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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Colusa)

THE PEOPLE, Plaintiff and Respondent, v. JOSE KELLY MUNOZ, Defendant and Appellant.	C058521 (Super. Ct. No. CR48644)

APPEAL from a judgment of the Superior Court of Colusa County, William Abel, Judge. Affirmed as modified and remanded with directions.

Rita Barker, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Kokans and Stephen G. Herndon, Supervising Deputy Attorneys General, Darren K. Indermill, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Jose Kelly Munoz of attempted murder of James Dowden (Pen. Code,[1] §§ 187, 664 - count II),

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I-V of the Discussion.

assault of Luis Magana with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1) - count III), and shooting at Magana from a vehicle (§ 12034, subd. (c) - count IV).[2] The jury found that in counts II and IV, defendant personally and intentionally discharged a firearm causing great bodily injury to Magana (§ 12022.53, subd. (d)), and that in count III, defendant inflicted great bodily injury to Magana (§ 12022.7, subd. (a)). The jury found that count II was not willful, deliberate and premeditated. (§ 664, subd. (a).) Defendant was sentenced to state prison for an aggregate 58 years eight months to life, consisting of determinate terms of seven years on count II and one year eight months (one-third the midterm) in count IV, plus two consecutive indeterminate terms of 25 years to life for the firearm enhancements in counts II and IV. Sentence on count III was stayed pursuant to section 654.

On appeal, defendant contends (1) admission of gang evidence was an abuse of discretion; (2) refusal to answer a juror's question prior to jury instructions and deliberations was prejudicial; (3) the foregoing errors were cumulative and require reversal; (4) the omission of jury instructions on a lesser included offense of count IV was erroneous and

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[1] Hereafter, undesignated statutory references are to the Penal Code unless otherwise indicated.

[2] The prosecution dismissed a count of attempted murder of Magana and related enhancing allegations. (Count I.)

prejudicial; (5) the sentencing court misunderstood its discretion and failed to exercise its discretion; and (6) the count IV enhancement term of 25 years to life was unauthorized and must be modified. We shall affirm the judgment of conviction and remand for resentencing.

FACTS

Prosecution Case-In-Chief

On an evening in August 2007, Dowden and Magana walked to Dowden's grandmother's house in Arbuckle. While they were walking, a car drove up behind them and stopped next to them. Three people were in the car, including defendant, who was seated in the rear passenger seat. Dowden had known defendant for a few years, and Magana is defendant's cousin.

A few months earlier, Dowden had been suspected of beating up a person named Santiago Ochoa. Dowden thought that both Ochoa and defendant were members of the Sureño gang, which Dowden referred to as "Blue," "Blue 13," and "scrap." Ochoa had told Dowden that he was in the gang. Dowden knew that defendant was in the gang because defendant had tattoos and once had asked him, "are you blue?" Dowden became scared when he saw defendant drive up in the car. Defendant had warned Dowden a couple of weeks prior that he knew Dowden had beaten up Ochoa and "[y]ou're going to get yours."

Magana walked up to defendant's window, which was open eight to 10 inches. Dowden stepped back at least five feet so that he was behind and to the side of Magana. Defendant was smirking and appeared to be angry. Dowden saw him holding a

.22-caliber sawed-off rifle in his lap. Defendant lifted the rifle, pointed it toward Dowden and Magana, fired, and tossed the rifle to the side. The shot shattered the window. Magana grabbed his chest and started screaming. Defendant told the driver to "take off." The car sped down the road but then stopped and defendant jumped out.

Magana told Dowden to call the police; Dowden ran to his grandmother's house. Defendant told Magana that he was sorry and that Magana "wasn't the one supposed to get hit." He pleaded, "'[d]on't call the cops. Say it was somebody else or say it was a drive-by.'"

Defendant and Magana walked to Magana's house. Magana yelled for someone to call the police even though defendant was telling him not to. Defendant told Magana's mother that he was sorry. She told him to stay if the shooting was an accident. However, Magana's brother told defendant to go away. At that point, defendant ran off.

Eight days after the shooting, defendant turned himself in to the sheriff's department. His leg and foot were injured. He told jail staff that the injuries occurred when he jumped off a bridge.

