



People v. Cruz

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OPINION

Roberto Carlos Cruz and Abel Castillo appeal from the judgments sending them both to prison for two consecutive life terms without the possibility of parole for the gang-related, first degree murders of Andes Garza and Francisco Walle.¹ Cruz contends he was denied a fair trial when the prosecution joined both defendants in a single prosecution, and the trial court failed to sever them. He emphasizes that his defense was that of mistaken identification, whereas his co-defendant Castillo asserted self-defense and absence of a gang purpose or benefit. He characterizes those defenses were incompatible with his own. Thus, Cruz concludes his right to due process was violated by the joint trial. We affirm.

Castillo argues the trial court erroneously denied his new trial motion and his motion to reduce the offense to voluntary manslaughter due to evidence of imperfect self-defense and the lack of evidence of premeditation and deliberation. Finally, he notes the trial court miscalculated his presentence custody credits, a point which the Attorney General concedes. Based on this concession, we order the clerk of the court to amend the abstract of judgment for Castillo to reflect a total of 1,044 days of presentence credits. Once modified, we affirm the judgment.

FACTS

The Alley Boys are a Santa Ana gang who are admitted adversaries of another Santa Ana gang called Delhi. One afternoon in March 2002, an Explorer and a Honda Civic drove up to an intersection parallel with each other in an area claimed by the Alley Boys as their territory. The intersection was adjacent to Mater Dei High School which had just let out. Andres Garza drove the Honda Civic, while Francisco Walle rode in the passenger seat. The Explorer was driven by Castillo with Cruz as his passenger. Castillo and Cruz were admitted Alley Boys.

Jennifer Angotti, Martha Ochoa, Maryann Ballestero, Allison Kritz and Gary Garcia were all located in the vicinity of the shooting at the time it happened. Angotti saw the occupants of the two cars



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talking to each other as they idled at the red light. Suddenly, the men in the Explorer started firing guns at the occupants of the Honda, and the Explorer sped away. The Honda slowly rolled through the intersection and came to rest against the curb.

Moments before, Ochoa noticed the Explorer coming up behind her, and in response she moved her car to the left, allowing it to come up to the intersection on her right. She saw the driver's hand emerge through the window but saw it to be empty. Seconds later, she heard gunshots. Later, she tentatively identified Castillo as the driver and Cruz as the passenger.

Ballestero was stopped at the light when she heard the gunshots. She noticed the shooter did not appear shaken or upset at all: He "just did it." Kritz likewise saw the two vehicles approach each other in different lanes of the same intersection. Her attention was momentarily diverted until the gunshots rang out. She glanced back and saw both the driver and passenger of the Explorer firing handguns at the occupants of the Honda. The two men in the Honda had their arms raised as if to fend off an attack.

Garcia was approaching the intersection when he heard the shots. He immediately followed the Explorer, attempting to call the police on his cellular phone and simultaneously take down the vehicle's license plate number. He tried to keep up with the Explorer, but Castillo was racing through stop signs, laughing and looking rather calm. Police soon joined the pursuit, at which time Garcia fell away from the chase.

Santa Ana Police Officer Michael Callahan took up where Garcia left off, following the Explorer until it turned a corner and thus, out of his sight for a few seconds. When Callahan again viewed it, it had been abandoned by the occupants, who had left both doors open and the engine running when they fled. A Glock, .40 caliber semiautomatic handgun lay in the street at approximately the same spot at which the passenger was seen stumbling after alighting from the Explorer. Callahan identified Castillo as the driver of the Explorer based on his observations before it stopped, and Garcia corroborated that identification.

The police surrounded the area, and a police helicopter patrolled over the location of the abandoned Explorer. Castillo was located almost immediately a short distance away and taken into custody. His hands were tested for gunshot residue, and the results confirmed he had recently fired a gun.

Cruz, on the other hand, phoned his girlfriend, Michelle Narvaez, to come and pick him up. In the company of her girlfriend, Aira Salas, Narvaez drove to the location Cruz had given her-not far from where the Explorer stood abandoned-and picked him up while a helicopter circled overhead. She then left the area with them.

The Explorer was scoured for evidence, and the police technicians discovered gunshot residue on the interior head liner. Also, Cruz's fingerprints were located on the exterior passenger door.



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Another gun—a 9 millimeter Glock—was discovered by a homeowner about a week after the shooting not far from where Castillo was arrested.² A criminalist compared the two Glock handguns with the casings recovered from the scene of the shooting. He concluded all the casings came from those two Glock handguns.

The two victims were found in the front seat of the Honda, both having received multiple gunshot wounds. Garza, the driver, had no pulse, and Walle, the passenger, was unconscious but alive and was transported immediately for emergency care but died soon thereafter. Both men died of blood loss due to the direct hits they received. In Garza's hand was clutched a loaded semiautomatic handgun although there was no round in the chamber for immediate firing.

