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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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.

FERNANDO LOPEZ et al.,

Defendants and Appellants.

2d Crim. No. B162333
(Super. Ct. No. BA1945465)
(Los Angeles County)

Appellants Fernando Lopez, Francisco Galindo and Francisco Lopez were tried before a jury and convicted of second degree murder with gang and firearm enhancements. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (b), 12022.53, subds. (d) & (e)(1).)[1] They argue that the murder convictions must be reversed because the jury was erroneously instructed that voluntary manslaughter based on provocation requires a specific intent to kill. They also challenge the admission of gang expert testimony and the true findings and sentences on the gang allegations. We order the sentence modified in certain respects, but otherwise affirm.

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

## FACTS AND PROCEDURAL HISTORY

Appellants are friends and members of the Breed Street gang. Pablo Navarro was a founding member of the rival Tiny Boys gang. On the afternoon of October 10, 1999, Navarro walked by the apartment complex on North Soto where appellant Fernando Lopez lived. The complex was in Breed Street territory.

Navarro saw appellant Francisco Galindo, with whom he had fought in 1997. Galindo was not wearing a shirt and had several tattoos showing his loyalty to the Breed Street gang. An altercation ensued. Galindo called out to "Shorty," the gang moniker used by appellant Fernando Lopez. Appellants Fernando Lopez and Francisco Lopez ran to Galindo from the back of the apartment complex, where they had been smoking "primos" (cigarettes of marijuana and crack cocaine), and they joined in the struggle with Navarro. Someone in their group yelled, "fuck him up." After Navarro was on the ground, Fernando Lopez pulled out a gun and shot Navarro five times. Navarro died of his wounds.

Fernando Lopez and Francisco Lopez fled the area in a stolen van and were apprehended later that night. Galindo was arrested several months later as he was crossing the border from Mexico into the United States using false documents.

Neighbors who saw the altercation between appellants and Navarro identified Galindo and Fernando Lopez as having been involved. They described a scene in which Galindo, Fernando Lopez and a third man struggled with and subdued Navarro before Fernando Lopez shot him. No eyewitnesses placed Francisco Lopez at the scene of the killing, but he was seen with Galindo and Fernando Lopez immediately afterward and left in the van with Fernando Lopez. Blood matching the victim's was found on Francisco Lopez's shoes.

The prosecution's theory of the case was that this was a classic gang related shooting. In addition to the percipient witnesses, the district attorney presented the testimony of Detective William Eagleson, who had worked for several years as a gang coordinator for the Hollenbeck Division of the Los Angeles Police Department.

Eagleson described Breed Street as a criminal street gang whose primary activities included the commission of certain qualifying felonies, such as robberies, carjackings, aggravated assaults and attempted murders. Given a hypothetical that matched the facts of the Navarro shooting, Eagleson opined that the shooting was gang related and benefited Breed Street by taking out an important member of the rival Tiny Boys gang and sending a shockwave through the community.

At trial, the appellants all testified and admitted involvement in the shooting. According to the defense version of events, Galindo had been standing outside the apartment when Pablo Navarro walked by and began taunting him. Navarro, who is much bigger than Galindo, pulled a gun out of a bag and held it in Galindo's mouth. Fernando Lopez and Francisco Lopez came running and Navarro pointed the gun at them. They began striking Navarro until he hit the ground. Fernando Lopez was carrying a loaded .22 handgun and shot Navarro several times. Fernando Lopez and Francisco Lopez took Navarro's gun and fled to Francisco Lopez's house, disposing of both weapons on the way. According to Fernando Lopez, he had been up for several days smoking primos and the only thing going through his mind when he fired the shots was that he was mad. According to Francisco Lopez and Galindo, they did not realize that Fernando Lopez would shoot Navarro.

None of the neighbors who witnessed the struggle between appellants and Navarro saw Navarro with a gun. Gunshot residue was found on Navarro's hand during the coroner's investigation, which meant that he had either recently fired a weapon, been in the vicinity of a weapon being fired, or had touched a surface coated with residue. Navarro had a blood alcohol level of .04 percent at the time of his death and cocaine was found in his system.

