People v. Diaz

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

OPINION

A jury convicted defendant Jose Antonio Diaz of one count of murder in violation of Penal Code[1] section 187, subdivision (a), and one count of street terrorism in violation of section 186.22, subdivision (a). As to the murder conviction, the jury found two special circumstances: A criminal street gang purpose (§ 190.2, subd. (a)(22)) and lying in wait (§ 190.2, subd. (a)(15)). The jury also found defendant personally discharged a firearm during the commission of the murder (§ 12022.53, subd. (d)), and defendant committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)). In the second portion of defendant's bifurcated trial, the court found prior strike (§§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)) and prior serious felony conviction (§ 667, subd. (a)(1)) allegations to be true.

Defendant's sentence consisted of life in prison without the possibility of parole for the murder conviction; enhancements of 15 years to life (for the benefit of a criminal street gang finding) and 25 years to life (use of a firearm finding); a five year term for the prior serious felony conviction; and a 16-month consecutive term for street terrorism, stayed pursuant to section 654.

In this appeal, defendant claims his right to a fair trial was violated because of comments made by a police investigator, who was testifying on the topic of defendant's alleged gang membership. Defendant also asserts the court improperly instructed the jury on imperfect self-defense (Judicial Council of Cal. Crim. Jury Instns. (2006-2007), CALCRIM No. 571). Finally, defendant raises two alleged sentencing errors (which do not pertain to defendant's life sentence). Other than ordering a technical modification of defendant's sentence, we affirm.

FACTS

The Lopers are a gang based in Santa Ana. Defendant was an active participant in the Lopers gang on September 21, 2006, the date of the murder at issue in this case. The murder victim, Emily Raygoza, was affiliated with the West Myrtle gang. At least until the Raygoza murder, the Lopers and

West Myrtle gangs maintained friendly relations. In the weeks preceding her death, Raygoza socialized with several Lopers, including defendant.

The night before her death, Raygoza returned from taking a call on her cell phone and informed several Lopers that a Loper gang member would be killed that night. Raygoza's statement aroused anger in defendant and the other Lopers. Raygoza had family members in the Walnut Street gang, a bitter rival of the Lopers. One Loper, nicknamed "Bullet," had recently been killed by the Walnut Street gang. Defendant had a tattoo on his back commemorating "Bullet's" life.

The next day, defendant asked Raygoza to accompany him to the store. As they walked through an alley, defendant turned on Raygoza and shot her seven times. Defendant admitted one week later to a fellow Loper that he killed Raygoza in the alley and said as he shot, "This is for my home boy. Rest in peace, Bullet." Defendant also told his girlfriend on a phone call from jail that he had problems with a girl, took a walk with her, and did what he "had to do." Defendant provided inconsistent stories to the police during his interrogation, ultimately admitting he was in the alley with Raygoza at the time of the shooting (but denying he shot her, claiming he rode away on a bicycle prior to the shooting).

DISCUSSION

Gang Expert Testimony

Defendant contends the court improperly refused to declare a mistrial following certain testimony by the lead detective in the case. Defendant claims the detective's testimony was particularly prejudicial because he sat at counsel's table with the prosecutor during the trial and testified prior to his objectionable statements that part of his job was to clear the innocent of crimes and to find the guilty.

Defendant first points to a portion of the record wherein the detective expressed his expert opinion that defendant was an active participant in the Lopers criminal street gang. When asked the basis for his opinion, the detective testified: "[H]is background, who he's been contacted with, his tattoos, the other Loper gang members identifying him as a Loper gang member, the consistency with the nickname of Speedy,[2]

and largely his conduct and actions in this case. The Loper gang was disrespected. There was a perceived disrespect on behalf of Emily [Raygoza], and Mr. Diaz handled that disrespect." (Italics added.) Counsel for defendant immediately moved to strike this testimony and the court granted the motion, noting to the jury "you must disregard the [detective's] conclusion that Mr. Diaz handled that disrespect."

Shortly thereafter, the detective was also asked, following the presentation of a lengthy "hypothetical" detailing the facts as summarized above, if the murder at issue "was committed for the benefit of or in association with a criminal street gang."[3]

The detective replied "yes," and defense counsel objected in part on the ground that the question allowed the detective to again testify to the ultimate issue of guilt. The court agreed to strike the detective's testimony, explaining the question was improperly formed and did not adequately emphasize its hypothetical nature, i.e., that the expert was assuming the facts necessary to form an opinion and that his opinion depended on facts the jury must first find to be true.

