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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GERARDO GRADILLAS and JERRY REYES, Defendants and Appellants.	2d Crim. No. B184255 (Super. Ct. No. KA066132-01-02) (Los Angeles County)

Gerardo Gradillas appeals his conviction, by jury, of the second degree murder of Pedro Alcala (Pen. Code, § 187, subd. (a))[1], shooting at an occupied motor vehicle (§ 246), and conspiracy. (§ 182, subd. (a)(1).) The jury further found that Gradillas personally used and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) and that he committed the offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b)(5).) He was sentenced to an indeterminate term in state prison of 40 years to life.

Jerry Reyes, Gradillas' co-defendant, appeals his conviction, by the same jury, of voluntary manslaughter (§ 192, subd. (a)), shooting at an occupied motor vehicle, throwing a substance at a vehicle (Veh. Code, 23110, and conspiracy. (§ 182,

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

subd. (a)(1).) The jury found that Reyes committed these offenses for the benefit of a criminal street gang. He was sentenced to a determinate term in state prison of 37 years.

Gradillas contends the trial court erred because it failed to instruct the jury sua sponte on the principle of "transferred" self-defense and that his trial counsel was ineffective because counsel failed to request those instructions or argue the point to the jury. He further contends the abstract of judgment must be amended to strike the order for victim restitution and to reflect a minimum parole eligibility term of 15 years.

Reyes asks us to review the sealed record of an in camera hearing held on his motion for discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. He contends his convictions of voluntary manslaughter, shooting at an occupied vehicle and conspiracy are not supported by substantial evidence, that there is no substantial evidence he threw a projectile at the victim's car with the required specific intent to do great bodily injury, and that the trial court erred when it failed to instruct the jury on the use of circumstantial evidence to prove specific intent. He contends his upper term sentence for voluntary manslaughter is unconstitutional under *Blakely v. Washington* (2004) 542 U.S. 296 and that the abstract of judgment fails to note that appellants are jointly and severally liable for the victim's funeral expenses.

We will direct the clerk of the superior court to prepare and forward to the Department of Corrections amended abstracts of judgment ordering each appellant, jointly and severally, to pay restitution in the amount of $4975 to the Restitution Fund in the state treasury. In light of *Cunningham v. California* (2007) ___ U.S. ___ [___ L.Ed.2d ___, 2007 WL13568], the trial court's imposition of the upper sentence term on appellant Reyes must be reversed. The matter is remanded for resentencing in a manner consistent with *Cunningham.*. In all other respects the judgments are affirmed.

Facts

This case centers around the April 10, 2004 street-side shooting of Pedro Alcala, a member of the El Monte Flores gang, by Gerardo Gradillas, a member of the

rival Northside Montes gang. On April 9, the day before his death, Alcala drove a red Camaro down Shirley Avenue in El Monte. Two young women, Maricela and Sindy Reyes, had parked their car near the corner of Shirley and Rose Avenues while waiting to pick up their brother, Jerry Reyes, a member of the Northside Montes. Sindy was standing outside their parked car when Alcala drove up to it. His passenger, Gustavo Munoz, got out of the Camaro, pulled out a gun and walked up to Sindy. He asked, "Where you from?" Sindy replied, "I'm not from no where. Do I look like a gangster to you?" Munoz put the gun to Sindy's forehead. Maricela got out of the car, pleading with Munoz to leave her sister alone. Munoz eventually got back into the Camaro and Alcala drove away.

Maricela and Sindy went to the nearby home of appellant Gradillas' family, who were family friends and members of their church. The sisters told Gradillas' mother about the incident. After about ten minutes, they drove back to their home in Monrovia without their brother, Jerry. They did not report the incident to police.

Juan Aguilar was standing outside his house when he saw Munoz threaten the Reyes sisters. Aguilar, who had only recently been released from prison, is a Northside Montes member and a cousin of appellant Gradillas. He was living with his parents and siblings in a house on Shirley Avenue that is across the street and to the north of the intersection where the Reyes sisters were assaulted. Aguilar told his mother about the incident. He recalled that later, the Reyes sisters stopped at the house to talk with his mother about what happened.

