The People v. Oliver Sanchez Zaragoza

2012 | Cited 0 times | California Court of Appeal | January 31, 2012

P. v. Zaragoza CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Affirmed.

INTRODUCTION

Defendant Oliver Sanchez Zaragoza appeals from a judgment of conviction entered after a jury trial. Defendant was charged with murder (Pen. Code,[1] § 187, subd. (a)) in count 1 and attempted premeditated murder (§§ 187, subd. (a), 664) in count 2. It was further alleged that a principal personally used a firearm (§ 12022.53, subds. (b), (e)), personally and intentionally used a firearm causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1)), and defendant committed his crime for the benefit of a criminal street gang with the intent to promote, further and assist the criminal street gang (§ 186.22, subd. (b)(1)(C)).

Defendant was convicted of second degree murder and attempted murder. The jury found the gun and gang allegations not to be true. A co-defendant, Fernando Espinoza (Espinoza), was acquitted on both counts.

Defendant was sentenced to a term of 15 years to life on count 1, to be served consecutive to the middle term of seven years in count 2. The court also: (1) assessed a $200 restitution fine pursuant to section 1202.4, subdivision (b); (2) imposed and suspended a parole revocation fine in the same amount pursuant to section 1202.45; (3) ordered defendant to pay $7,500 in restitution to the Victims State Compensation Board; (4) imposed a $60 criminal conviction assessment pursuant to Government Code section 70373; and (5) a court security fee of $60 pursuant to section 1465.8, subdivision (a)(1). At sentencing, the court indicated that it was imposing a DNA penalty assessment of $20.

On appeal, defendant contends there was instructional error, the penalty assessment imposed was improper, and the criminal conviction assessments must be stricken. We find no grounds for reversal

and affirm the judgment.

FACTS

A. Prosecution

1. The Shooting

On September 6, 2008, Roger S., a minor and a member of the criminal street gang Jardin 13, was with his friend, Robert Ramirez (Ramirez). They met Ramirez's cousin, and all three started walking along Whittier Boulevard toward the cousin's home. They were not armed.

While they were walking, a car pulled up, and someone in the car asked Ramirez where he was from. Roger claimed membership in Jardin 13. Someone in the car responded, "Maravilla." Roger then heard shooting and realized he had been shot in the leg.

Los Angeles County Sheriff's Deputy Alicia Kohno responded to the scene and saw Ramirez lying on the sidewalk with a gunshot wound to his head. There were no weapons anywhere near the scene. Ramirez had received four gunshot wounds, including one to his head, which was fatal. Yesenia Jimenez (Jimenez), another of Ramirez's cousins, lived nearby. She heard three or four gunshots coming from outside her home. She ran outside and saw Ramirez on the ground with a gunshot wound to his head.

Arlene Guevara (Guevara), an off-duty Monterey Park police officer, was in a parked car on Whittier Boulevard. Guevara saw three men walking down the street. The men had tattoos and shaved heads that Guevara associated with gang activity or gangsters. Guevara heard approximately six gunshots. She saw one of the men fall to the ground. Guevara also saw a white, four-door Nissan Sentra leaving the area. Three men were inside the Sentra. The man in the front passenger seat was pointing a handgun out the window as the car passed her.

On September 7, 2008, Guevara was shown a photographic lineup. Guevara was unable to identify anyone in the lineup. At trial, she was again shown the photographic lineup containing defendant's photograph and identified him. She testified that defendant looked somewhat different in the photograph than he did at the time of the crime.

On January 12, 2010, Guevara was shown a series of photographs to determine if she could identify the Nissan Sentra. At that point, she saw a photograph of defendant and remembered that he was the person sitting in the front passenger seat of the Sentra. On February 2, Guevara was in court and told the prosecutor that a few weeks earlier, she had seen a photograph of defendant, the person in the front seat holding the gun.

On September 8, 2008, defendant and Espinoza were interviewed separately, and an audiotape of each interview was played for the jury. Defendant started his interview by explaining that his initial version of the events had not been correct. Defendant said that he was standing outside Espinoza's house, when three people walked by and were "dogging" him.[2] Defendant saw Oscar Revelo (Revelo), whom defendant knew as "Mugsy," walking down the street. Revelo asked, "So what's up with those fools[?]" Defendant told Revelo and Espinoza, "Let's go." Defendant knew that Revelo was armed.

Espinoza told the police that defendant called out to him and told him to come along with them. When they were in the car, defendant told him they were "probably going to box these fools." Defendant said, "Let's go f--- these guys up."

Espinoza was driving defendant's white Nissan because defendant intended to get out and fight. Defendant was in the front passenger's seat, and Revelo was directly behind defendant. The three men who had "mad dogged" defendant were running down the street with their backs to the vehicle. Revelo told defendant, "Yeah, I'm gonna blast somebody." Defendant and Espinoza told him not to do so.