The parties stipulated that a single shot was fired; the bullet fragmented into two pieces, probably when it struck the window glass; and two bullet fragments entered Magana's body. One fragment lodged in Magana's liver and surgeons could not retrieve it.

Defense

Defendant testified that he had been practicing target shooting with his gun. Then he took the gun along with him as he hung out with friends. He did not want his little brothers to play with the gun. Defendant and his friends were drinking beer and, when it ran out, they drove to a gas station to buy more beer. On the way back, defendant and his friends saw Dowden and Magana walking along the street. After the car stopped, defendant waved Magana over to the car and asked, "What's up?" Defendant picked up the gun to show it to Magana. When he lifted it, the gun got caught on the door handle and accidentally fired. Defendant did not intend to pull the trigger.

After the shooting, the driver started to drive away but defendant told him to stop. Defendant got out of the car and yelled, "'[s]omebody call the cops. My cousin just got hurt.'" Dowden ran off, and defendant walked Magana to his mother's house. Defendant hugged Magana's mother and told her he was sorry and that it was an accident. Magana's mother told him to get away from her, so he tried to explain everything to Magana's brother. The brother warned, "'Get away from me before I kick your ass,'" so defendant left. He broke his leg jumping off a bridge. A few days later, he contacted an attorney who advised him to turn himself in.

Defendant considered Dowden a friend and had never threatened him. He did not intend to do anything about Ochoa's beating. He did not want to hurt Dowden or anyone else.

Defendant did not know that Ochoa was a Sureño. Defendant claimed that he was not a Sureño, and that his friends in the car were not Sureños, but he admitted he hung around Sureños. He claimed that Dowden and Magana were lying about everything.

Rebuttal

Magana's mother testified that defendant apologized to her for shooting her son. She begged him to stay, but he ran off.

A Colusa County Sheriff's deputy testified that he found gang-related items, particularly evidence of Sureño membership, in the bedrooms of the other two people who were in the car with defendant.

DISCUSSION

I.

Defendant contends the trial court abused its discretion when it allowed the prosecution to present evidence concerning the gang affiliations of defendant and the other individuals involved. He argues the evidence, which purportedly proved motive, was cumulative and should have been excluded under Evidence Code section 352. We are not persuaded.

Background

Prior to trial, defendant moved to exclude evidence concerning his "alleged gang affiliation or association" and evidence "concerning the defendant's tattoos."

The prosecutor responded that his theory of the case was that defendant was "attempting to gain revenge for one of his fellow gang members," Ochoa, who had "claimed he was beaten up by" Dowden. The prosecutor predicted that the gang evidence

would be elicited from Dowden and Magana. The court ruled that the evidence was relevant to motive and would be admissible.

During trial, defendant objected on relevance and undue prejudice grounds to the prosecutor's question to Deputy Salm regarding the number of persons he had known were gang members based upon their clothing, their tattoos, or their admission of gang membership. The court ruled the question was relevant and not unduly prejudicial or time-consuming.

Defendant objected on undue prejudice grounds to Deputy Salm's rebuttal testimony regarding the gang items found in the searches of the other car occupants' bedrooms. The objection was overruled.

Analysis

"[I]n a gang-related case, gang evidence is admissible if relevant to motive . . . , so long as its probative value is not outweighed by its prejudicial effect. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

[Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 (*Rodrigues*).)

In this case, the gang evidence was probative of defendant's motive for the shooting. Defendant's defense was that the gun fired accidentally when it got caught on the door handle; he did not intend to shoot anybody. However, the gang evidence showed that defendant had a motive for shooting Dowden. Dowden was suspected of beating up a Sureño gang member. Evidence that defendant was a Sureño gang member supplied a motive for him to threaten that Dowden "would get [his]" and to track down Dowden with a loaded gun to kill him. This evidence also helps explain defendant's statement "I didn't mean to hit you." Magana testified he understood that statement to mean that he wasn't the one supposed to get hit. The gang connection supplied the only reason for defendant to shoot Dowden. Without the gang evidence, the prosecution would not have had solid evidence of defendant's motive, which was extremely important to show that defendant intended to kill and did not fire the gun accidentally. Without the gang evidence, defendant's voiced threat to Dowden would have been inexplicable.