On the evening of April 10, Aguilar was again standing outside his house on Shirley Avenue watching his nephews and nieces as they played outside. There was a party going on at an apartment complex behind the Aguilar family home. Several people, most of them friends or family of Aguilar's, were hanging out in and around his driveway. Aguilar saw the red Camaro drive slowly down the street. He yelled for his sister's help to get the children inside the house. After they did so, Aguilar opened the front door a crack and watched as the Camaro stopped in the street

just past his house. Aguilar saw appellant Reyes throw a bottle at the car. Gradillas was running down the street carrying a shotgun. When he was about five feet from the Camaro, Gradillas fired one shot into the driver's side of the car. Aguilar's mother pulled him to the floor when she heard the gunshot. By the time he looked again, Reyes, Gradillas and the Camaro were nowhere in sight. Aguilar told police shortly after the shooting that he saw Reyes and other Northside Montes members flash gang signs to the men in the Camaro. At trial, Aguilar denied seeing any gang signs.

Leticia Aguilar, Juan's younger sister, also saw the red Camaro pass by their house. She saw that the passenger was holding a gun under his nose, sniffing it. Leticia thought he was going to shoot somebody. She watched appellant Reyes throw a bottle at the car, then she went inside the house. Moments later, Leticia heard the gunshot.

Mary Ann Carlos and her then-boyfriend Eric Ruiz were standing on the opposite side of the street, talking. They saw the red Camaro drive slowly, up and down the street, several times. The headlights were on and the radio was playing at what seemed like full volume. Carlos also noticed there was party going on across the street. Six or seven young men were standing out front. At some point, one member of the group left on a bicycle. Another man threw something at the Camaro. One of the others told him, "Go hide. You're going to mess everything up." The man who did the throwing hid behind some bushes. Meanwhile, the Camaro drove down the block to an intersection, did a U-turn and sped back toward the group. The men on the sidewalk exchanged words with the men in the Camaro.

Ruiz saw that the bike rider had returned on foot, with a gun. He told Carlos, "Get down. They're going to start shooting people right now[,]"and threw her to the ground. As Ruiz held Carlos on the ground, he looked up, through the windows of her car, to see the man with the gun exchange words with the driver of the Camaro, then point and fire the gun into the car. The Camaro drove off, heading south on Shirley. Within seconds another car arrived, heading north on Shirley. The shooter got in and the car drove off.

The mortally wounded Alcala managed to drive the red Camaro about two blocks before crashing it into a building. He and his passenger, Munoz, fled on foot. Alcala made his way to his apartment where he collapsed after telling his wife that he had been shot by some Northside Monte members. Alcala died of a gunshot to the torso. The unusually large wound was consistent with having been inflicted by a shotgun.

In his trial testimony, Gradillas admitted that he shot Alcala with a shotgun. He thought Alcala was going to shoot at him or his friends and family, so he left Aguilar's house on a bicycle, retrieved the shotgun from his house and quickly walked back to Aguilar's house. When Gradillas got to the house, the driver of the Camaro made eye contact with him. The driver leaned back and then the passenger in the car pointed a gun at Gradillas, cocked the gun and fired it.[2] Gradillas fired back. Gradillas knew he hit the car, but did not think he'd hit the driver.

Discussion

"Transferred" Self-Defense

The theory of Gradillas' defense at trial was that he acted either in self-defense or imperfect self-defense. Because the blast from his shotgun hit the unarmed driver rather than the armed passenger, Gradillas contends the trial court prejudicially erred when it failed, sua sponte, to instruct the jury on the principles of "transferred" perfect and imperfect self defense. He further contends his counsel at trial rendered ineffective assistance because counsel failed to request those instructions or argue the matter to the jury. Neither point has merit.

The trial court has a duty to instruct, sua sponte, on an affirmative defense, such as self defense, " ' "if it appears that the defendant is relying on such a

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[2] In his direct testimony, Gradillas said he saw the driver lean back and then, "I looked at the steering wheel I see a gun pointing at me." He saw the person holding the gun cock it back and then he, "saw a bullet fly out [of the gun]." On cross-examination, Gradillas testified that the passenger had the gun, not the driver. "I believe – it was not the front driver. It was the passenger. I believe the driver was leaning back."

defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." ' " (*People v. Maury* (2003) 30 Cal.4th 342, 424, quoting *People v. Barton* (1995) 12 Cal.4th 186, 194.) Imperfect self-defense describes a type of voluntary manslaughter rather than an affirmative defense to murder. As a result, "the trial court must instruct on this doctrine, whether or not instructions are requested by counsel, whenever there is evidence substantial enough to merit consideration by the jury that under this doctrine the defendant is guilty of voluntary manslaughter." (*People v. Michaels* (2002) 28 Cal.4th 486, 529.)

