People v. Pettis

2008 | Cited 0 times | California Court of Appeal | January 17, 2008

OPINION

Appellant Terry Lee Pettis stands convicted, following a jury trial, of first degree murder of Rene Shannon Abbott (Pen. Code,[1] § 187, subd. (a); count 1), and attempted robbery of Abbott and Kent Joseph Wolf (§§ 211, 664; counts 2 & 3, respectively). The jury further found, as to count 1, that appellant committed the murder while engaged in the commission or attempted commission of robbery (§ 190.2, subd. (a)(17)); as to count 3, that he personally inflicted great bodily injury (§ 12022.7, subd. (a)); and, as to all three counts, that he personally used a firearm (§ 12022.53, subd. (b)). He was sentenced to a total unstayed term of life in prison without the possibility of parole plus 25 years and now appeals, raising claims of instructional error and cruel and unusual punishment. For the reasons that follow, we will affirm.

FACTS

On the evening of April 27, 2004, Rene Abbott drove her boyfriend, Kent Wolf, to a parking lot near the Campus Courtyard Apartments, a gated complex on Ninth Street between Bulldog Lane and Shaw Avenue in Fresno. Wolf was planning to sell Michael Tunnell a little under an ounce of marijuana for $280. Tunnell was purchasing the drug for Jonathan Woods, who lived in the apartment complex and who in turn was obtaining it at the behest of Abimbola Jose, who was also a resident of the complex. Woods's apartment was a hangout for Fresno State basketball players and others. Appellant, who lived in the Bulldog Apartments on the other side of Ninth Street, was there briefly that evening.

When Wolf arrived at the parking lot, he contacted Tunnell by cell phone. Tunnell, who was at the apartment complex, then walked over to their meeting place. He was not aware of anyone following him.

Abbott was in the driver's seat of her white Nissan Altima, Wolf was in the front passenger seat, and Tunnell got into the rear seat behind Abbott. It was around 7:30 p.m. and still daylight. Tunnell gave

Wolf three $100 bills and Wolf handed him the marijuana. Abbott was searching through her purse for change when an African-American male approached the car from the Ninth Street area. He held what looked like a Glock pistol partially extended through the driver's side window and pointed it at Abbott's head, and said, "'Give me the shit.'" Wolf started saying, "'Go, go, go," and either he or Abbott put the car in reverse or it was already in gear. As the car started moving, the gun discharged once. Tunnell believed Abbott may have hit the gas, because the car went backwards "really fast," over a curb and into a tree.

When the car came to rest, the shooter, who had a surprised look on his face, was still standing where he had been. He then ran over and opened Wolf's door. According to Tunnell, the man snatched the money out of Wolf's lap, then looked at Abbott and then at Tunnell. Tunnell, who was holding the marijuana, threw it at him. The man caught the bag and ran northbound on Ninth. Wolf remembered getting out of the car to get help, and noticing that the shooter was in front of the vehicle. Wolf did not ever see him enter the car and did not know whether any money was taken.[2] Wolf ran across the street to some trucks when he noticed the man appeared to be trailing him with the gun. Wolf then ran to a nearby restaurant and told the people there that he had been shot, then he ran back to the car.

Abbott died from a single gunshot wound to the head. A .45-caliber bullet passed through her head and Wolf's left leg, and lodged in his right leg. It and the shell casing that was found in the area of the shooting came from a Glock pistol. Glocks, which have no safety mechanism, can have a lighter and shorter trigger pull than similar weapons.

At trial, the main issue was the identity of the shooter. Tunnell, who originally described the person as wearing blue jeans and a red and white Fresno State jersey with a number on it, selected two pictures from a photographic lineup, one of which was of appellant. He positively identified appellant at trial. Wolf also selected appellant's picture from a photographic lineup, although he was not positive of his identification at the time. While he identified appellant at trial, he admitted he could not be certain because everything happened so quickly.

