



People v. Cruz

2006 | Cited 0 times | California Court of Appeal | December 8, 2006

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OPINION

Introduction

A jury convicted Manuel Avendano Cruz of one count of attempted murder (Pen. Code, §§ 187, subd. (a), 664 [count 1]), two counts of assault with a deadly weapon (*id.*, § 245, subd. (a)(1) [counts 2 and 3]), and one count of residential burglary (*id.*, § 459, 460, subd. (a) [count 4]). The jury found true the allegations that Cruz inflicted great bodily injury under counts 1, 2, and 3, and found true the allegation that Cruz committed attempted murder willfully, deliberately, and with premeditation.

The trial court sentenced Cruz to a life term with possibility of parole on count 1. The court sentenced Cruz to two three-year terms on counts 2 and 3, enhanced with three-year consecutive terms for the great bodily injury findings, and to a concurrent four-year term on count 4. The court struck the great bodily injury enhancement on count 1. The court stayed sentence on counts 2 and 3 pursuant to Penal Code section 654, but declined to stay sentence on count 4.

Cruz challenges his conviction and sentence on two grounds: (1) the trial court abused its discretion by permitting a principal prosecution witness to testify as a rebuttal witness; and (2) the trial court violated Penal Code section 654 by imposing sentence under count 4.

We conclude: (1) the trial court did not abuse its discretion in permitting the rebuttal testimony because it was proper as a response to two defense exhibits; and (2) Penal Code section 654 applies to count 4 because Cruz harbored a single criminal objective in committing the crimes. We therefore affirm the judgment as modified to stay imposition of the four-year sentence on count 4.

Facts

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)



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In the early morning of October 15, 2003, Cruz attacked Hugo Bojorquez with a metal pry bar in the one-bedroom apartment in Anaheim that Cruz once shared with his girlfriend Alma Vazquez. Cruz and Vazquez had been a couple for seven years and were the parents of a six-year-old daughter. Cruz, Vazquez, and their daughter moved into the apartment in 2001.

In late 2002 or early 2003, Vazquez obtained a restraining order against Cruz after a heated argument in which he struck her. The argument erupted because Cruz believed Vazquez was having an affair with another man. Despite the restraining order, Cruz continued to live in the apartment with Vazquez and their daughter.

In August 2003, Bojorquez and his girlfriend Elsy Escobar moved into the apartment with Cruz, Vazquez, and their daughter. Bojorquez and Escobar slept in the living room, and Cruz, Vazquez, and their daughter slept in the bedroom. At that time, both Cruz and Escobar were employed by the same painting firm.

Cruz was unhappy with the living arrangement, but in September 2003 left to work temporarily in another state. When he returned a few weeks later, Vazquez asked him to move out of the apartment. Vazquez was afraid the police would find him in the apartment, in violation of the restraining order, and also wanted time "to be able to get my ideas together." A few days later, Cruz moved out of the apartment and gave Vazquez his apartment key.

Several weeks later, Escobar confronted Vazquez and asked whether she was having an affair with Bojorquez. Vazquez denied having any relationship with him. Escobar moved out of the apartment soon thereafter. Bojorquez stayed at the apartment and continued to sleep on the living room couch.

On the day Escobar moved out of the apartment, Cruz telephoned Vazquez and asked her why she had taken Escobar's boyfriend away. Escobar had told Cruz she had moved out because she thought Vazquez and Bojorquez were having an affair. Vazquez told Cruz that was not true.

On October 12, 2003 or thereabouts, Vazquez drove Cruz to look for work in the truck they owned together. Cruz told Vazquez he loved her, did not want to be separated from her and their daughter, and wanted her to tell Bojorquez to move out of the apartment. Cruz appeared desperate and spoke in a sad tone of voice. Cruz dropped off Vazquez at the apartment and drove away in the truck.

About 8:30 p.m. on October 14, 2003, Cruz called 911. Identifying himself as Gregorio Zuazo (Vazquez's brother), Cruz told the dispatcher he was concerned about the safety of his sister and niece. Cruz said that he had been speaking by telephone with Vazquez, when someone (Cruz believed her boyfriend) yanked the telephone from her. Cruz said he heard his niece start to cry. Cruz also told the dispatcher that Vazquez recently broke up with a boyfriend and was now living with another one. The court played the tape of this call for the jury, received the tape in evidence as exhibit G, and received the transcript in evidence as exhibit H.