"[T]he doctrine of transferred intent is available as a defense in California. Under this doctrine, just as 'one's criminal intent follows the corresponding criminal act to its unintended consequences,' so too one's *lack* of criminal intent follows the corresponding *non*-criminal act to its unintended consequences. (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1023 [154 Cal.Rptr. 628].) Thus, a defendant is guilty of no crime if his legitimate act in self-defense results in the inadvertent death of an innocent bystander." (*People v. Levitt* (1984) 156 Cal.App.3d 500, 507.)

Gradillas aimed his loaded shotgun at the driver's side door of the Camaro and pulled the trigger. Not surprisingly, the shot hit the driver rather than the passenger. He nevertheless contends that substantial evidence created a sua sponte duty to instruct on the principle of transferred perfect or imperfect self-defense. We disagree. The concept of transferred intent would apply where the defendant intends to shoot one person and inadvertently hits another. Here, Gradillas shot at the driver's side of the car and hit the driver, not another person. There was nothing "transferred" or inadvertent about that impact.

The issue of "transferred" self-defense was nevertheless adequately addressed in the trial court's instructions to the jury. The trial court instructed the jury to consider its instructions "as a whole and each in light of all the others." (CALJIC No. 1.01.) The jury was provided with all of the standard instructions on self defense (CALJIC No. 5.12, 5.13, 5.14, 5.15, 5.32, 5.50, 5.51, 5.52, 5.55), imperfect or

unreasonable self defense (CALJIC No. 5.17) and voluntary manslaughter on an unreasonable self defense theory (CALJIC No. 8.37, 8.40, 8.50). It was further instructed: "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed." (CALJIC No. 8.65.) Finally, the jury was instructed that, if it had a reasonable doubt as to whether the crime was murder or manslaughter, it "must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder." (CALJIC No. 8.72.)

We view the challenged instructions " 'in the context of the instructions as a whole and the trial record' to determine ' "whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way" that violates the Constitution.' (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 482, 116 L.Ed.2d 385]; accord *People v. Holt* (1997) 15 Cal.4th 619, 677 [63 Cal.Rptr.2d 782, 937 P.2d 213].)" (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) The transferred intent instruction informed the jury that the crime, "if any" is the same, even if the victim was not Gradillas' intended target. Thus, a reasonable juror would understand that, if Gradillas could have shot the armed passenger in self-defense, he would also have been acting in self-defense if he hit the driver by mistake. There is no reasonable likelihood that the instructions could have been interpreted to permit Gradillas' conviction of second degree murder on either the theory that he acted reasonably but hit the wrong person, or that he acted unreasonably and shot an unintended victim. There was no error.

For the same reasons, we reject Gradillas' claim that he received ineffective assistance of trial counsel. Gradillas contends his trial counsel failed to request "transferred" self-defense instructions or argue that point to the jury. But trial counsel did raise the issue. Counsel argued in closing that Gradillas acted without malice and that his actions were reasonable under the circumstances, even though he hit the unarmed driver rather than the armed passenger. The jury was properly instructed and counsel raised the self-defense issue in closing argument. There is no

reasonable probability the result would have been more favorable to appellant had additional instructions been given or arguments raised. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

Substantial Evidence of Conspiracy

Reyes contends his conviction of voluntary manslaughter, shooting at a vehicle and conspiracy must be reversed because there is no substantial evidence that he agreed with Gradillas to shoot at the Camaro, that he was aware of Gradillas' plan or that knowingly and intentionally acted to encourage or assist Gradillas. We are not persuaded.

Proof of a conspiracy may serve " 'to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy. Thus, "where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all." ' (*People v. Salcedo* (1994) 30 Cal.App.4th 209, 215 [35 Cal.Rptr.2d 539], quoting *People v. Kauffman* (1907) 152 Cal.331, 334 [92 P. 861]; see *People v. Superior Court (Quinteros)* [(1993)] 13 Cal.App.4th [12,] 21.)" (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 843.)

