People v. Napoles

2009 | Cited 0 times | California Court of Appeal | February 4, 2009

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A jury found Eddie Carlos Napoles guilty of first degree murder (Pen. Code, §§ 189/187, subd. (a)),[1] and found true the special allegations that he personally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)) and that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury also found Napoles guilty of two counts of attempted murder and found true that he intentionally discharged a firearm as to those counts (§ 12022.53, subds. (b) & (c)) and that both offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury found not true as to those counts that Napoles discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). Finally, the jury found Napoles guilty of being a felon in possession of a firearm (§ 12022, subd. (a)(1)). The trial court sentenced Napoles to a prison term of 50 years to life.

We strike a stayed 10-year term imposed under section 186.22, subdivision (b)(1)(C). We also strike a concurrent 25-years-to-life sentence imposed on great bodily injury enhancements (§ 12022.53, subd. (d)) that the jury found not true. Napoles's total sentence remains 50 years to life. In all other respects we affirm.

FACTS

On March 27, 2006, at approximately 7:00 p.m., Alisha Fee went with some friends to Miguel Zamora's house on Anchor Street in Carson. Among Fee's friends were Steve Cortez, Marissa Gonzales and Grace Ramos. About an hour later, Fee and her friends were outside the house saying good-bye. Fee was standing near Zamora in his driveway.

Cortez saw a car pass by and sensed something was wrong. Cortez identified Napoles as sitting in the front passenger seat of the passing car. Napoles yelled, "Keystone Ese." Cortez heard three to five shots ring out and saw the side of a gun in Napoles's hand. The car drove off. Fee dropped to the ground. Cortez drove Fee to the hospital where she died of a gunshot wound.

Angelic Perez is a member of the Keystone gang. Napoles is also a member. On March 31, 2007, Perez was staying at her stepmother's house. Perez got up at 3:00 a.m., to let her cousin in the house.

Her cousin was with Napoles and another Keystone member. All three went to the living room. Perez went to the kitchen. She overheard them talking about the shooting on Anchor Street. She said sarcastically, "I know you're not talking about the incident that happened with the heina [sic] on Anchor Street." Napoles replied, "What do you think?" Napoles said, "[W]e should earn some stripes for this."

Gang Expert Testimony

Sheriff's Detective Luis Trejo is assigned to the Carson gang unit. His brothers were gang members, and he has been familiar with gang life for as long as he can remember. He is the primary investigator of the Keystone and Carson 13 gangs. He had spoken with 50 to 60 Keystone gang members over the four years he has been the primary investigator for that gang. He has approximately 500 hours in training specifically related to gangs, he speaks to gang members on a daily basis and has spoken to thousands of gang members. Napoles is a member of the Keystone gang, and Zamora, in front of whose house Fee was shot, is an associate of Carson 13.

Trejo testified that the primary activities of the Keystone gang are: vandalism; sales of narcotics; attempted murder; murder; witness intimidation; assault with a deadly weapon, firearms or other weapons; and assaults with firearms on police officers.

Trejo testified he knows Junas Taclay, a member of the Keystone gang. Taclay was convicted on April 21, 2005, of assault with a deadly weapon against a police officer. Trejo also knows Hugo Iberri, another member of the Keystone gang. On July 28, 2003, Iberri was convicted of attempted murder.

In Trejo's opinion, if a car containing Keystone members drove up to a house where a Carson 13 member lives, and a member in the car yelled, "Keystone Ese," and shot three times, that would be gang related and for the benefit of a gang.

DISCUSSION

I.

Napoles contends CALCRIM No. 220's definition of reasonable doubt violates his due process rights. He believes the instruction precludes the jury from considering the lack of evidence in determining whether the prosecution has proved him guilty beyond a reasonable doubt. He also believes the instruction advises the jury to weigh the evidence in a manner suggestive of the preponderance of the evidence standard.

CALCRIM No. 220 provides in part: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty 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."

Napoles complains about the portion of the instruction that tells the jury, "you must impartially compare and consider all the evidence," in deciding whether the People have proved their case beyond a reasonable doubt. Napoles argues that by instructing that the jury must compare all the evidence, the instruction undermines the fundamental rule that the prosecution alone bears the burden of proof, even if no contrary evidence is presented. Napoles believes that CALCRIM No. 222 exacerbates the problem. That instruction provides in 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."