Circumstantial evidence of identity was also presented. Appellant's palm print was found on the outside of the upper left portion of the driver's door window of Abbott's car. There were corresponding fingerprint impressions on the inside of the window, which was rolled down approximately two inches, as if someone had grabbed or held it. A second, smudged print was on top of appellant's palm print.[3]

Dreike Bouldin, who was then a member of the Fresno State basketball team, saw appellant walking toward the Campus Courtyard Apartments exit that led to the parking lot next to Ninth Street. Several other people were in the area, including a White male who was leaving the complex via the same exit. Appellant was 20 to 30 feet behind this person. Ashley Mohammadi, who dropped Bouldin off in the Campus Courtyard Apartments lot about five to ten minutes before the shooting, saw

appellant pass in front of her car, headed east toward Ninth Street. He was wearing basketball shorts and a black tank top, and was carrying or wearing a red backpack on the front of his body. He was walking quickly, and appeared to be hurrying to catch the gate to the apartment complex parking area, which was closing. A minute or two later, she heard two gunshots. She saw appellant on Ninth Street, moving at a fast pace. She then saw a car up on the sidewalk and a man outside of it, yelling for help.

Around 7:30 p.m. on April 27, Jade Rogers and Dreiana Daniels were turning onto Ninth Street from Shaw when they saw appellant, whom Daniels subsequently told police was wearing a black jersey, in the middle of the street. He was walking and had come out of the car gate of the Campus Courtyard Apartments. Rogers also saw a White male walking from the apartments. She drove up Ninth Street and made a U-turn; by the time she returned, Abbott's car was half on the sidewalk and half on the street. Rogers could no longer see appellant, but the White man she had seen was in the middle of the street, yelling.

Then-11-year-old Hussam Y. saw the shooter take the handgun from a red pouch and then, after the shooting, run off into the driveway of The Villages Apartments. Hussam described the person, whom he could not be sure was appellant, as an African-American male, six feet seven inches tall, wearing a red jersey with lettering. According to Hussam's friend, Anthony Y., the man, who had a red backpack, took a lot of money out of the car. He then ran into The Villages apartment complex and on toward Bulldog Stadium.

Abimbola Jose related that, during the early afternoon hours of April 27, appellant remarked that he was going to "get a lick," i.e., commit a robbery. Later that evening, appellant telephoned Jose and said he was going to have to give Jose some money or some marijuana.[4] The next day, Jose went to a hotel and picked up money and about 14 grams of marijuana from Jennifer Birt. Birt was a friend of appellant; appellant spent the night of April 27 at her residence, near Herndon and 99, after telling her someone had been shooting at him. Appellant made the arrangements with respect to Jose and gave Birt the marijuana. Appellant explained that he was going home on an airplane and could not take it with him. Appellant subsequently talked Birt into purchasing a ticket to Minnesota for him. The departure point was someplace other than Fresno.

Melissa Cenci, appellant's girlfriend, was interviewed by Detectives Garcia and Alcorn on May 6, 2004.[5] She told them that, on the afternoon in question, she had dropped appellant off at his friend's residence in the Courtyard Apartments, as he had been there earlier and said he had forgotten his backpack, which was red. At the time, appellant was already planning to leave Fresno and return to his home. Cenci said that appellant arrived back at his own apartment a short time later, looking scared. He told her they needed to leave, and not to ask any questions. They drove around aimlessly for a while, during which time appellant was crying hysterically and could not calm down. He eventually admitted to Cenci that "'[s]omething just really, really bad happened.'"

He said he had seen a White male with some marijuana. Appellant, who had a gun, had followed this person to a car to get it. There were two people in the car, and the person appellant followed got into the backseat. Appellant had told the people to give him the marijuana, but the male on the passenger side reached for something and told the girl to drive off. She had moved the gearshift, and appellant said that was when he accidentally shot something. Appellant said he did not remember the gun going off, although he saw the car fly backward. He did not know if anyone was hurt. He did not say anything about going up to the car after it stopped, but said he got scared and ran. Cenci told him that she could not be around him, and so she dropped him off at Jennifer Birt's residence.