Matthew Craig, a gang investigator with the Santa Ana Police Department, testified as an expert for the prosecution. He described the Alley Boys and Delhi gangs as rival groups, with the Alley Boys claiming the intersection of the shooting as their territory. Both Castillo and Cruz were admitted gang members, Castillo having boasted of Alley Boys membership and Cruz having bragged of membership in the Alley Tiny Criminals, which was later subsumed within the Alley Boys. Craig concluded that the killings were committed to benefit the Alley Boys gang, due to the shooting's location and the victims' association or membership with Brown Pride and United Assassins, a group in alliance with the Delhi gang.

Cruz denied any involvement with the shooting. He testified he was friends with Castillo's sister but had never even met Castillo until they were placed together in jail for these charges. The Explorer belonged to Castillo's girlfriend, Salina Canales, and thus, his fingerprint was detected on it because Castillo's sister and Canales had previously given him a ride.

Castillo, on the other hand, did not testify but called several relatives to establish that he feared his life was in danger due to threats he had received over the years. He had also been shot at, and his grandfather's house was the object of a drive-by shooting when Castillo was not present. On the day of the shooting, Castillo's sister-Lila Mendez—had asked Castillo to give Cruz a ride because Cruz was a friend of hers.

DISCUSSION

A. Severance

Cruz raised a motion to sever his trial on the charges from those against Castillo on the grounds that the two defendants had conflicting and antagonistic defenses. However, that motion was belatedly made after the prosecution rested its case-in-chief. It was denied, as were the renewed motion to sever after Lila Mendez testified for Castillo and the post-conviction motion for new trial. He argues on appeal that the denial of the severance motions—and the new trial motion—deprived him of due process.



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Section 1098 establishes the legislative preference for joint trials whenever "two or more defendants are jointly charged with any public offense . . ." (See also Cal. Const., art. I, § 30(a).) When a severance is denied to a defendant so charged, we review that denial for abuse of discretion "judged on the facts as they appeared at the time of the ruling[,]" granting reversal on appeal only if it is shown "to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (People v. Coffman and Marlow (2004) 34 Cal.4th 1, 40-41.)

The denial of the severance motion during trial was appropriate. To begin with, the motion was untimely, as severance motions must be made pretrial or the issue is deemed waived. (People v. Simms (1970) 10 Cal.App.3d 299, 306.) However, if evidence should arise during trial demonstrating the need for severance which was not apparent at the pretrial stage, the motion must be renewed at that point to preserve the issue for review. (See People v. Ervin (2000) 22 Cal.4th 48, 68; see also 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) §§ 370-371, pp. 536-538.)

At the time of the original motion, neither defendant had presented any evidence as to their respective defenses. However, counsel for Castillo had given an opening statement, proposing that his case would be one of self-defense by a former gang member in a gang culture. Counsel for Cruz reserved his opening, so there was no possibility of comparing potential defense positions.

According to Cruz, no California case exists in which a trial court abused its discretion by denying severance due to antagonistic defenses. Cruz has likewise failed to show that the severance denial was an abuse in this case. However, he responds that irrespective of the appropriateness of the denial of his original severance motion, "the joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (Williams v. Superior Court (1984) 36 Cal.3d 441, 448.)³ He proposes that the actual testimony at trial rendered his trial fundamentally unfair (cf. People v. Bean (1988) 46 Cal.3d 919, 940) due to the clash between Castillo's self-defense claim and Cruz's assertion of mistaken identity.

Accepting that a joint trial is preferred, a trial court may nonetheless grant a severance of jointly charged defendants "``in the face of an incriminating confession, prejudicial association with co-defendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a co-defendant would give exonerating testimony.'"" (People v. Hardy (1992) 2 Cal.4th 86, 167.) The only possible application to the defendants before us is the conflicting defenses claim, and we narrow our attention to that matter.

Joint trials are preferred even in the face of "different and possibly conflicting defenses" because "[i]f the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials `would appear to be mandatory in almost every case.' [Citation.]" (People v. Hardy, supra, 2 Cal.4th at p. 168.) Therefore, co-defendants are deemed not to have antagonistic defenses even if they accuse one another of the crime or generally approach one another with hostility. Rather, "``it must be demonstrated that the conflict is so



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prejudicial that the defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.] Stated another way, '"mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the other.' [Citations.]" (Ibid.)