## DISCUSSION

### I.

### *Instructions on Voluntary Manslaughter*

The jury was instructed on voluntary and involuntary manslaughter as lesser included offenses of the charged murder. Appellants argue that the judgment must be reversed because the court provided a version of CALJIC No. 8.40 that erroneously defined voluntary manslaughter to require an intent to kill, in contravention of our Supreme Court's decision in *People v. Lasko* (2000) 23 Cal.4th 101. We agree there was error, but conclude it was not prejudicial.

Murder is the unlawful killing of a human being with express or implied malice aforethought. (§ 187, subd. (a).) Malice is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature;" i.e., a specific intent to unlawfully kill. (§ 188; *People v. Carpenter* (1997) 15 Cal.4th 312, 391.) It is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which was deliberately performed by the defendant knowing that his conduct endangers the life of another and who acts with conscious disregard for life. (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1217.) Implied malice does not require an intent to kill. (*People v. Swain* (1996) 12 Cal.4th 593, 602.)

It has long been the rule that an intentional killing that would otherwise be an express malice murder will be reduced to voluntary manslaughter when it is the product of adequate provocation and heat of passion or a good faith but unreasonable belief in the need for self-defense. (*People v. Lasko, supra,* 23 Cal.4th at p. 108.) The court in *Lasko* clarified that this rule of mitigation also applies to implied malice murder, so that a defendant who kills with a "conscious disregard for life" as a result of legally adequate provocation is guilty only of voluntary manslaughter. (*Id.* at pp. 108-110.) In the companion case of *People v. Blakeley* (2000) 23 Cal.4th 82, 85, the Supreme Court held that a similar rule applies to a killing committed with conscious disregard of life, but in the unreasonable and good faith belief in the need for self-defense.

Before *Lasko* and *Blakeley*, a number of published cases had stated in dicta that intent to kill was an essential element of voluntary manslaughter. (See *People v. Lasko, supra,* 23 Cal.4th at p. 109.) The standard version of CALJIC No. 8.40, which defines voluntary manslaughter, included intent to kill as an essential element of the offense. (CALJIC NO. 8.40 (6th ed. 1996).)

In an attempt to comport with *Lasko* and *Blakeley*, the trial court in this case initially instructed the jury with a modified version of CALJIC No. 8.40 that defined voluntary manslaughter in relevant part as an unlawful killing "done with or without an intent to kill due to heat of passion or unreasonable self-defense. . . ."[2] Involuntary manslaughter was defined as an unlawful killing without intent to kill that was committed in unreasonable self-defense. After the jury began deliberations, defense counsel advised the court that in their view, *Lasko* and *Blakeley* did not apply to appellants' crimes, which were committed before those decisions became final. With the prosecution's acquiescence, the court reinstructed the jury with the older version of CALJIC No. 8.40, which defined voluntary manslaughter as requiring an intent to kill, and admonished the jurors to disregard the other version of the instruction. This was error with respect to the provocation/heat of passion variant of voluntary manslaughter.

As explained in *People v. Johnson* (2002) 98 Cal.App.4th 566, *Lasko* clarified existing law when it held that intent to kill was not an element of voluntary manslaughter based on provocation. Although published decisions had characterized intent to kill as an element of voluntary manslaughter, no case had directly considered whether provocation could negate implied as well as express malice. Because it did not state a new rule of law, *Lasko* applied to all cases not yet final, even those in which the

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[2] This instruction did not accurately state the rule of *Lasko* and *Blakeley*, because those decisions require that a defendant act with at least a conscious disregard for life to be convicted of voluntary manslaughter. The 2001 revision of CALJIC No. 8.40 correctly describes the mental state element of voluntary manslaughter after *Lasko* and *Blakeley*: "The perpetrator of the killing either intended to kill the alleged victim or acted in conscious disregard for life . . . ." A defendant who acted without intent to kill or conscious disregard for life could be convicted at most of involuntary manslaughter.

offense was committed before its June 2, 2000 filing date. (*Johnson*, at p. 569; accord, *People v. Crowe* (2001) 87 Cal.App.4th 86, 95.) On the other hand, *Blakeley* stated a new rule of law when it held that a killing committed with conscious disregard but in the unreasonable belief in the need for self-defense was voluntary manslaughter, because previous cases had held that such a killing was only involuntary manslaughter. (*People v. Blakeley, supra,* 23 Cal.4th at p. 92.) As an "unforeseeable judicial enlargement of the crime of voluntary manslaughter," *Blakeley* could not be applied to crimes committed before the June 2, 2000, filing date of that opinion. (*Blakeley,* at p. 92; *Johnson,* at p. 569.) The trial court's instruction that voluntary manslaughter requires an intent to kill thus was correct with respect to the theory of unreasonable self-defense, but misstated the applicable law of voluntary manslaughter based on provocation.