At the corner, defendant heard one of the men say, "Jardin." Defendant responded, "Puro Maravilla."[3] Espinoza told the police that the encounter began with Revelo twice asking the three men, "Where you from?" The three men froze and had no response. Both defendant and Revelo stated, "This is Maravilla!"

Defendant told the police that he was about to get out of the car to "box" the men when he heard the gunshots. He did not turn around to look at Revelo or see a gun. Espinoza drove away and then took Revelo home. Defendant denied that he was the shooter. He said he would not do a shooting in that neighborhood because he grew up there and everyone knew him.

Espinoza told the police that he, defendant and Revelo were dressed alike in white T-shirts and black basketball shorts.

2. Gang Evidence[4]

Jimenez had told police in an interview that defendant had told her that he was trying to get into the Lopez Maravilla gang.

The prosecution's gang expert, Los Angeles County Sheriff's Detective Eduardo Aguirre, opined that defendant was an associate of the Fraser Maravilla and Lopez Maravilla gangs based upon several factors.

B. Defense

Gregory Estevane testified as defendant's gang expert. He opined that defendant was not a gang associate.

Detective Aguirre interviewed Revelo's cousin, Javier Mora (Mora), on September 12, 2008. Mora testified that he could not remember whether he told Detective Aguirre that his cousin was wearing a white T-shirt and black basketball shorts on the day of the crime. Detective Aguirre testified Mora told him Revelo was wearing a white T-shirt and black basketball shorts.

Kathy Pezdek, Ph.D., a cognitive psychologist who had specialized in the study of eyewitness memory and identification, testified as a defense expert in eyewitness identification.

DISCUSSION

A. Jury Instructions

In general, the trial court has the duty to instruct the jury sua sponte as to the principles of law relevant to the issues raised by the evidence. (People v. Wims (1995) 10 Cal.4th 293, 303; People v. Saddler (1979) 24 Cal.3d 671, 681.) This duty extends to "instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense" have been established, but instructions on lesser included offenses are not required if "there is no evidence that the offense [is] less than that charged." (People v. Breverman (1998) 19 Cal.4th 142, 154; People v. Barton (1995) 12 Cal.4th 186, 200-201.) Instructions on lesser included offenses must be given whenever there is "'"evidence from which a jury composed of reasonable [persons] could have concluded"' that the particular facts underlying the instruction did exist." (People v. Wickersham (1982) 32 Cal.3d 307, 324, disapproved on other grounds in Barton, supra, at p. 201; People v. Flannel (1979) 25 Cal.3d 668, 684-685.) In the absence of such evidence, no instruction on the lesser included offense need be given. (Wickersham, supra, at pp. 324-325; Flannel, supra, at p. 684.

1. Failure to Instruct on Involuntary Manslaughter

Defendant contends that the trial court erred in failing to sua sponte instruct the jury as to involuntary manslaughter, and that his convictions must be reversed for this failure. We disagree.

Section 192, subdivision (b), defines involuntary manslaughter as "the unlawful killing of a human being without malice" during the "commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Involuntary manslaughter is also a lesser included offense of murder. (People v. Halvorsen (2007) 42 Cal.4th 379, 415.)

Initially, the People contend that defendant has forfeited any federal constitutional claim based on the failure to instruct on involuntary manslaughter by failing to request the instruction. Regardless,

we find that the jury was properly instructed.

Defendant argues that because the jury was instructed as to the natural and probable consequences doctrine under the conspiracy theory, and it was instructed as to simple assault, as well as assault by means likely to produce great bodily injury, the trial court was also required to instruct the jury as to involuntary manslaughter under a misdemeanor-manslaughter theory. We disagree.

The record before the trial court lacked substantial evidence to support the involuntary manslaughter instructions. The evidence clearly established that Ramirez was killed intentionally; Revelo shot him four times, including one shot to the head. Where the evidence shows an intentional killing, no instruction on involuntary manslaughter is required. (People v. Dixon (1995) 32 Cal.App.4th 1547, 1556.) There was no evidence that Ramirez was killed during the commission of a misdemeanor or an otherwise lawful act done without due caution and circumspection.

Defendant further contends that instructing the jury that simple assault was identified as one of the possible objects of a conspiracy required an involuntary manslaughter instruction based on the natural and probable consequences doctrine. The jury was instructed as to the natural and probable consequences doctrine under a conspiracy theory. Under this theory, the prosecution was required to establish that defendant formed an agreement with Revelo to commit assault or assault by means likely to inflict great bodily injury, intended to commit that crime, committed one of the enumerated overt acts, and that the murder and attempted murder were the natural and probable consequences of the conspiracy itself pursuant to CALCRIM Nos. 416, 417, and 420. Under a conspiracy theory, each conspirator is responsible for everything done by his coconspirators, including the probable and natural consequences of the conspiracy. (People v. Zacarias (2007) 157 Cal.App.4th 652, 657.)