The court subsequently instructed the jury to disregard the detective's response to the hypothetical question and gave further guidance as to the jury's role in finding facts and assessing expert testimony. The court informed the jury that the detective "cannot give an opinion about the defendant's guilt of the charges he's facing in this trial. And I think that he may have accidentally done so in... several questions that were put to him. [¶] In other words, when it's your turn to deliberate on the evidence that you received, you can't go into the jury room and say among yourselves, or even think among yourselves, well, if the investigating officer... thinks the defendant is guilty, he must be guilty. That's not your job." The court concluded its comments by providing an extra reading of CALCRIM No. 332, the jury instruction pertaining to expert testimony and hypothetical questions. Following the court's admonishment of the jury, defendant moved for a mistrial. The court rejected the motion, noting its "admonishment was thorough" and "clearly understood by the jurors." The court allowed the prosecution to continue with a rephrased question to the detective, which more clearly emphasized its hypothetical nature.

"A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant." (People v. Torres (1995) 33 Cal.App.4th 37, 46.) This is because "the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (Id. at p. 47.) The court applied this rule in granting defendant's motions to strike, and providing lengthy admonitions to the jury to ignore any testimony by the detective which indicated his belief in the guilt of defendant.

The issue on appeal is whether the court erred in refusing to grant a mistrial. "A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged'"' [citation], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' [citation]. 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion." (People v. Avila (2006) 38 Cal.4th 491, 573-574 [holding trial court did not abuse its discretion by admonishing the jury to ignore improper testimony rather than declaring a mistrial].)

The court did not abuse its discretion in opting to admonish the jury rather than grant a mistrial. One potential danger of trial by jury is that jurors could defer to the implicit "expert" judgment made by the police officers who arrested the defendant. (See CALCRIM No. 220 ["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."].) Here, the detective made that judgment explicit through his testimony. The court, however, clearly instructed the jury to ignore the detective's improper testimony, and provided a lucid explanation for why the jury must reserve the resolution of defendant's guilt or innocence to its own province. "We presume the jury followed the court's instructions." (People v. Avila, supra, 38 Cal.4th at p. 574.) Defendant provides no authority for the proposition that it is an abuse of discretion to deny a mistrial motion in the circumstances at issue here, and we decline to so hold.[4]

Imperfect Self-defense Jury Instruction

Defendant requested and the court agreed to provide a jury instruction on imperfect self-defense, a version of CALCRIM No. 571 modified to insert "Emily Raygoza" as the name of the "decedent/victim."[5] Nevertheless, defendant now claims it was error to provide the instruction as given, because the instruction as given supposedly limited the jury's consideration to threats or harm committed by the victim.

The jury instruction omitted an optional portion of CALCRIM No. 571, which states: "If you find that the defendant received a threat from someone else that (he/she) reasonably associated with [insert name of decedent/victim], you may consider that threat in evaluating the defendant's beliefs." Defendant argues the jury was misled by this omission into thinking it could not consider threats or harm done by the Walnut Street gang, which killed defendant's fellow Loper, Bullet. Defendant contends there was a strong evidentiary basis for an imperfect self-defense finding: Raygoza's affiliation with Walnut Street, her comments at the party the night before her murder suggesting a Loper would soon be killed, and testimony indicating defendant noticed a car parked on the corner by the alley he was walking down with Raygoza before the shooting occurred.

Defendant forfeited this argument by not raising it to the trial court. (People v. Hudson (2006) 38 Cal.4th 1002, 1011-1012 ["'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'"].)

Even if the argument had not been forfeited, any omission of the language now requested by defendant was harmless. The jury instruction at issue requires the following for a finding of imperfect self-defense: "1. The defendant actually believed that (he/ [or] someone else/_____ was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶]... [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant." (Italics added.) As the instruction states, the jury was free to consider all the circumstances. Portions of the instruction referring specifically to threats made or harm done by Raygoza serve merely as examples of factors that may be considered in weighing "all the circumstances as they were known and appeared to the defendant."