At trial, Cenci testified she was unable to remember much of what she told detectives during the interview or the details of what happened on the night of the shooting. She was not trying to be truthful with the detectives, because she was intimidated by them and scared. Other people had said they were going to say appellant was the perpetrator, and Cenci was afraid they would come after her and her and appellant's then-unborn child. What she told the detectives was what she had heard from the others. Appellant never said he had shot or tried to rob anyone. All he told her was that he had heard some gunshots and started running.

DISCUSSION

I. INSTRUCTIONAL ERROR

A. CALCRIM No. 372

The trial court instructed the jury on flight in the language of Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 372, to wit: "If the defendant fled immediately after a crime was committed or after he was accused of committing a crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Appellant now complains that the instruction did not require that the jury first find he actually fled to avoid detection or observation before using flight as evidence of guilt. Since the evidence showed he left the apartment complex by running through an automatic gate as it was closing, he argues, jurors should have been instructed his departure from the apartment complex parking lot did not necessarily support a finding of consciousness of guilt insofar as appellant had some other explanation for it.

Appellant appears to have misread the record. Testimony from Ashley Mohammadi and Jade Rogers established appellant was hurrying to exit the gate, which was closing, as he was leaving the Campus Courtyard Apartments before the shooting. This testimony was not presented to demonstrate flight, but instead concerned whether appellant was hurrying because he was following Michael Tunnell to

the location of the drug transaction, or for some other, innocuous reason. Thus, in arguing the significance of the fact some eyewitnesses said the shooter was wearing a red jersey, while the people who knew appellant said he had on a black tank top, defense counsel told the jury:

"Remember there are bushes there, people are coming after the fact, people had [appellant] crossing the street, somehow the fact that he hurries cause the gate's closing is supposed to have some significance to it. The fact that Mike Tunnell happened to take that same path supposedly has some significance to it, but we know from his own witness, he saw somebody coming up the street. He saw somebody come up Ninth Street behind him, and you heard that testimony. That's the direction the person with the red jersey came from." Contrary to appellant's claim, defense counsel did not argue that appellant did not flee the scene; indeed, counsel conceded appellant ran away although the better decision would have been to stay and talk to the police.

In any event, there was no error. Although flight "'requires neither the physical act of running nor the reaching of a faraway haven' . it does require 'a purpose to avoid being observed or arrested.' [Citations.]" (People v. Jurado (2006) 38 Cal.4th 72, 126.) Nevertheless, the California Supreme Court recently rejected the argument that, if a flight instruction is given, the jury must also be required to make a finding concerning the preliminary facts underlying the instruction, viz., that (1) a person fled the scene of the crime; (2) the defendant was that person; and (3) the defendant fled to avoid apprehension or discovery. (People v. Abilez (2007) 41 Cal.4th 472, 522; see also People v. Navarette (2003) 30 Cal.4th 458, 502.) The court explained: "'[T]he instruction did not assume that flight was established, leaving that factual determination and its significance to the jury.' [Citation.] Instead, 'the instruction merely permitted the jury to consider evidence of flight in deciding defendant's guilt or innocence; it did not suggest that the jury should consider such evidence as dispositive.' [Citation.]" (Abilez, supra, at p. 522.)

In the present case, in addition to eyewitness accounts of appellant or the perpetrator walking or running away from the scene of the shooting, there was evidence appellant frantically insisted he and Cenci leave his apartment afterward; and went and stayed at a house near Herndon and 99, quite a distance from campus and, inferentially, appellant's usual environs. There was also evidence that, although he already planned to return home to Minnesota, he did not have a ticket until he talked Jennifer Birt into buying him one, and then his departure location was somewhere other than Fresno. Accordingly, there was ample evidence appellant fled the scene of the shooting in order to avoid observation or arrest and, thus, from which jurors logically could infer his movement was motivated by guilty knowledge. (People v. Abilez, supra, 41 Cal.4th at p. 522; see, e.g., People v. Roybal (1998) 19 Cal.4th 481, 517-518 [reasonable juror could have found return to New Mexico from Oceanside constituted flight & supported inference of guilt where, although defendant previously indicated desire to return to New Mexico, he made no specific plans to do so prior to murder, then suddenly left Oceanside for New Mexico within hours of homicide]; People v. Bradford (1997) 14 Cal.4th 1005, 1055 [instruction properly given where defendant left victim's apartment, though not apartment building, after homicide; told someone he really needed to get out of there; packed his belongings &