We are not persuaded by the Attorney General's argument that the claim is barred because the error was invited by their counsel. Although defense counsel requested the older version of CALJIC No. 8.40 requiring specific intent to kill for a conviction of voluntary manslaughter, the request was based on a misunderstanding of the law that was shared by the prosecutor and the court. For the doctrine of invited error to apply, it """must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.""" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.) Counsel expressed the belief that the instruction would be advantageous with respect to the unreasonable self-defense theory of manslaughter, because it would require a conviction of the lesser crime of involuntary manslaughter if the jury found that appellants acted with conscious disregard rather than intent to kill, but this rationale did not extend to the instructions on provocation.

Having rejected the claim of invited error, we consider whether appellants were prejudiced by the instruction that voluntary manslaughter requires an intent to kill. Prejudice is established only if it is reasonably probable they would have obtained a more favorable result absent the error, that is, if it is reasonably probable the jurors would have convicted appellants of the lesser crime of voluntary manslaughter if they had been

instructed that a killing with conscious disregard of life and upon adequate provocation is voluntary manslaughter. (*People v. Lasko, supra,* 23 Cal.4th at pp. 111.)

We conclude there was no prejudice, because it is not plausible the jury relied on an implied malice/conscious disregard of life theory of murder to convict appellants. Fernando Lopez shot Navarro five times while he was on the ground, which was strong evidence that he acted with express malice and a specific intent to kill, and not simply with conscious disregard for the danger to human life. (See, e.g., *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224.) Francisco Lopez and Francisco Galindo were convicted as accomplices under the theory that they directly aided and abetted the shooting; thus, the jury necessarily found that they knew and shared the murderous intent of Fernando Lopez.[3] (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) If the jurors had been persuaded that the defendants were acting in the heat of passion and upon reasonable provocation, they would have returned verdicts of voluntary manslaughter under the instructions given, which advised the jury that appellants were guilty only of that lesser offense if they acted with intent to kill but upon reasonable provocation. (See *People v. Lasko, supra,* 23 Cal.4th at pp. 112-113; *People v. Crowe, supra,* 87 Cal.App.4th at p. 97.)

Moreover, heat of passion/provocation was neither the strongest nor the most prominently argued theory of voluntary manslaughter. If the jurors did not believe the victim Navarro had a gun, they would have rejected the provocation theory of voluntary manslaughter regardless of the instruction requiring intent to kill because Navarro did nothing else that would have aroused the passions of the proverbial """"ordinary [person] of average disposition."""" (*People v. Lasko, supra,* 23 Cal.4th at p. 108.) If, on the other hand, the jurors believed appellants' testimony that Navarro had a

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[3] The jury was not instructed on the "natural and probable consequences" doctrine, under which an aider and abettor is guilty not only of an intended crime, but of any other offense that is a natural and probable consequence of the former. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 260.)

gun, they would have been far more likely to view the killing as one committed in self-defense rather than as the product of provocation. Recognizing this, defense counsel focused primarily on imperfect self-defense in their closing arguments. (See *id.* at pp. 112-113; *People v. Crowe, supra,* 87 Cal.App.4th at p. 97.) As we have already explained, the instructions on imperfect self-defense correctly stated the applicable law.

Under the circumstances, the use of a pre-*Lasko* version of CALJIC No. 8.40 was not prejudicial. Reversal of the murder convictions is not required.

II.