The gang evidence also was necessary to impeach defendant. He testified that neither he nor his friends in the car at the time of the shooting were Sureño gang members. Evidence that gang-related items, including evidence of Sureño gang membership, were found in the friends' bedrooms impeached defendant's credibility and strengthened the prosecution's

argument that the shooting was gang-motivated. This evidence was not cumulative to any other evidence offered in the case.

To be sure, the gang evidence supported the prosecution case and undercut the defense case. "The governing test, however, evaluates the risk of '*undue*' prejudice, that is, '"evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,"' not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Because the gang evidence furnished the motive for the shooting, rebutted the defense claim of accident, and was not cumulative of other evidence, the trial court's ruling that the evidence was more probative than prejudicial was not "arbitrary, capricious or patently absurd" and did not "result[] in a manifest miscarriage of justice." (*Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125; see *Williams, supra,* 16 Cal.4th at pp. 193-195.) There was no abuse of discretion.

II.

Defendant contends the trial court erred when it failed to answer a question that a juror had submitted regarding intent. He further contends that, if his trial counsel forfeited the issue by failing to object, then counsel rendered ineffective assistance. We consider these claims in turn.

Background

During the prosecution's rebuttal case, a juror gave the court a note containing the question: "In order to be found guilty, does the willful intent have to be directed at the actual victim? Or could the intent be at/towards someone else and he still be found guilty?"

Stating "I think that's going to be answered in jury instructions," the trial court declined to answer the question at that time. Defense counsel agreed.

Analysis

Section 1093 provides in relevant part: "At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case." (§ 1093, subd. (f).) Because neither party had requested an immediate answer, the trial court had discretion to defer its answer until it instructed the jury on the law governing the case.

The instruction on attempted murder, CALCRIM No. 600, provided that defendant must have "intended to kill that person" whom he "took at least one direct but ineffective step toward killing." Thus, in count II defendant's intent had to be directed at the actual named victim (Dowden) and not at someone else (Magana); the legal principle of transferred intent did not apply.

Once the jury was instructed and deliberations began, no juror questioned the court on the issue of intent. Nothing in the record suggests the juror who had authored the note remained confused on the issue. Deferral of the answer until the giving of jury instructions was not an abuse of discretion.

Defendant's trial counsel could reasonably anticipate, as the trial court had done, that the jury instructions would adequately answer the juror's question. He was not ineffective for having failed to make an unnecessary request for an immediate answer. (*People v. Stratton* (1988) 205 Cal.App.3d 87, 97.)

III.

Defendant contends the foregoing errors were cumulatively prejudicial and require reversal of the judgment. Having rejected both claims of error, we also reject the claim of cumulative prejudice.

IV.

Defendant contends the trial court erred prejudicially on count IV (shooting at Magana from a vehicle (§ 12034, subd. (c))) by failing to instruct the jury sua sponte on the lesser included offense of discharging a firearm in a grossly negligent manner. (§ 246.3, subd. (a).)[3] We are not persuaded.

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[3] Section 246.3, subdivision (a), provides: "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison."

Background

In *People v. Ramirez* (2009) 45 Cal.4th 980 (*Ramirez*), the California Supreme Court recently held that grossly negligent discharge of a firearm (§ 246.3, subd. (a)) is a necessarily included offense of discharge of a firearm at an inhabited dwelling (§ 246). (*Ramirez, supra,* at pp. 983, 985.)

Following the decision in *Ramirez*, we granted defendant's request to submit supplemental briefing on whether grossly negligent discharge of a firearm is also a necessarily included offense of count IV. Both defendant and the Attorney General have filed supplemental briefs.

Analysis

The Attorney General contends defendant forfeited his claim because he did not raise it in the trial court and the court's instructions did not affect his substantial rights. (Citing § 1259 and *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) *Arredondo* explains that the affecting of "substantial rights" has been equated with reversible error. (*Arredondo, supra,* at p. 978.) In effect, the Attorney General invites us to find forfeiture by evaluating defendant's claim on its merits and finding no reversible error. Perceiving little utility in such a circuitous approach, we shall simply evaluate defendant's claim on its merits.