A criminal conspiracy exists where there is an unlawful agreement between two or more people to commit a crime and at least one of those people performs an overt act in furtherance of the conspiracy. (*People v. Gonzalez* (2004) 116 Cal.App.4th 1405, 1417.) "In proving a conspiracy, however, it is not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities

of the alleged conspirators before and during the alleged conspiracy." (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) "While 'mere association' cannot establish a conspiracy, '[w]here there is some evidence of participation or interest in the commission of the offense, it, when taken with evidence of association, may support an inference of a conspiracy to commit the offense.' (*People v. Hardeman* (1966) 244 Cal.App.2d 1, 41 [53 Cal.Rptr. 168].)" (*People v. Prevost, supra,* 60 Cal.App.4th at p. 1400; see also *People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1734.)

Here, there is evidence of more than "mere association" between the appellants. The evidence supports a reasonable inference that Reyes, Gradillas and other Northside Montes members conspired to throw objects and shoot at the people in the red Camaro. Men in the same car had threatened Reyes' sisters the evening before the shooting. On the evening of the shooting, Alcala drove by the Aguilar house several times. Mary Ann Carlos testified that the red Camaro drove by the house "five or six times" over the course of about one hour before Gradillas shot Alcala. Carlos' boyfriend, Eric Ruiz, estimated the encounter lasted only about 15 minutes. In any event, a significant period of time elapsed while Reyes, Gradillas and other Northside Montes members watched the red Camaro, flashing gang signs and exchanging words with the men inside the Camaro and with each other. After Reyes threw the bottle at the Camaro, one of the other Northside Montes told him to hide because otherwise, he would mess everything up. While Reyes and his companions were occupying the rival gang members, Gradillas was retrieving his shotgun. He then returned to fire the fatal shot.

A reasonable jury could infer from this evidence that Reyes and Gradillas, along with other Northside Montes, reached a tacit (if not explicit) agreement to keep the Camaro engaged long enough for Gradillas to fetch his shotgun and return. As part of that plan, Reyes hurled insults, flashed gang signs and threw a rock or bottle at the Camaro. This substantial evidence supports Reyes' convictions of voluntary manslaughter, shooting at an occupied vehicle and conspiracy to commit

assault with a firearm. (*People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Vehicle Code Section 23100, Subdivision (b)

Reyes was also convicted of violating Vehicle Code section 23110, subdivision (b) which provides: "Any person who with intent to do great bodily injury maliciously and willfully throws or projects any rock, brick, bottle, metal or other missile, or projects any other substance capable of doing serious bodily harm at such vehicle or occupant thereof is guilty of a felony . . . ." He contends his conviction must be reversed because there is no substantial evidence that he acted with the intent to do great bodily injury. Again, we disagree.

The evidence outlined above supports a reasonable inference that Reyes acted with the requisite intent. Reyes and his companions flashed gang signs at the Camaro and exchanged words with its occupants. By the time Reyes threw the rock or bottle, Gradillas had left to retrieve the shotgun. He threw the object hard enough to make a loud impact that could be heard across the street, over the noise of the nearby party and the Camaro's radio. Reyes had a motive to hurt or even kill the occupants of the Camaro because they were from a rival gang and because men using the same car had assaulted his sisters the previous evening. A reasonable juror could draw the inference that Reyes threw the object at the car with the intent to cause its occupants serious injury. (*People v. Whitney* (1978) 76 Cal.3d 863, 871.)

CALJIC No. 2.01

Reyes contends the trial court prejudicially erred when it instructed the jury on its use of circumstantial evidence. The trial court instructed on the use of circumstantial evidence in general with CALJIC No. 2.01. It did not instruct on CALJIC No. 2.02, which discusses the use of circumstantial evidence to prove specific intent and mental state. There was no prejudicial error.