*Gang Allegation Under section 186.22, subdivision (b)*

The jury made a true finding on the allegation that appellants committed the murder of Pablo Navarro "for the benefit of, at the direction of, or in association with" a criminal street gang under section 186.22, subdivision (b). The effect of this finding was to trigger the sentencing provisions of section 186.22, subdivision (b) and to subject appellants Francisco Lopez and Francisco Galindo to 25-year-to-life enhancements under section 12022.53, subdivision (d), notwithstanding that they did not personally discharge a firearm. (§ 12022.53, subd. (e)(1).)[4]

Appellants argue the evidence was insufficient to support the gang allegation. We disagree. It was undisputed that appellants were members of the Breed Street gang and Navarro was a founding member of Tiny Boys, a rival gang. Detective Eagleson, the prosecution's gang expert, described in some detail the gang culture and its ethos of respect, territorialism and retaliation. He opined that Breed Street was a criminal street gang within the meaning of the statute because its primary activities included the commission of one or more of the offenses enumerated in section 186.22 and members of

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[4] When appellants committed this offense in 1999, section 12022.53, subdivision (e)(1) provided, "The enhancements specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of section 186.22 are pled and proved." The subdivision has since been reworded but is substantively the same. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171, fn. 4.)

Breed Street had committed at least two of the predicate offenses necessary to prove the allegation. Eagleson testified without objection that the killing of a Tiny Boys founder under the circumstances of this case would be gang related and would benefit Breed Street by enhancing Breed Street's reputation and "taking the heart out" of Tiny Boys.

Our review of the sufficiency of the evidence on the gang allegation is deferential, and we presume the existence of every fact the jury could reasonably deduce from the evidence presented. (See *People v. Augborne* (2002) 104 Cal.App.4th 362, 371; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 660.) The jury here could reasonably infer the murder was motivated by a gang rivalry and satisfied the elements of section 186.22, subdivision (b). Substantial evidence—evidence that is reasonable, credible and of solid value—supports the true finding on the gang allegation. (*Ibid.*)

Appellants Francisco Lopez and Fernando Lopez complain there was no substantial evidence that they acted with the intent of benefiting their gang because there was no proof they recognized Navarro as a member of Tiny Boys. We are not persuaded. Although there was no direct evidence that either man knew Navarro personally, the Breed Street and Tiny Boys gangs had relatively few active members on the date of the shooting: 16-25 in Breed Street and 12-16 in Tiny Boys. Detective Eagleson testified during cross-examination by the defense that when a person is involved in a gang, "you know exactly who is getting out [of prison] and who your enemy is, where your rivals hang out, and what to watch out for." This testimony supported a finding that Fernando Lopez and Francisco Lopez would have recognized Navarro, notwithstanding their testimony to the contrary. Additionally, appellant Galindo knew Navarro because he had fought him during a gang-related altercation in 1997, and the jury could infer that he communicated the victim's identity or gang affiliation to his codefendants during the altercation that led to the shooting.

Appellants argue that we should not rely on Detective Eagleson's testimony to uphold the finding on the gang allegation because it was based on an unfounded assumption that all three defendants knew Navarro's identity. They observe that on

cross-examination, Eagleson indicated that if appellants did not know who Navarro was, he would not be able to say it was a gang related shooting.

It is well settled that an expert cannot rely on speculative or conjectural data, and that the assumption of facts contrary to the evidence destroys the value of an expert opinion. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338.) Here, however, the evidence supported the assumption that appellants knew Navarro: appellant Galindo admitted as much, the other appellants' membership in the Breed Street gang placed them in a position where they would logically be expected to know Navarro's identity, and Galindo's preexisting relationship with the other appellants supported an inference that he conveyed information about Navarro's identity to them during the altercation. If the jury had determined that none of the appellants knew Navarro's identity, they presumably would have disregarded Eagleson's opinion that the crime was gang related.

Appellants also claim that the admission of Eagleson's testimony requires reversal because his opinion encompassed ultimate issues of fact and drew inferences that were the province of the jury. Though an expert opinion is not automatically inadmissible when it embraces the ultimate issue to be decided by the jury, """[u]ndoubtably there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.""" (*People v. Killebrew, supra,* 103 Cal.App.4th at p. 651.)

One portion of the expert testimony cited by appellants was beyond the scope of expert testimony: Eagleson's opinion offered during direct examination that the shooting was part of a plan in which everyone had an assignment. This portion of the expert testimony was "the type of opinion that did nothing more than inform the jury how [Eagleson] believed the case should be decided." (*People v. Killebrew, supra,* 103 at p.