Napoles acknowledges that several recent Court of Appeal decisions have rejected the same challenge to CALCRIM No. 220. (People v. Campos (2007) 156 Cal.App.4th 1228, 1238; People v. Guerrero (2007) 155 Cal.App.4th 1264, 1268-1269; People v. Flores (2007) 153 Cal.App.4th 1088, 1092-1093; People v. Westbrooks (2007) 151 Cal.App.4th 1500, 1509-1510; People v. Rios (2007) 151 Cal.App.4th 1154, 1156-1157.) We agree with the unanimous opinions of the courts that have decided the issue. An instruction can be determined to be ambiguous or misleading only if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (People v. Campos, supra, at p. 1237.)

The plain language of CALCRIM No. 220 instructs that the "[presumption of innocence] requires that the People prove the defendant guilty beyond a reasonable doubt." The only reasonable meaning of the language is that lack of evidence can lead to reasonable doubt. (Ibid.) The instruction does not say that reasonable doubt must arise from the evidence. (Ibid.) The instruction simply tells the jury the almost self-evident principle that it must compare and consider all of the evidence during its deliberations. (Ibid.) Nor is CALCRIM No. 220 misleading. The instruction simply tells the jury that it must not decide the case on matters outside the evidence.

Napoles's reliance on Coffin v. United States (1895) 156 U.S. 432, is misplaced. There the court refused to instruct that the defendant is presumed innocent. (Id. at p. 453.) Here CALCRIM No. 220 states, "A defendant in a criminal case is presumed to be innocent."

II.

Napoles contends the gang enhancements are not supported by substantial evidence.

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In reviewing the sufficiency of the evidence we view the evidence in a light most favorable to the judgment. (People v. Johnson (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (People v. Ryan (1999) 76 Cal.App.4th 1304, 1316.) We have no power on appeal to reweigh the evidence or judge the credibility of witnesses. (People v. Stewart (2000) 77 Cal.App.4th 785, 790.) We must affirm if we determine that any rational trier of fact could find the elements of the crime or enhancement beyond a reasonable doubt. (People v. Johnson, supra, at p. 578.)

The jury found that the murder and attempted murders were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A). Section 186.22, subdivision (f), defines criminal street gang as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in... subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

Napoles challenges the sufficiency of the "primary activities" evidence. Detective Trejo testified the Keystone gang's primary activities include murder, sale of narcotics, witness intimidation and assault with a deadly weapon. These crimes are enumerated in section 186.22, subdivision (e). Napoles acknowledges that a gang's primary activities may be proved by expert testimony. (Citing People v. Sengpadychith (2001) 26 Cal.4th 316, 323.) He claims, however, that here the expert's opinion was not based on an adequate foundation.

But Trejo testified that he grew up around gangs and has spoken to 50 to 60 Keystone gang members over the four years he has been the primary investigator for that gang. In addition, Trejo testified he has approximately 500 hours in training specifically related to gangs, and speaks to gang members on a daily basis as one of his duties. He estimated the number of gang members he has talked to as being in the thousands.

The foundation for Trejo's opinion is at least as strong as the foundation for the expert opinion that our Supreme Court found sufficient in People v. Gardeley (1996) 14 Cal.4th 605, 620. There the gang expert based his opinion on conversations with the defendants, other members of the defendants' gang, personal investigation of hundreds of crimes committed by gang members, and information from colleagues and various law enforcement agencies. (Ibid.)

Napoles also challenges the sufficiency of the "pattern of criminal gang activity" evidence. Section 186.22, subdivision (e), provides in part, "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on

separate occasions, or by two or more persons...." Among the listed offenses are murder and assault with a deadly weapon.

Trejo testified he knows Junas Taclay and Hugo Iberri. They are members of the Keystone gang. Taclay was convicted in April of 2005 of assault with a deadly weapon, and Iberri was convicted in July of 2003 of attempted murder. Napoles complains that Trejo did not explain how the crimes were gang related or testify that he had personal knowledge of the incidents.

But section 186.22, subdivision (e), contains no requirement that the crimes must be gang related. (See People v. Gardeley, supra, 14 Cal.4th at pp. 621-622.) Nor does Napoles cite any authority for the proposition that the expert must have personal knowledge of the offenses.

This case is not like In re Nathaniel C. (1991) 228 Cal.App.3d 990, 1003. There, as proof of the predicate offenses, the expert offered hearsay testimony of a "suspected" shooting. (Ibid.) Here Trejo testified that the gang members were convicted of the predicate offenses. That is a far cry from hearsay that the gang members were suspected of committing the offenses.