Even where the prosecution may be relying on the natural and probable consequences doctrine to establish liability, there still must be evidence to support a conviction of involuntary manslaughter to require instruction on that offense. (People v. Huynh (2002) 99 Cal.App.4th 662, 678.) Since such evidence was absent here, no such instruction was required.

If the relevant theory of liability had been aiding and abetting, as opposed to conspiracy, both parties acknowledge that the law is unsettled as to whether aiding and abetting a misdemeanor can support a murder conviction under the natural and probable consequences doctrine. (People v. Canizalez (2011) 197 Cal.App.4th 832.) In Canizalez, two defendants were convicted of second degree murder for three deaths that occurred after racing on a residential street at speeds up to 87 miles an hour, running a stop sign and crashing with the victims' car. The court left open the question of whether a misdemeanor can ever support a murder conviction under the natural and probable consequences doctrine. They did not have to "decide whether a misdemeanor [could] ever support a murder conviction under the natural and probable consequences doctrine because . . . the speed contest was a felony." (Id. at p. 854.) The court did state as follows: "Given that the natural and probable consequences doctrine looks to the reasonable likelihood that the nontarget murder will result from

the target offense, it would appear that applying the label 'felony' or 'misdemeanor' to the target offense is not talismanic in deciding whether the aider and abettor can be convicted of a nontarget murder. The key factor is the ability to anticipate the likelihood that the nontarget offense will result from the target offense." (Ibid.)

The case of People v. Huynh, supra, 99 Cal.App.4th at page 678 appears to imply that involuntary manslaughter instructions are warranted where the defendant aided and abetted a misdemeanor that resulted in death. Huynh was charged with four counts of murder, shooting at an occupied vehicle, two counts of assault by force likely to produce great bodily injury and possession of a firearm by a convicted felon. Huynh was convicted of second degree murder and shooting at an occupied vehicle. (Id. at pp. 664-666.) The court held that the facts did not support a finding of unintentional homicide under a "natural and probable consequences" aiding and abetting theory, based on the commission of a misdemeanor dangerous to human life or of a noninherently dangerous felony committed without due caution and circumspection. All of the conduct that defendant and his companions envisioned, in pulling the other car over and confronting its occupants, constituted felonies. (Id. at pp. 678-679.)

The court in Huynh was faced only with the natural and probable consequences doctrines it related to an aiding and abetting theory of guilt and not natural and probable consequences as applied to conspiracy. In the instant case, even if the relevant theory of liability had been aiding and abetting, rather than conspiracy, the relevant issue would still have been whether the ultimate crime of murder was a "'reasonably foreseeable offense.'" (People v. Prettyman (1996) 14 Cal.4th 248, 261.) Revelo's shooting of Ramirez and Oscar was certainly foreseeable, regardless of whether the target offense was a felony or a misdemeanor.

2. Failure to Instruct on Heat of Passion Voluntary Manslaughter and Attempted Voluntary Manslaughter

The trial court denied defendant's request to instruct the jury as to voluntary manslaughter and attempted voluntary manslaughter based upon a heat of passion theory. Defendant contends that there was substantial evidence of sufficient provocation to justify an instruction on voluntary manslaughter resulting from a sudden quarrel or heat of passion. We disagree.

Voluntary manslaughter is "the unlawful killing of a human being without malice" "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) An unlawful killing also may be voluntary manslaughter where malice has been negated by an honest but unreasonable belief the defendant's life was in imminent danger from a victim. (People v. Blakeley (2000) 23 Cal.4th 82, 87-88; People v. Lasko (2000) 23 Cal.4th 101, 108.)

A killing "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)) occurs "'if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause

an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment.'"'" (People v. Lasko, supra, 23 Cal.4th at p. 108.) The offense has both a subjective and an objective component. (People v. Steele (2002) 27 Cal.4th 1230, 1252.)

In People v. Manriquez (2005) 37 Cal.4th 547, the victim called the defendant a derogatory name and repeatedly told him that if he had a weapon, "he should take it out and use it." (Id. at p. 586.) The Supreme Court held such taunting statements "plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment" and held "[t]he trial court properly denied defendant's request for an instruction on voluntary manslaughter based upon the theory of a sudden quarrel or heat of passion." (Ibid.) "'"A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable [person], such passion as reduces an unlawful killing with a deadly weapon to manslaughter."' [Citation.]" (People v. Najera (2006) 138 Cal.App.4th 212, 226.) In Najera, the victim repeatedly called the defendant a derogatory name; the two swore at one another and physically fought. Minutes later, the defendant obtained a knife, approached the victim, and slashed him several times, killing him. (Id. at pp. 215-216.) The court found no evidence to support a manslaughter instruction. (Id. at p. 226.)