asked another person if he could stay with her at a different location; & repeatedly pleaded with roommate to drive him out of town]; People v. Pensinger (1991) 52 Cal.3d 1210, 1244 [while evidence defendant left scene & went home is not evidence of flight that necessarily supports inference of consciousness of guilt, jury could infer that sudden change in plans in that regard showed consciousness of guilt]; People v. Turner (1990) 50 Cal.3d 668, 695 [substantial evidence of flight existed where physical evidence suggested defendant's departure from scene occurred "with particular haste" & defendant testified he fled in panic]; but see People v. Crandell (1988) 46 Cal.3d 833, 869-870 [flight instruction erroneously given where evidence showed defendant left scene to accomplish specific tasks & with intent to return to dispose of bodies], overruled on other grounds in People v. Crayton (2002) 28 Cal.4th 346, 364-365.) As the prosecutor relied on flight as evidence of guilt, a flight instruction was required. (§ 1127c;[6] People v. Turner, supra, 50 Cal.3d at p. 694.) That appellant's identity as the perpetrator was in issue, or that he may have posited alternate, innocent explanations for his conduct, does not alter this requirement. (People v. Mason (1991) 52 Cal.3d 909, 943; People v. Turner, supra, 50 Cal.3d at pp. 694-695; see People v. Bradford, supra, 14 Cal.4th at pp. 1054-1055; People v. Lucas (1995) 12 Cal.4th 415, 470-471; People v. Hutchinson (1969) 71 Cal.2d 342, 346.)

B. CALCRIM No. 220

The trial court instructed the jury on reasonable doubt pursuant to CALCRIM No. 220, to wit:

"The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and special allegation beyond a reasonable doubt. Whenever I tell you that the People must prove something, I mean they must prove it beyond a reasonable doubt.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you must find him not guilty." (Italics added.)

This was immediately followed by CALCRIM No. 222, which told jurors, in pertinent part: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and

anything else I told you to consider as evidence."

Appellant now contends these instructions, when read together and especially the emphasized portion of CALCRIM No. 220, limited the jury's determination of reasonable doubt to the evidence received at trial and precluded it from considering the absence of evidence connecting him to the crimes in determining whether reasonable doubt existed, thereby lessening the prosecution's burden of proof and impinging on appellant's right to present a defense. As he recognizes, we have rejected this argument (People v. Flores (2007) 153 Cal.App.4th 1088, 1091-1093), as have other courts (People v. Guerrero (2007) 155 Cal.App.4th 1264, 1267-1269; People v. Westbrooks (2007) 151 Cal.App.4th 1500, 1509-1510). We see no reason to revisit our previous holding.

C. CALCRIM No. 224

Pursuant to CALCRIM No. 223, the trial court defined direct and circumstantial evidence for the jury, and explained that both were acceptable types of evidence and that neither was necessarily more reliable or entitled to greater weight than the other. Pursuant to CALCRIM No. 224, the court then instructed:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence you must accept only reasonable conclusions and reject any that are unreasonable." (Italics added.)

Appellant now complains that, because a jury is constitutionally required to determine only whether an accused is guilty or not guilty, not whether he or she is innocent, the italicized portion lowered the prosecution's burden of proof by allowing jurors to find guilt if they believed appellant was not innocent. He says the error is structural and was not cured by the giving of CALCRIM No. 220, since that instruction also uses the erroneous "innocent," instead of the correct "not guilty," in defining reasonable doubt.

Appellant's argument relies on People v. Han (2000) 78 Cal.App.4th 797 (Han), in which the defendants complained about a similar use of the term "innocence" in the corresponding CALJIC instruction on circumstantial evidence, CALJIC No. 2.01. Although finding no prejudice because other standard instructions -- particularly CALJIC No. 2.90, defining reasonable doubt -- clarify the applicable law, the court "recognize[d] the semantic difference," "appreciate[d] the defense

argument," and agreed that the language, standing alone, was inapt and potentially misleading. (Han, at p. 809.)