Nor is this case like In re Leland D. (1990) 223 Cal.App.3d 251, 259. There the gang expert testified that members of the Fink White Deuces have engaged in the sale of rock cocaine, vehicle thefts and assaults with deadly weapons. The court determined that such "conclusional pronouncements" are insufficient to show a pattern of criminal activity. (Ibid.) Here, in contrast to testimony about offenses committed by unnamed persons on unspecified dates, Trejo identified the persons and the dates of their convictions.

The gang enhancements are supported by substantial evidence.

III.

Napoles contends, and the Attorney General concedes, that the trial court made sentencing errors.

The trial court sentenced Napoles on count 1 (first degree murder) to 50 years to life. The sentence consists of 25 years to life for the first degree murder; 10 years for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), stayed; plus 25 years to life for personally discharging a firearm causing death pursuant to section 12022.53, subdivision (d).

The trial court sentenced Napoles to a concurrent 40 years to life on counts 2 and 3 (attempted murder). The sentence consists of 15 years to life for attempted murder and 25 years to life for discharging a firearm causing great bodily injury or death.

The trial court sentenced Napoles to a concurrent two years on count 4 (carrying a loaded firearm).

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It was clearly error for the trial court to sentence Napoles to a 25-years-to-life term pursuant to section 12022.53, subdivision (b) on counts 2 and 3. The jury found those enhancement allegations not true as to counts 2 and 3.

The Attorney General also concedes that the gang enhancement on count 1 should be stricken. Section 186.22, subdivision (b)((1)(C) provides for a 10-year sentence enhancement for a violent felony committed for the benefit of a criminal street gang. Subdivision (b)(5) of the section, however, provides an exception, it states in part: "[A]ny person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." Because murder is punishable in prison for life, it was error for the trial court to impose and stay a 10-year sentence under section 186.22, subdivision (b)(1)(C). The sentence must be stricken. (See People v. Lopez (2005) 34 Cal.4th 1002 [trial court erred in applying 10-year gang enhancement to defendant's first degree murder conviction].)

While conceding it was error to sentence Napoles under section 186.22, subdivision (b)(1)(C), the Attorney General argues we should impose on appeal the 15-year minimum provided in subdivision (b)(5) of the section. But, as Napoles points out, subdivision (b)(5) of the section was not alleged and the verdict form contained no reference to it. Nevertheless, the Attorney General cites People v. Navarro (2008) 161 Cal.App.4th 1100, 1105-1106, for the proposition that Napoles can be punished under section 186.22, subdivision (b)(5), in spite of the error in the verdict form.

The Attorney General's reliance on Navarro is misplaced. There the defendant was charged, among other offenses, with attempted first degree murder, assault with a firearm and a gang enhancement under section 186.22, subdivision (b)(1). Pursuant to a plea agreement, he pled no contest to assault with a firearm and the gang enhancement. The trial court advised him that the gang enhancement sentence would be 10 years under section 186.22, subdivision (b)(1)(C). On appeal, the defendant challenged the 10-year gang enhancement sentence contending the appropriate sentence was five years under section 186.22, subdivision (b)(1)(B). The court dismissed the appeal for failure to obtain a certificate of probable cause. The court noted, however, that the minute order of the sentencing hearing and the abstract incorrectly cited the applicable statute as section 186.22, subdivision (b)(4), instead of subdivision (b)(1)(C) of that section. (People v. Navarro, supra, 161 Cal.App.4th at p. 1104, fn. 3.) The court ordered the abstract of judgment corrected to reflect the correct subdivision.

In Navarro, the defendant agreed to be sentenced under section 186.22, subdivision (b)(1)(C). The court simply ordered the abstract corrected to reflect that agreement. Here Napoles did not agree to be sentenced under section 186.22, subdivision (b)(5). Nor did the trial court sentenced him under that subdivision. The Attorney General wants us to go far beyond correcting the abstract of judgment to reflect the actual sentence, as the court did in Navarro. The Attorney General provides no authority to support his request that we add section 186.22, subdivision (b)(5), to Napoles's sentence.

The concurrent 25 years to life term imposed under section 12022.53, subdivision (b), on counts 2 and

3 is stricken. The 10-year term under section 186.22, subdivision (b)(1)(C), imposed and stayed on count 1 is stricken. In all other respects the judgment is affirmed.

We concur: YEGAN, J., COFFEE, J.

1. All statutory references are to the Penal Code.