant guilty of manslaughter. There is no indication in the record the jury did not follow the court’s instructions, so we presume they were followed. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

In a noncapital case the court’s failure to instruct sua sponte on a lesser included offense, or the failure to give complete instructions on such an offense, is not a

violation of the federal Constitution and therefore is subject to review under the standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 165, 170.) Under *Watson*, reversal is required only when, ““after an examination of the entire cause, including the evidence’ (Cal. Const., art. VI § 13), it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred [citation].” (*People v. Breverman, supra*, 19 Cal.4th at p. 178, fn. omitted.) This court ““focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration.’ [Citation.]” (*People v. Lee* (1999) 20 Cal.4th 47, 62.) We conclude that even if the jury had been instructed the way defendant now suggests, it is not reasonably probable that it would have convicted defendant of manslaughter instead of murder.

Street Terrorism

Defendant next contends his sentence on the street terrorism conviction should be stayed under the provisions of section 654. The Attorney General argues: “[T]he trial court could find that [defendant] harbored multiple independent intents in committing the murder and the receiving stolen property offenses and, therefore, it was not required to stay the punishment on the substantive gang participation offense.” But to that argument defendant states: “First of all, under the court’s instruction, [defendant] was prosecuted for street terrorism based on his involvement in the murder and receiving stolen property offenses. Under these circumstances, [defendant’s] commission of the murder and receiving stolen property offenses were necessary elements of the street terrorism offense, and the provisions of section 654 prohibited multiple sentences on either the murder or receiving stolen property convictions, and on the street terrorism conviction. [¶] Secondly, respondent’s contention ignores the fact that the trial court also imposed sentence on the receiving stolen property conviction. The trial court imposed a

15 year to life term on the murder conviction, a concurrent three year term on the receiving stolen property conviction, and a concurrent two year term on the street terrorism conviction. Clearly, imposing sentence on all three of these convictions violated the provisions of section 654.”

The following wording was used in the court’s instruction for violating section 186.22, subdivision (a): “Felonious criminal conduct means committing Murder and Receiving Stolen Property. To decide whether a member of the gang or a defendant committed Murder and Receiving Stolen Property, please refer to the separate instructions that I have given you on those crimes.” During sentencing, the court did not mention anything about separate motives.

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) Whether section 654 applies is generally a question of fact. (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.) “[T]he trial court’s finding will be upheld on appeal if it is supported by substantial evidence. [Citations.]” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

As the Supreme Court explained in *Neal v. State of California* (1960) 55 Cal.2d 11, under the plain terms of section 654, “‘If only a single act is charged as the basis of . . . multiple convictions, . . .’ [T]he defendant can be punished only once. [Citation.]” (*Id.* at p. 19.) *Neal* also observed that “‘[s]ection 654 has been applied not only where there was but one ‘act’ in the ordinary sense . . . but also where a course of conduct violated more than one statute . . .’ [Citation.]” (*Ibid.*) Whether aggregate conduct “is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were

incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Ibid.*)

Here defendant was convicted of and punished for three crimes, even though he committed only two acts, murder and receiving stolen property. Under these circumstances, we cannot find substantial evidence supports defendant’s sentence for violating section 186.22, subdivision (a) and conclude it violates section 654.

III

DISPOSITION

The judgment is modified to stay the sentence for street terrorism. In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.