In People v. Anderson (2007) 152 Cal.App.4th 919 (Anderson), the court rejected Han's criticism of CALJIC No. 2.01, explaining: "For a defendant to be found not guilty, it is not necessary that the evidence as a whole prove his innocence, only that the evidence as a whole fails to prove his guilt beyond a reasonable doubt. In other words, a not guilty verdict is based on the insufficiency of the evidence of guilt. [¶] However, when considering isolated items of evidence, the issue is different. A particular item of evidence may fall into one of three categories: it may tend to prove guilt; it may tend to prove innocence; or it may have no bearing on guilt or innocence. If the evidence falls into the latter category, it does not support either a guilty or a not guilty verdict. In effect, the evidence is not relevant to the case and should be excluded. Thus, if a particular item of evidence, circumstantial or otherwise, is relevant to the jury's ultimate determination, it is relevant only because it tends to prove either guilt or innocence. [¶] CALCRIM No. 224 simply recognizes this distinction when the jury is considering the circumstantial evidence as a whole." (Anderson, at pp. 932-933; see also People v. Wade (1995) 39 Cal.App.4th 1487, 1492 ["innocence" in CALJIC No. 2.01 connotes state of evidence opposing guilt].) This court recently accepted the rationale of Anderson, while rejecting that of Han. (People v. Ibarra (2007) 156 Cal.App.4th 1174, 1187, petn. for review pending, petn filed Dec. 26, 2007.)

Significantly, the California Supreme Court has rejected the claim that the reference to "guilt or innocence" in CALJIC No. 2.01 and other standard instructions "relieved the prosecution of its burden of proof by implying that the issue was one of guilt or innocence instead of whether there was or was not a reasonable doubt about defendant's guilt. Challenges to the wording of jury instructions are resolved by determining whether there is a reasonable likelihood that the jury misapplied or misconstrued the instruction. [Citation.] Here, it is not reasonably likely that the jury would have misapplied or misconstrued the challenged instructions, one of which expressly reiterates that defendant's guilt must be established beyond a reasonable doubt. (CALJIC No. 2.01.) The instructions in question use the word 'innocence' to mean evidence less than that required to establish guilt, not to mean the defendant must establish innocence or that the prosecution has any burden other than proof beyond a reasonable doubt. [Citation.]" (People v. Crew (2003) 31 Cal.4th 822, 847-848 (Crew).)

We fail to see why Crew is not dispositive. Appellant says "such reliance on the unavoidably convoluted language of 'reasonable doubt' to counteract the effect of a simple word like 'innocence' is a legal fiction and must not be deemed persuasive in evaluating" CALCRIM No. 224, but we disagree. We discern no difference between CALCRIM No. 224, read in conjunction with the definition of reasonable doubt contained in CALCRIM No. 220, and CALJIC No. 2.01, read in conjunction with the definition of reasonable doubt contained in CALJIC No. 2.90. This is especially true since CALJIC No. 2.90, like CALCRIM No. 220, states that a defendant in a criminal action is presumed to be innocent.

"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (People v. Burgener (1986) 41 Cal.3d 505, 538, disapproved on other grounds in People v. Reyes (1998) 17 Cal.4th 743, 756.) In light of the numerous instructions directing the jury here to convict only on proof beyond a reasonable doubt of guilt, we conclude there is no reasonable likelihood the jury misapplied or misconstrued CALCRIM No. 224. (See People v. Snow (2003) 30 Cal.4th 43, 97; People v. Frye (1998) 18 Cal.4th 894, 957-958.)