In Hardy, each of three defendants cast blame on one or two of his former comrades, denying guilt as to himself. Thus, although their expected defenses were "technically `conflicting' in that all three defendants denied culpability and speculated that one or both of the other defendants was responsible, their defenses were not . . . `antagonistic,' as that term is used in the federal courts." (Hardy, *supra*, 2 Cal.4th at page 168, *italics added*.) More importantly, the reviewing court emphasized the "'`realistic benefits [derived] from a consolidated trial.'" (Id. at p. 169.) For instance, that "'`different defendants . . . have conflicting versions of what took place, or the extent to which they participated in it, *vel non*, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.' [Citations.]" (Id. at p. 169, fn. 19, *emphasis added by italicizing "for."*)

We reject Cruz's characterization that had the jury accepted Castillo's argument of self-defense, it had to then reject his explanation of mistaken identity. Castillo did not testify; Cruz did, denying any involvement in the incident. Lila Mendez, Castillo's sister, testified in Castillo's case that she had asked Castillo to pick up Cruz and return him to his own home because she did not want to see him. Castillo had laughed and said, "sure." No other mention was made of Cruz in Castillo's case. Nothing about Castillo's case would have necessarily made the jury reject Cruz's proffer of mistaken identity because there was no evidence that Castillo did, in fact, meet and pick up Cruz. Mendez's testimony concerning the conversation with Cruz and her subsequent request of Castillo was rather confused and disconnected from the rest of the events.

Castillo's reliance on self-defense due to the presence of the gun in the dead Garza's hand did not preclude the jury finding Cruz was not the passenger in the Explorer. However, the fact of his fingerprint on the Explorer in combination with the tentative identifications⁴ of him by Angotti and Ochoa as well as his girlfriend's testimony that she picked him up in the general vicinity of the abandoned Explorer indubitably contributed to the jury's rejection of his explanation far more than did Castillo's claim of self-defense and his sister's one reference to Cruz.

Cruz summarizes his claim as one in which the prosecution had a very weak case against him, but that the gaps in the prosecution's case were filled in by his co-defendant Castillo's case. Thus, being tried with Castillo resulted in his facing two adverse parties, and the prosecution failed to prove every element of the offense beyond a reasonable doubt by itself. (See *Tehan v. U.S. ex. rel. Shott* (1966) 382 U.S. 406, 415 ["the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution `shoulder the entire load.'"].)



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That same allegation could be made in any joint trial in which the defendants desire to cast the blame on the other. Mere antagonistic cross-examination by a co-defendant's counsel does not render the trial fundamentally unfair. (E.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1208.) Although instances have occurred in which a co-defendant's approach has resulted in prejudice to a defendant, it is very rare. (See e.g., *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078 [mutually exclusive defenses may require separate trials]; *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895 [mutually exclusive defenses require severance particularly in light of co-defendant's eliciting confidential informant's hearsay statements concerning defendant]; *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173 [mutually exclusive defenses necessitated severance].) In each such case, the defendants presented mutually exclusive defenses, which are defined as cases in which "acquittal of one co-defendant would necessarily call for the conviction of the other." (*Tootick*, supra, 952 F.2d at p. 1081.) But Cruz has not shown that an acquittal of Castillo on his self-defense assertion would necessarily result in Cruz's own conviction. In the alternative, nothing about Cruz's defense, if believed, would necessarily result in Castillo's conviction. They were mutually inconsistent, and the defendants appeared hostile to the other's position, but one defense did not necessarily result in the conviction of the other. Thus, their defenses were not mutually exclusive, and reversal is not warranted.

B. Denial of the New Trial Motion

Castillo contends the trial court erred in denying his motion for new trial due to insufficient evidence of premeditation and deliberation. As an alternative to a new trial, Castillo requested the trial court reduce the conviction to voluntary manslaughter. In particular, Castillo argued in his motion that the evidence was insufficient to support the first degree murder element of premeditation and deliberation. He also averred in his written motion that he specifically requested the trial court not to instruct the jury that voluntary manslaughter was a lesser included offense to the murder charge; the court complied with that request, informing the jury that second degree murder was the only lesser offense it might consider. (CALJIC Nos. 8.25.1, 8.30, 8.31, 8.70, 8.71, as given.) In his motion, Castillo requested the court to reweigh the evidence, emphasizing that Garza had a gun and imperfect self-defense negates the presence of malice. The trial court rejected the motion and the alternative request.

Castillo contends on appeal that there was a dearth of evidence showing premeditation and deliberation. The Attorney General responds to the contrary. Noting that we must review the entire record in the light most favorable to the verdict and affirm if there is substantial evidence on which a rational trier of fact could find the elements of premeditation and deliberation (see *People v. Perez* (1992) 2 Cal.4th 1117, 1124), we examine the facts in light of the guidelines for that element reiterated in *Perez* and originally outlined in *People v. Anderson* (1968) 70 Cal.2d 15: "In identifying categories of evidence bearing on premeditation and deliberation, Anderson did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. [Id. at p. 27.] From the cases surveyed, the Anderson court



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identified three categories of evidence pertinent to the determination of premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. Regarding these categories, Anderson stated: `Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).' [Citation.] It is thus evident from the court's own words that it was attempting to do no more than catalog common factors that had occurred in prior cases. The Anderson factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (Perez, supra, 2 Cal.4th at p. 1125.)