Although the two instructions are virtually identical, CALJIC No. 2.01 is the more inclusive instruction, and CALJIC No. 2.02 is properly given where "the only element of the offense that rests substantially or entirely on circumstantial evidence is

that of specific intent or mental state." (*People v. Cole* (2004) 33 Cal.4th 1158, 1222.) A trial court is not required to instruct sua sponte on the use of circumstantial evidence " 'when the only inference to be drawn from circumstantial evidence points to the existence of a requisite mental state . . . .' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.) Where, as here, the trial court gives the more inclusive instruction "its refusal to additionally instruct with CALJIC No. 2.02 clearly was not prejudicial error." (*Id.*)

Pitchess Motion

Pursuant to *Pitchess v. Superior Court, supra,* 11 Cal.3d 531, appellant Reyes moved for discovery of the personnel records of the officer who interrogated Aguilar, to the extent those records disclosed any aggressive behavior, violence, excessive force, attempted violent or excessive force, racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct or violation of constitutional rights. The trial court conducted an in camera review of the personnel records and found no responsive complaints. At appellant's request, we have reviewed the sealed transcript of that proceeding. The trial court's rulings were an appropriate exercise of discretion because the matters left undisclosed are not responsive to appellant's discovery requests. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1232; *Pitchess v. Superior Court, supra,* 11 Cal.3d 531.)

Sentencing Error

In sentencing appellant Reyes, the trial court imposed the upper term for the voluntary manslaughter conviction, based upon two aggravating factors on which the jury had not made findings. Reyes contends this circumstance violates his right to a jury trial under the Sixth Amendment to the federal constitution. This contention was rejected by our Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, but credited by the United States Supreme Court in *Cunningham v. California* (2007) ___ US. ____ [___ L.Ed.2d ___, 2007 W.L. 135687]. As a result the sentence must be vacated the matter remanded for resentencing consistent with *Cunningham.* Although we agree with respondent that error under *Cunningham* may be harmless in some

cases, we decline to find it so here. It is not possible to determine whether the trial court would have imposed the upper term based solely on appellant's prior convictions.

Restitution

Appellants contend their respective abstracts of judgment should be amended to strike the order that they pay restitution for the victim's funeral expenses. They contend the order is improper because the expenses were paid by the State of California in the first instance. We disagree. At the sentencing hearing, the trial court properly imposed on each appellant a joint and several obligation to pay restitution in the amount of $4,975 to the Restitution Fund for Alcala's funeral expenses. Section 1202.4, subdivision (f)(4)(A) mandates that assistance provided to a victim by the State Victim Compensation Board "be included in the amount of the restitution ordered." Further, because "each defendant is entitled to a credit for any actual payments by the other[,]" the trial court properly ordered restitution "paid by both defendants jointly and severally." (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.) Accordingly, we will direct the clerk of the superior court to prepare and forward to the Department of Corrections amended abstracts of judgment ordering each appellant, jointly and severally, to pay restitution in the amount of $4,975 to the Restitution Fund in the state treasury.

Parole Eligibility

The trial court sentenced Gradillas to a prison term of 15 years to life pursuant to section 190, subdivision (a) for the second degree murder of Alcala, enhanced by an additional and consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d), for his personal use of a firearm causing death. The abstract of judgment states: "Pursuant to Penal Code section 186.22 (b)(5), [Gradillas] must serve a minimum state prison sentence of 40 years prior to being paroled." Gradillas contends the abstract of judgment is incorrect and must be amended to reflect a minimum parole eligibility term of 15 years. We disagree.

The jury found that Gradillas committed a second degree murder for the benefit of a criminal street gang, and that he personally used a firearm to do so.

Section 186.22, subdivision (b)(5) mandates that Gradillas, "shall not be paroled until a minimum of 15 calendar years have been served." Section 12022.53, subdivision (d) imposes an additional and consecutive term of 25 years to life for the personal firearm use. Gradillas must also serve the minimum term of 25 years before he may be paroled. (§§ 669, 3046, subd. (a)(2).) Combining those two mandatory terms means that Gradillas must serve a minimum state prison sentence of 40 years before he is eligible for parole. The abstract of judgment omits references to every applicable statute, but is nevertheless correct.

Conclusion

As to Gradillas, the judgment is affirmed.

As to Reyes, the sentence imposed is vacated and the matter is remanded for resentencing.

As to both appellants, the clerk of the superior court is directed to prepare and forward to the Department of Corrections amended abstracts of judgment ordering each appellant, jointly and severally, to pay restitution in the amount of $4975 to the Restitution Fund in the state treasury. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Philip S. Gutierrez, Judge

Superior Court County of Los Angeles

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