II. CRUEL AND/OR UNUSUAL PUNISHMENT

At sentencing, appellant asked the court to strike the special circumstance term as unconstitutional cruel and unusual punishment and to sentence him to 35 years to life in prison. He now contends the trial court erred by refusing to do so, and that his sentence must be vacated because it runs afoul of the federal and state Constitutions. We disagree.[7]

The prosecution did not seek the death penalty in the present case. Accordingly, upon the jury's verdict finding the robbery-murder special circumstance to be true, the statutorily mandated punishment was life in prison without the possibility of parole (§ 190.2, subd. (a)), as the trial court was without discretion to strike the special circumstance finding in order to reduce the punishment (§ 1385.1; People v. Johnwell (2004) 121 Cal.App.4th 1267, 1283; People v. Mora (1995) 39 Cal.App.4th 607, 614-615).

The court retained authority, however, to reduce sentence under compulsion of the federal and/or state Constitutions. (People v. Mora, supra, 39 Cal.App.4th at p. 615; see People v. Johnwell, supra, 121 Cal.App.4th at p. 1285.) Because its decision not to do so presents a question of law, we review it independently, subject to the trial court's findings of the underlying facts on substantial conflicting evidence. (Mora, at p. 615.) In so doing, we must be mindful of "the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. [Citations.] While these intrinsically legislative functions are circumscribed by . constitutional limits ., the validity of enactments will not be questioned 'unless their unconstitutionality clearly, positively, and unmistakably appears.' [Citations.]" (People v. Wingo (1975) 14 Cal.3d 169, 174, fn. omitted.)

We turn first to an analysis under the federal Constitution.

"The Eighth Amendment to the United States Constitution proscribes 'cruel and unusual punishment' and 'contains a "narrow proportionality principle" that "applies to non-capital sentences."' (Ewing v. California (2003) 538 U.S. 11, 20 (lead opn. of O'Connor, J.), quoting Harmelin v. Michigan (1991) 501 U.S. 957, 996-997.) That principle prohibits '"imposition of a sentence that is

grossly disproportionate to the severity of the crime"' (Ewing v. California, supra, 538 U.S. at p. 21 (lead opn. of O'Connor, J.), quoting Rummel v. Estelle (1980) 445 U.S. 263, 271), although in a non-capital case, successful proportionality challenges are '"exceedingly rare."' (Ibid.)

"A proportionality analysis requires consideration of three objective criteria, which include '(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.' (Solem v. Helm (1983) 463 U.S. 277, 292.)

But it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play. (Harmelin v. Michigan, supra, 501 U.S. at p. 1005 (conc. opn. of Kennedy, J.).)" (People v. Meeks (2004) 123 Cal.App.4th 695, 707.)

Considering the gravity of the offense and the harshness of the penalty, we find no gross disproportionality here and, accordingly, we need not examine the remaining two criteria. (Harmelin v. Michigan, supra, 501 U.S. at p. 1005 (conc. opn. of Kennedy, J.).) Intentionally or not, appellant killed someone during the course of an attempted robbery. While we recognize that "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished," "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state .." (Tison v. Arizona (1987) 481 U.S. 137, 156, 157.) Under the circumstances, we conclude that a mandatory sentence of life in prison without the possibility of parole does not offend the United States Constitution. (See Harmelin v. Michigan, supra, 501 U.S. at pp. 994-995; id. at pp. 996-997, 1004, 1005 (conc. opn. of Kennedy, J.) [upholding imposition of mandatory term of life in prison without the possibility of parole for possession of more than 650 grams of cocaine]; Solem v. Helm, supra, 463 U.S. at p. 290, fn. 15 [observing that no term of imprisonment would be disproportionate for felony murder where defendant did not take or attempt to take life, or intend that life be taken or lethal force be used].)

We now turn to an analysis under state law.

"The California Constitution prohibits 'cruel or unusual punishment.' (Cal. Const., art. I, § 17, italics added.)[8] A punishment may violate the California Constitution 'although not cruel or unusual in its method, [if] it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (In re Lynch [(1972)] 8 Cal.3d [410,] 425 [(Lynch)].)

"The court in [Lynch] spoke of three 'techniques' the courts have used to administer this rule, (1) an examination of the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' ([Lynch], supra, 8 Cal.3d at p. 425), (2) a comparison of the challenged

penalty with the punishments prescribed for more serious offenses in the same jurisdiction (id. at p. 426), and (3) 'a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision' (id. at p. 427)." (People v. Meeks, supra, 123 Cal.App.4th at p. 709.)