658.) But appellants did not object to this testimony and the issue has been waived. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 505-506.) Although appellant Galindo filed an *in limine* motion seeking the exclusion of gang expert testimony on certain issues, including the specific intent of individual gang members, this motion was not sufficiently specific to place the court and counsel on notice that testimony regarding the individual appellants' roles in the killing was encompassed within the objection. (See *ibid*.)

Appellants urge us to reverse on the alternative ground that defense counsel were ineffective in failing to object to the improper expert testimony. To prevail on such a claim on direct appeal, the record must affirmatively show that counsel had no rational tactical purpose in allowing the evidence to come in without an objection. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1259-1260.) Counsel's questions during cross-examination suggest that they were engaging in a strategy of eliciting overly confident explanations from Detective Eagleson for the purpose of rebutting that testimony and discrediting him before the jury. The testimony that everyone had a role in a planned shooting was contradicted by defense evidence that the victim had a gun and that the events leading to the homicide were not contemplated by the defendants ahead of time. Defense counsel could have reasonably concluded it was more effective to rebut Eagleson's testimony with contrary evidence than to object to its admission in the first place.

In any event, appellants have not demonstrated that they were prejudiced by the expert testimony regarding their roles in the shooting. Eagleson testified that everyone acted according to a plan, but the jury acquitted appellants of first degree premeditated murder. This shows the jury gave little if any credence to this portion of Eagleson's opinion.

III.

*Sentencing Issues*

The jury returned true findings that each appellant had committed the murder for the benefit of a criminal street gang under section 186.22, subdivision (b). As to appellant Fernando Lopez, the shooter, it imposed a consecutive two-year enhancement under subdivision (b)(1). As to appellants Francisco Lopez and Francisco Galindo, the non-shooters, the court imposed a similar two-year enhancement, but stayed the terms under section 654 because the same finding was also being used to make them eligible for the firearm enhancement under section 12022.53, subdivisions (d) and (e).

Appellants argue that the two-year enhancements under section 186.22, subdivision (b)(1) should have been stricken because the underlying murder offense carries an indeterminate term. We agree that the enhancements were improper. As we explained in *People v. Johnson* (2003) 109 Cal.App.4th 1230, section 186.22, subdivision (b) establishes for two forms of punishment when a crime has been committed for the benefit of a criminal street gang. When the underlying offense carries a determinate term, subdivision (b)(1) provides the defendant's punishment must be increased by a particular term of years. But when the underlying offense carries an indeterminate sentence, such as the 15-year-to-life terms imposed for appellants' murder convictions, former subdivision (b)(4) [now renumbered (b)(5)] requires the defendant to serve a minimum of 15 calendar years before being released on parole. (*Johnson*, at p. 1236-1237, 1239; accord *People v. Harper* (2003) 109 Cal.App.4th 520; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.) The court should have specified a minimum parole date of 15 years under this latter provision rather than imposing an enhancement for a term of years under subdivision (b)(1).

The Attorney General urges us to follow the majority decision in *People v. Herrera* (2001) 88 Cal.App.4th 1353, which approved the imposition of an enhancement under section 186.22, subdivision (b)(1) in a first degree murder case where the defendant was sentenced to an indeterminate term of 25 years to life. Issues concerning

the applicability of the subdivision (b)(1) enhancement to indeterminate sentences are currently pending in the Supreme Court (*People v. Lopez*, review granted Nov. 12, 2003, S119294), but in the meantime, we will continue to follow our opinion in *People v. Johnson*, *supra*, 109 Cal.App.4th 1230, which we believe was correctly decided.

DISPOSITION

The judgments are modified in the following respects: (1) the consecutive two-year term imposed as part of appellant Fernando Lopez's sentence under section 186.22, subdivision (b)(1) is stricken; (2) the two-year terms imposed as part of appellants Francisco Lopez's and Francisco Galindo's sentences under section 186.22, subdivision (b), and then stayed under section 654, are stricken; (3) the judgments of all three appellants shall include a provision that they shall not be paroled before serving a minimum of 15 calendar years in prison, pursuant to section 186.22, former subdivision (b)(4) [now renumbered (b)(5)]. The superior court shall prepare an amended abstract of judgment and shall forward a copy to the Department of Corrections. As so modified, the judgments are affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Larry P. Fidler, Judge

Superior Court County of Los Angeles

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