"[T]he elements of section 246.3(a) are: '(1) the defendant unlawfully discharged a firearm; (2) the defendant did so intentionally; [and] (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a

person.' [Citations.]" (*People v. Ramirez, supra,* 45 Cal.4th at p. 986.) "The elements of [section 246] are (1) acting willfully and maliciously, and (2) shooting at an inhabited house. [Citation.]" (*Id.* at p. 985, fn. omitted.) *Ramirez* noted that both offenses require that the defendant willfully fire a gun. (*Id.* at p. 990.) *Ramirez* also noted that, although the mens rea requirements are somewhat differently described, both are general intent crimes. (*Ibid.*)

The elements of section 12034, subdivision (c), are similar to those of section 246: (1) willfully and maliciously shooting from a motor vehicle, and (2) shooting at another person who was not in a motor vehicle. (CALCRIM No. 968.) Based on the Supreme Court's analysis in *Ramirez*, the parties agree that section 246.3, subdivision (a), is also a necessarily included offense of section 12034, subdivision (c). We assume for present purposes that the parties are correct.

The sua sponte duty to instruct on necessarily included offenses does not arise unless there is substantial evidence from which a jury composed of reasonable people could conclude that defendant violated section 246.3, subdivision (a), but did not violate section 12034, subdivision (c). (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

The parties agree that the only evidence suggesting the incident was something other than the gang-related retaliatory shooting theorized by the prosecution was defendant's testimony that the gun fired accidentally when it got caught on a door handle. This evidence suggests that the firing of the gun was

not willful. Because sections 246.3, subdivision (a), and 12034, subdivision (c), both require that the firing be willful (see *Ramirez, supra,* 45 Cal.4th at p. 990), the foregoing evidence would not allow a jury composed of reasonable people to conclude that defendant violated section 246.3, subdivision (a), but did not violate section 12034, subdivision (c). Rather, if believed, the evidence would have required the conclusion that defendant did not violate either section.

Defendant disagrees, claiming "If there was sufficient evidence to instruct that the discharge of the gun was accidental, then surely there was sufficient evidence to warrant an instruction that the discharge of the gun was done in a grossly negligent manner, rather than directed at a person." Although purportedly sure of its existence, defendant does not identify this evidence in his supplemental brief. An appellate court is not required to scrutinize the record for the testimony on which defendant relies. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1227-1228.) In any event, we have already explained that evidence suggestive of an accident was not sufficient to require a sua sponte instruction. There was no evidence that defendant fired the gun willfully, as opposed to accidentally, even though he had not aimed it at any particular person.

We have searched defendant's supplemental brief in vain for any contention that his trial counsel's failure to request a jury instruction on grossly negligent discharge of a firearm constituted ineffective assistance. The Attorney General's assertion that such a claim is before us has no merit.

V.

Defendant contends the matter must be remanded for resentencing because the trial court misunderstood the scope of its sentencing discretion. This contention has merit.

Background

In January 2008, the probation department filed a presentence report. Due to "a breakdown of information" within the probation department, "the recommendation in this report was totally erroneous." In February 2008, the probation department filed a corrected report.

Under the heading, "Criteria Affecting Concurrent or Consecutive Sentences, Judicial Council Rule 4.425 [capitalization omitted]," the corrected probation report recommended that the sentence on count IV (shooting at Magana from a vehicle) run consecutively to the sentence on count II (attempted murder of Dowden) on the rationale that the "crimes and their objectives were predominantly independent of each other due to the fact that there were two (2) separate victims." (Citing Cal. Rules of Court, rule 4.425(a)(1).)[4] The corrected probation report did *not* note that the crimes were "committed so closely in time and place as to indicate a single period of aberrant behavior," a factor that would have justified a concurrent sentence. (Rule 4.425(a)(3).)

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[4] Hereafter, references to rules are to the California Rules of Court.

At sentencing, the trial court noted that count II involved Dowden, while counts III and IV involved Magana. The court commented, "between Count II and Count[s] III and IV, it's separate victims, *separate times,* so I think this [probation] report, as I now understand, is accurate." (Italics added.) Neither the prosecutor, nor defense counsel, nor the probation officer responded to the finding that the crimes occurred at "separate times." Instead, defendant's trial counsel conceded that the probation officer's "recommendation is mandated by the Penal Code," and that "the only thing [he had] left is to argue the [E]ighth [A]mendment, say that under these facts for the Court to follow the law as stated would create cruel and unusual punishment on [defendant]."