Appellant focuses on the first Lynch technique. (See People v. Dillon (1983) 34 Cal.3d 441, 487, fn. 38 (Dillon) [punishment need not be shown to be disproportionate in all three respects to be ruled constitutionally excessive].) "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment ""'shocks the conscience and offends fundamental notions of human dignity'"" [citation], the court must invalidate the sentence as unconstitutional." (People v. Hines (1997) 15 Cal.4th 997, 1078; Dillon, supra, at p. 479.)

Here, appellant planned in advance to commit a robbery. He was motivated by a desire to obtain money and/or illegal drugs. He chose to use a firearm in his planned endeavor, despite the fact it was daylight and there were a number of people -- including children -- in the general area. His chosen means were extremely dangerous -- sticking a loaded firearm into the small, enclosed space of a car and pointing it at the driver's head from, inferably, a very short distance. As the sole perpetrator, he was completely involved in, and responsible for, what happened. The consequences of his criminal acts, even if unintentional, cannot be overstated: one person dead and another seriously injured. Although youthful (19 years old at the time of the shooting), appellant was legally an adult. While his prior criminal record may be characterized as minimal, he was on probation following misdemeanor convictions for battery in a relationship (§ 243, subd. (e)(1)) and vandalism (§ 594, subd. (a)), and he failed to complete the Batterer Intervention Program as required under the conditions of his probation.[9] Letters written to the trial court on appellant's behalf and those who spoke for him at sentencing revealed an intelligent young man who, prior to the disastrous choices he made on April 27, 2004, had great potential and a supportive, loving family.

Appellant seeks to liken his case to that of the defendant in Dillon, supra, 34 Cal.3d 441. In that case, the California Supreme Court found disproportion between punishment and offense to be "manifest on the record" before it. (Id. at p. 450.) Accordingly, it modified a judgment of first degree felony murder, for which the defendant was sentenced to life in prison, so as to punish the defendant as a second degree murderer. (Ibid.)

As aptly summarized in People v. Young (1992) 11 Cal.App.4th 1299, 1310, "Appellant's case contrasts sharply with Dillon. At the time of the murder in Dillon the defendant was 17, legally a minor, although prosecuted as an adult. The uncontradicted evidence, which was accepted by a sympathetic

jury and trial judge, showed the defendant was unusually immature and childlike, even for a person of 17. ([Dillon], supra, 34 Cal.3d at pp. 482, 483, 486, 488.) The defendant had no prior criminal record at all. (Id. at p. 486.) In Dillon the defendant testified frankly, admitting the shooting and attempting to explain the panic which led him to shoot. (Id. at pp. 482-483.) The jury sympathized but had no alternative under the law then finding the defendant guilty of first degree felony murder. (Id. at p. 485.) The jury, the probation officer and the trial judge all concluded the statutory penalty was extraordinarily harsh as applied to the defendant."

Here, by contrast, appellant was legally an adult. There was no evidence he was unusually immature. (See People v. Young, supra, 11 Cal.App.4th at p. 1310.) His prior record, while certainly not extensive or involving felonious conduct, did evidence some amount of violence. He did not comply with the conditions of his probation. Although the actual shooting was unintentional, appellant committed a premeditated armed robbery in a way that demonstrated "wanton disregard for the high risk to human life and . as a result of his own conduct, killed" a young woman. (Ibid.; see also People v. Martinez (1999) 76 Cal.App.4th 489, 497; People v. Weddle (1991) 1 Cal.App.4th 1190, 1199; People v. Hankey (1989) 215 Cal.App.3d 510, 513.) Whatever sympathy the jury may or may not have felt, neither the trial court nor the probation officer concluded the statutory penalty was extraordinarily harsh as applied to appellant. Indeed, the probation officer concluded he represented a danger to the community, and recommended imposition of a slightly higher determinate term than the court ultimately imposed.[10]

In announcing its tentative ruling, the trial court said:

"First of all, let me address the prescribed punishment for the charged crime and the crime of which the defendant was convicted.