We presume the jury properly applied the jury instruction, and found defendant did not actually believe he or someone else was in imminent danger of being killed and/or defendant did not actually believe shooting Raygoza was necessary to defend against that danger. There is a scintilla of evidence from which the jury could have inferred defendant feared the imminent use of deadly force against him by members of the Walnut Street gang.[6] However, we see nothing in the record to support the conclusion defendant believed he needed to shoot Raygoza seven times (rather than individuals in the car) to prevent an imminent act of violence. For the same reason, we reject defendant's alternative argument that he received ineffective assistance of counsel. (See Strickland v. Washington (1984) 466 U.S. 668, 687-688 [claim of ineffective assistance must show prejudice].)

Gang Activity Sentence Enhancement

The court sentenced defendant to life in prison without the possibility of parole for his murder conviction on count one. The court also included several enhancements as part of defendant's murder conviction. Of relevance here is an enhancement pursuant to section 186.22, subdivision (b), for which the court imposed a term of "15 Years to life" with the "[s]entence to be consecutive to sentence on count 1." Defendant contends this enhancement was improper.

"[S]section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang." (People v. Lopez (2005) 34 Cal.4th 1002, 1004 (Lopez).) Section 186.22, subdivision (b)(1), provides for various potential term enhancements for a defendant who has committed particular felonies: "(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." The abstract of judgment and the court's minute order indicate defendant's sentence was based on a subdivision (b)(1) enhancement of 15 years, a number presumably derived from both a five-year and 10-year enhancement under subdivisions (b)(1)(B) and (b)(1)(C) - murder is both a "serious felony" under section 1192.7 and a "violent felony" under section 667.5, subdivision (c).

The term enhancements provided in section 186.22, subdivision (b)(1), do not apply when the crime at issue is "punishable by imprisonment in the state prison for life...." (§ 186.22, subd. (b)(1), (5).) In such cases, subdivision (b)(5) applies and it requires imposition of a minimum period of 15 years before the defendant may be considered for parole (but does not require a term enhancement, as the potential term already consists of life in prison). (Lopez, supra, 34 Cal.4th at pp. 1006-1007.) For instance, a defendant convicted of attempted premeditated and deliberate murder, with a section 186.22, subdivision (b), enhancement could be sentenced to "15-years-to-life," based on the minimum 15 years without parole dictated by section 186.22, subdivision (b)(5), combined with the base sentence of life in prison with the possibility of parole for attempted murder. (See People v. Villegas (2001) 92 Cal.App.4th 1217, 1228-1229.)

In Lopez, supra, 34 Cal.4th 1002, the defendant was convicted of first degree murder; he was sentenced to 25 years to life for the murder, along with a consecutive 10-year criminal street gang enhancement pursuant to section 186.22, subdivision (b)(1)(C). (Lopez, at p. 1005.) Lopez held section 186.22, subdivision (b)(5), unambiguously applied to any life sentence, and that the 10-year gang enhancement to defendant's sentence was therefore improper. (Id. at pp. 1006-1008.) Lopez ordered the defendant's sentence modified to delete the 10-year gang enhancement. (Id. at p. 1011.) The Lopez court came to this conclusion notwithstanding the fact that a section 186.22, subdivision (b)(5), 15-year minimum parole period had no practical effect on the defendant's first degree murder sentence, which already had a minimum parole eligibility term of 25 years. (Lopez, at pp. 1008-1009.)

In discussing the legislative history of section 186.22, subdivision (b), the Lopez court noted: "the predecessor to section 186.22(b)(5) was understood to apply to all lifers, except those sentenced to life without the possibility of parole." (Lopez, supra, 34 Cal.4th at p. 1010.) The People offer this dicta as support for the argument the trial court correctly applied section 186.22, subdivision (b)(1), rather than subdivision (b)(5). We disagree. As recognized in Lopez, subdivision (b)(5) unambiguously applies to "'any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life.'" (Lopez, at p. 1005.) There is no exception in the language of the statute for individuals who have been sentenced to life in prison without the possibility of parole.

Accordingly, the trial court erred in imposing and staying a 15-year consecutive term enhancement under section 186.22, subdivision (b)(1). We modify the judgment by striking the 15-year gang enhancement. (Lopez, supra, 34 Cal.4th at pp. 1004, 1011.) Of course, this result has no practical effect on defendant's sentence, as he is ineligible for parole in the first instance.

Parole Revocation Fine

The court imposed both a $10,000 restitution fine under section 1202.4 and a $10,000 parole revocation fine under section 1202.45, which the court stayed pending any violation of parole. Section 1202.45 provides: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine shall... be suspended unless the person's parole is revoked." (Italics added.)