These are the guidelines used in appellate review of premeditation and deliberation. They are not elements: deliberation is defined as a careful weighing of considerations in forming a course of action, and premeditation is defined as consideration beforehand. (See *People v. Perez*, supra, 2 Cal.4th at p. 1123.) "The process of premeditation and deliberation does not require any extended period of time. `The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and . . . calculated judgment may be arrived at quickly . . . ' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

The evidence shows that the occupants of the two vehicles exchanged words and salutations. Within a short time, shots broke out. From this, Castillo contends, no finding of premeditation and deliberation can logically be made. We disagree. The defendants obviously armed themselves in advance and went looking for rival gang members whom they shot as soon as the two determined they were from such rival groups. As opined by the gang expert, a shooting on "turf" claimed by the Alley Boys by two admitted members of that gang in which two members of the rival gang, Delhi, are killed, comprises the very action which bolsters the gang's reputation and status. Moreover, such an action is absolutely mandated of gang members within the gang culture, and they prepare themselves for just such encounters. Thus, the record supports the jury's finding of (1) planning in advance, (2) motive in the form of gang values and prestige, and (3) manner of killing indicative of a gang killing of a rival.

Castillo argues that one cannot logically infer any planning from an obviously chance encounter at a corner intersection. However, he narrows his review of the facts to his own defense case and his defense allegations made in argument. He ignores the expert's testimony entirely, contending that he had left the gang and thus, all the expert testimony was inapplicable.

The jury was not required to limit its review in that manner. Moreover, it was not required to assume that the shooting must have resulted from Castillo's spotting the gun in Garza's hand. None of the witnesses saw a gun before the shots were heard. After Garza's death, a gun was found in his hand but it was not in a condition to be immediately fired. Obviously, Castillo and Cruz fired their weapons before Garza and Walle were able to respond, supporting the interpretation that Castillo and Cruz drew their weapons before Garza had the opportunity to raise his.



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Nonetheless, Castillo argues it was error for the trial court to refuse to reduce the conviction to voluntary manslaughter under the authority of section 1181.⁵ Such authority provides for the court to make such an order, but only if the verdict is contrary to law or the facts as established at trial. As discussed above, the finding by the jury was supported in law and by the facts, irrespective of Castillo's continued argument-as distinct from fact-that he feared Garza and fired in response to Garza's wielding a gun.

DISPOSITION

As conceded by the Attorney General, Castillo is entitled to have his presentence custody credits enhanced by 24 days, and the clerk of the superior court is ordered to correct the abstract of judgment accordingly. Upon this modification, the judgment is affirmed.

WE CONCUR: ARONSON, J., FYBEL, J.

1. Both defendants also faced a charge of street terrorism (see Pen. Code, § 186.22, subd. (a)) and special allegations that the murders were committed in a drive-by shooting (see Pen. Code, § 190.2, subd. (a)(21)), that the murders were of multiple victims (see Pen. Code, § 190.2, subd. (a)(3), that the murders were committed by active criminal street gang members (see Pen. Code, § 190.2, subd. (a)(22)) and were committed at the direction and for the benefit of the Alley Boys, a criminal street gang. (See Pen. Code, § 186.22, subd. (b)(1).) The jury found all charges to be true. Each defendant also faced two prior "strike" allegations (Pen. Code, §§ 667, subd. (d)-(e)(2), 1170.12, subd. (b)&(c)(2)) which the court found to be true, but which the prosecution requested dismissal at the time of sentencing. Moreover, the gang enhancements were stricken at sentencing and the term for the street terrorism count was stayed pursuant to Penal Code section 654. All further section references are to the Penal Code, unless otherwise stated.

2. Paz Gallegos saw the Explorer come to a screeching halt and both sides' doors fly open. The driver leapt out, running in one direction and the passenger took off in a different direction, stumbling at the curb. Both Gallegos and her husband described the passenger as appearing several inches shorter than Cruz and as much as 25 pounds lighter.

3. We note that the Williams holding on the issue of joinder of charges and factors to be considered for severance was abrogated by the passage of Proposition 115 in 1990, as recognized in *Price v. Superior Court* (2001) 25 Cal.4th 1046 at pages 1069- 1071.

4. Other witnesses failed to identify Cruz as the passenger. Garcia actually made a tentative in-field show up identification of another person, Kenneth Reyna. Kritz likewise indicated that two other photographs appeared similar to the passenger, but she failed to pick out that of Cruz.

5. Section 1181 provides, in pertinent part, "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial" if "the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly



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without granting or ordering a new trial"