"The People of the State of California have long ago made a decision that, at least as important as one's intent when one intentionally kills someone, is one's decision to engage in a violent crime and to arm one's self with a firearm in the commission of that offense.

"And while there is at least an argument that the sentence of life without the possibility of parole is a harsh one, particularly in circumstances where the evidence suggests that the actual killing may have been an accident, the law doesn't really care.

"What the law says is if you go to the door of a car and you stick a loaded firearm in the window of that car and point it at the head of a young lady to rob the occupants of that car for a few hundred dollars of cash and marijuana and if that gun discharges and she dies, that is a crime for which you should be punished with a commitment of life without the possibility of parole.

"I do not differ with the jury's verdict in that regard. I do not differ with that law. And so I am left, then, with the single decision of addressing whether that sentence is cruel and unusual in a

constitutional sense on the facts of this case and the circumstances of this defendant.

"What was cruel was the making of that decision in the taking of Rene Abbott's life. And I cannot find that this act, being punished by a term of life without the possibility of parole, is in any way constitutionally unsound or cruel or unusual. Rene Abbott is dead, and this defendant will have the rest of his natural life to consider the circumstances that resulted in that.

"And to my mind, it is not appropriate on these facts to strike that finding by the jury for purposes of sentencing. It would not be appropriate to sentence him to anything less than a term of life without the possibility of parole given the circumstances of this case, its effect, and the circumstances of this defendant."

After further argument, the court reiterated its finding that the sentence was constitutionally sound.

We reject appellant's claim the trial court failed to recognize and apply the governing law. The trial court's comments show it considered both the offense in the abstract and the facts of the crime in question, as well as the characteristics of appellant himself. (See People v. Rhodes (2005) 126 Cal.App.4th 1374, 1390-1391.) Moreover, the court did not ignore the fact that the killing was not found to be intentional; in context, its reference to "the making of that decision in the taking of Rene Abbott's life" is to appellant's choosing to commit robbery by sticking a loaded gun in a car window and pointing it at someone's head.

"Although some mitigating factors are indicated in the record, particularly related to [appellant's] personal history, we are persuaded that the extreme seriousness associated with the offense negates his claim of cruel [or] unusual punishment." (People v. Rhodes, supra, 126 Cal.App.4th at p. 1390.) Simply put, that what happened may appropriately be characterized as a tragedy for the perpetrator as well as for the victim does not mean harsh punishment is unconstitutional.

DISPOSITION

The judgment is affirmed.

WE CONCUR: Vartabedian, J., Cornell, J.

1. All statutory references are to the Penal Code.

2. Two $100 bills and one $20 bill were found in the front passenger area of the car after the shooting. Marijuana was also found inside the vehicle.

3. According to Carmen Anderson, Jr., appellant purchased marijuana from Tunnell in the parking lot of the Wendy's at Cedar and Shaw on an earlier occasion. Tunnell was in Abbott's car then, as were another man and a woman. Anderson

saw appellant touch the passenger side of the car, walk around, and briefly get in the back driver's side of the vehicle.

4. Jose was aware that Jonathan Woods was in contact with appellant. It was Jose's understanding that Woods was supposed to be getting Jose the marijuana for which he had paid $280.

5. A tape recording of the interview was played for the jury.

6. Section 1127c provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given."

7. Our discussion addresses the propriety of the life-without-parole term, and not the additional 25-year determinate term. The thrust of appellant's argument, both here and in the trial court, has been that he should have a chance someday for parole. Obviously, if a life-without-parole term is constitutional, imposition of an additional 25 years makes no practical difference.

8. We have no occasion in this case to determine whether the use of a different conjunction means the state clause proscribes some punishments the federal clause allows. (See In re Alva (2004) 33 Cal.4th 254, 291.)

9. Insofar as we can ascertain from the probation hearing report, appellant's failure to complete the program was not occasioned by his arrest in the instant matter.

10. The probation officer recommended imposition of the upper three-year term on count 3. The court imposed the two-year middle term.