Both parties agree defendant's sentence should not have included the $10,000 parole revocation fine because defendant's sentence does not include the possibility of parole. The parties are mistaken. Defendant was sentenced to 16 months for his street terrorism conviction on count two. This is a determinate prison term under section 1170; all determinate terms "shall include a period of parole" under section 3000. (People v. Brasure (2008) 42 Cal.4th 1037, 1075 (Brasure).) Brasure held section 1202.45 parole revocation fines should be included in a sentence whenever the sentence includes a

determinate prison term, despite the simultaneous imposition of a life sentence without the possibility of parole. (Brasure, at p. 1075.) Under Brasure's interpretation of the relevant Penal Code provisions, defendant's sentence in this case should include a parole revocation fine. (Ibid.)

The parties appear to believe the court's section 654[7] stay of defendant's street terrorism sentence distinguishes the instant case from Brasure. It is true Brasure, in reasoning that a parole revocation fine was justified in that case, specifically cited determinate prison terms imposed on the defendant which had not been stayed pursuant to section 654 (and did not specifically cite other terms for counts which were stayed pursuant to section 654). (Brasure, supra, 42 Cal.4th at pp. 1049, 1075) We see no reason, however, to distinguish between terms stayed pursuant to section 654 and terms not so stayed. As the Brasure court noted, it is unlikely a defendant sentenced to life without parole will ever actually serve any part of the parole period (because of the life sentence), and it is therefore even more unlikely such a defendant will ever be required to pay the parole revocation fine. (Brasure, at p. 1075.) "Nonetheless, such a [parole] period [is] included in [a] determinate sentence by law and carrie[s] with it, also by law, a suspended parole revocation restitution fine." (Ibid.) This logic applies equally to sentences stayed pursuant to section 654, as there is nothing in the language of the relevant statutes to distinguish such sentences.

DISPOSITION

The 15-year enhancement imposed on count 1 pursuant to section 186.22, subdivision (b)(1), is ordered stricken. The court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations. We affirm the judgment as modified.

WE CONCUR: BEDSWORTH, ACTING P. J., ARONSON, J.

1. All further statutory references are to the Penal Code.

2. Defendant's gang nickname was Speedy at the time of the Raygoza murder.

3. The full question at issue was stated as follows: "Now, in this case if I give you a hypothetical that there was a female who was a West Myrtle Street associate and also hung out with Walnut Street, and she was also hanging out with the Loper gang members at a party, and she discussed the fact that someone was going to die about 3:00 o'clock amongst the Loper gang members, and they had knowledge that she's an associate to Walnut Street; that those gang members, specifically the person that goes by the moniker of Speedy, who is a Loper gang member, overhears this and believes that he may be a target of that particular crime; that the next day Speedy took this female for a walk down an alley and shot her repeatedly, to the point where she was killed. Based on those facts, do you have an opinion as to whether or not this particular offense was committed for the benefit of or in association with a criminal street gang?"

4. People v. Alvarado (2006) 141 Cal.App.4th 1577 (Alvarado) does not support defendant's position. In Alvarado, the

prosecutor stated in rebuttal closing argument that "'I have a duty and I have taken an oath as a deputy District Attorney not to prosecute a case if I have any doubt that that crime occurred. [¶] The defendant charged is the person who did it.'" (Id. at p. 1580.) The Alvarado court held this statement to be prosecutorial misconduct (in that it invited the jury to decide the case by deferring to the prosecutor's judgment rather than weighing the evidence) and further held no admonition could have cured the misconduct. (Id. at pp. 1584-1586.) There is no allegation of prosecutorial misconduct in this case. Moreover, the court in this case promptly and aggressively addressed the detective's improper testimony, which distinguishes the posture of our review.

5. The instruction stated, in relevant part: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because [he] acted in (imperfect self-defense/ [or] imperfect defense of another.) [¶]... [¶] The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if: [¶] 1. The defendant actually believed that (he/ [or] someone else/_____ was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] [If you find that Emily Raygoza threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.] [¶] [If you find that the defendant knew that Emily Raygoza had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.]

6. In relaying the story of the shooting to his fellow gang member, defendant mentioned that he saw a car "in the corner" prior to opening fire. There is no evidence in the record explaining whether seeing the car "in the corner" had anything to do with defendant's decision to open fire on Raygoza.

7. Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Thus, because both the murder and street terrorism counts against defendant arose out of his act of shooting Raygoza, the court stayed execution of the lesser sentence for street terrorism.