At the close of the sentencing hearing, the trial court stated to defendant, "I've known you for a long time and I held you in high regard. This is a sentence I have to impose. Good luck to you."

Analysis

Before considering defendant's claim, we note that the evidence fails to support the corrected probation report's suggestion that the "crimes and their objectives were predominantly independent of each other." Neither side presented evidence of *any objective* of injuring Magana; in fact, the prosecutor acknowledged in his opening summation that defendant "accidentally shot the wrong guy."

Nevertheless, our Supreme Court has noted that there "is no persuasive reason why the trial court should not be allowed to

consider the fact of multiple victims as a basis for imposing either the upper term or a consecutive sentence." (*People v. Calhoun* (2007) 40 Cal.4th 398, 408; see *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1061; rule 4.408 [the rules' stated sentencing criteria are not exclusive].) Thus, the fact of separate victims can support a consecutive term even without the fact of separate criminal objectives.

However, the trial court took its separate-victims analysis a step too far when it found that there were "separate victims, *separate times*." (Italics added.) Because the same gunshot was the factual basis of every count in this case, the finding of "separate times" was clearly erroneous. This error might have been averted had the corrected probation report noted that the crimes were "committed so closely in time and place as to indicate a single period of aberrant behavior." (Rule 4.425(a)(3).) The error might also have been averted had one of the other three participants reminded the court of the relevant facts.

Because the trial court believed that counts II and IV occurred at "separate times," it had no occasion to consider in its discretion whether to impose a concurrent term on count IV pursuant to rule 4.425(a)(3). The court's closing comment, "[t]his is a sentence I have to impose," underscores its belief that it lacked discretion to impose a concurrent term and demonstrates that its erroneous belief was prejudicial.

"'A ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that

in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]' [Citation.] 'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 912; see *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182.)[5] Defendant is entitled to have the trial court consider in its discretion whether to impose a concurrent term on count IV pursuant to rule 4.425(a)(3). We shall remand for resentencing.

VI.

Defendant contends the 25-years-to-life enhancement on count IV constitutes an unauthorized sentence and must be modified. Specifically, because a consecutive term was imposed on count IV, he argues the minimum parole eligibility period must be limited to one-third of that otherwise imposed, or eight years four months to life. We consider this issue for guidance in the event that the trial court elects in its discretion to reimpose a consecutive term on count IV. (See part V, *ante*.)

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[5] The Attorney General does not contend that defendant forfeited this issue by failing to assert it in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354.) On this record, any such forfeiture would have constituted ineffective assistance of counsel. There could be no tactical purpose for defendant's trial counsel's failure to correct the court's mistaken belief that the crimes occurred at separate times. We thus consider the issue on its merits.

Section 12022.53, subdivision (d), provides in relevant part, "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in . . . subdivision (c) . . . of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7 . . . to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Defendant relies on *People v. Moody* (2002) 96 Cal.App.4th 987 (*Moody*), in which this court considered an identical contention with respect to a *determinate 10-year enhancement* imposed pursuant to subdivision (b) of section 12022.53. Because the enhancement provided a determinate term, section 1170.1, subdivision (a), reduced the consecutive enhancement to one-third of the statutory 10-year period. (*Id.* at pp. 992-994.)

However, "sentences of some number of years to life are indeterminate sentences not subject to the [Determinate Sentencing Act]." (*People v. Felix* (2000) 22 Cal.4th 651, 659.) Thus, unlike the 10-year enhancement in section 12022.53, subdivision (b), the 25-years-to-life enhancement in section 12022.53, subdivision (d), is not subject to reduction pursuant to section 1170.1, subdivision (a) and *Moody, supra,* 96 Cal.App.4th 987. If the trial court elects in its discretion to impose a consecutive term on count IV, the corresponding enhancement is 25 years to life.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded to the trial court for further proceedings consistent with this opinion.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

RAYE, J.