The trial court declined defendant's request for an instruction because there was not sufficient provocative conduct and stated, "no words were exchanged, no verbal threats . . . at most[,] some mad dogging, and I don't think under the governing law that's enough to instruct on voluntary manslaughter." It is clear that hard looks or mad-dogging someone does not constitute adequate provocation to shoot that person. (People v. Lucas (1997) 55 Cal.App.4th 721, 740.) The applicable test is what an "'"ordinarily reasonable person of average disposition"'" would likely do (People v. Lee (1999) 20 Cal.4th 47, 59), not what an irrational gang member would likely do. While the gang culture certainly does have violence attributed to it, allowing the instruction requested by defendant when there was simply hard looks does not have a precedent in law or logic. In short, the evidence was clearly inadequate to meet either the objective or the subjective prong for a heat of passion instruction.

B. Imposition of DNA Penalty Assessments

At the time of sentencing, the trial court ordered defendant to pay a $200 fine pursuant to section 1202.4, subdivision (b); imposed and suspended a parole revocation fine in the same amount pursuant to section 1202.45; ordered defendant to pay $7,500 in restitution to the Victim Compensation and Government Claims Board; imposed a $60 criminal conviction assessment pursuant to Government Code section 70373; and imposed a court security fee of $60 pursuant to section 1465.8. In addition, the trial court imposed $20 in DNA fees pursuant to Government Code sections 76104.6 and 76104.7. The court did not impose any other fines or assessments.

Defendant contends that the DNA penalty assessment was improperly imposed and must be stricken. The People concur, but they submit that the assessment is not in the abstract of judgment or the minute order and there is no need to strike it. We agree with the People.

Government Code section 76104.6, subdivision (a)(1), provides for the imposition of an additional penalty of $1 for every $10, or portion of $10, on "every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses." Subdivision (a)(2) provides that this penalty is to "be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code" and subdivision (a)(3)(A) states that this penalty does not apply to any restitution fines.

In People v. Valencia (2008) 166 Cal.App.4th 1392, 1396, the court held that the penalty assessment under Government Code section 76104.6, subdivision (a), does not apply to court security fees imposed pursuant to section 1465.8, subdivision (a)(1). The Valencia court also ordered that the penalty assessment under Government Code section 76104.7, subdivision (a), be stricken because that penalty can only be imposed in addition to the penalty imposed under Government Code section 76104.6. (Valencia, supra, at p. 1396.)

The criminal convictions assessments pursuant to Government Code section 70373, subdivision (a)(1), do not support the DNA penalty assessment under Government Code sections 76104.6 and 76104.7. Subdivision (b) of section 70373 provides, in pertinent part, that "[t]he penalties authorized by Chapter 12 (commencing with Section 76000), and the state surcharge authorized by Section 1465.7 of the Penal Code, do not apply to this assessment."

While defendant therefore is correct that the DNA penalty assessment imposed by the trial court was unauthorized, we find no reason to order it stricken since the assessment does not appear in the abstract of judgment or the minute order.

C. Imposition of Criminal Conviction Assessments

Defendant contends that the criminal convictions assessments must be stricken because they violate defendant's protection against ex post facto laws of the United States and California Constitutions. As defendant admits, the case law that has addressed this issue has rejected defendant's argument. We also reject defendant's contention.

The date of the offense in the instant case was September 6, 2008. Defendant was convicted by the jury on March 15, 2010. At the time of the sentencing, the trial court ordered defendant to pay $60 in criminal conviction assessments pursuant to Government Code section 70373, subdivision (a)(1).

Government Code section 70373 went into effect on January 1, 2009. Subdivision (a)(1) provides in part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . in the amount of thirty dollars ($30) for each . . . felony .

. . ." The cases that have addressed the issue have uniformly rejected the ex post facto law argument. (People v. Lopez (2010) 188 Cal.App.4th 474, 480 ["We conclude that the assessment is not punitive and was properly imposed by the court"]; People v. Davis (2010) 185 Cal.App.4th 998, 1000, 1001; People v. Brooks (2009) 175 Cal.App.4th Supp. 1, 5.) We agree with the rationale of these cases.

DISPOSITION

The judgment is affirmed.

We concur: WOODS, Acting P. J. ZELON, J.

1. Unless otherwise specified, all further statutory references are to the Penal Code.

2. "Mad dog" is a term used by gang members to describe a hard look given to them by someone else.

3. The area where the men were walking, Whittier Boulevard and McBride Avenue, is near the border of the territory claimed by Fraser Maravilla and Lopez Maravilla. Jardin 13 was not a rival gang of either Fraser Maravilla or Lopez Maravilla, but did not get along with either.

4. Since the gang allegations were found to be not true, we only provide an abbreviated review of the testimony concerning gangs.