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About 9:00 p.m. on October 14, 2003, police officers appeared at the apartment. According to Vazquez, they said they were looking for Cruz and left after searching the apartment. Anaheim Police Officer Jeffrey Burke, who responded to Cruz's 911 call, testified he was not looking for Cruz and did not tell Vazquez he was looking for him. Vazquez telephoned Cruz and told him the police had come to the apartment looking for him. The conversation ended by Vazquez hanging up on Cruz. Between 10:00 p.m. and 11:00 p.m., Vazquez's telephone rang 10 to 15 times. She did not answer because she believed Cruz was calling and did not want to argue with him. She went to bed after disconnecting the telephone. Bojorquez earlier had fallen asleep on the living room couch.

Sometime between 1:00 a.m. and 1:30 a.m. on October 15, Vazquez was awakened by a sound which she thought was caused by small stones being thrown against the sliding glass door dividing the bedroom and a balcony. She got up and heard the sound of the truck she owned with Cruz. Vazquez awakened Bojorquez, and told him Cruz was outside. Vazquez told Bojorquez she did not want any trouble and instructed him to leave the apartment through the bedroom balcony.

As Bojorquez walked toward the bedroom, Vazquez heard footsteps from just outside the apartment. Vazquez yelled at Cruz to leave. Hearing no response, she turned to Bojorquez and again told him to leave. Vazquez followed Bojorquez into the bedroom. When Vazquez heard a loud noise coming from an open window in the living room, she locked the bedroom door, reconnected the telephone, and dialed 911.

Cruz entered the apartment through the open window. He was holding a metal pry bar. Cruz forced open the bedroom door, rushed in, and attacked Bojorquez with the pry bar. Bojorquez was able to grab the rod but tripped and fell on the bed. As the two struggled, Cruz said he was going to kill Bojorquez. Cruz and Bojorquez fought from the bedroom, into the living room, and eventually made their way outside the apartment. Outside, Cruz pulled a knife out of his pocket, stabbed Bojorquez in the stomach and slashed his ear, and beat his head with the pry bar.

Anaheim Police Officer Paul Delgado arrived at the apartment in response to Vazquez's 911 call. He saw Cruz and Bojorquez struggling across a balcony walkway. Bojorquez was bent over, and Cruz's arms were underneath his abdomen. Delgado ordered them to stop. Bojorquez continued to yell, "help me, help me, somebody help me." Just then, Cruz and Bojorquez tumbled down the staircase at one end of the balcony. Delgado pointed his gun at them and ordered them to sit down. Bojorquez complied, but Cruz walked to the base of the staircase and placed a metal rod and a bloody knife on the ground before sitting down. Bojorquez had blood about his face, head, chest, and neck. He had stab wounds in his stomach and rib cage, and had a cut to his head. Cruz did not appear injured.

Anaheim Police Officer Michael Cunha followed Cruz as he was taken to a hospital. In the hospital emergency room, Cunha heard Cruz tell the attending physician he had gone to the apartment and saw a man with his wife. Cruz said he became angry when the man punched him through the window screen and retrieved a pry bar to defend himself. At the hospital, Delgado interrogated Cruz after he



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waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Bojorquez underwent surgery and spent four days in the hospital. He has scars on his chest and stomach.

Discussion

I. The Trial Court Did Not Abuse Its Discretion by Permitting Delgado to Testify as a Rebuttal Witness

Cruz asserts the trial court erred by permitting Delgado to testify as a rebuttal witness concerning his interrogation of Cruz at the hospital on October 15, 2003. Cruz argues that Delgado's rebuttal testimony should have been presented when Delgado testified during the prosecution's case-in-chief because it did not counter defense evidence or assertions other than those implicit in denial of guilt.

A. Background

Near the end of the defense case, the prosecutor advised the court he intended to call Delgado as a rebuttal witness. Delgado had testified during the prosecution's case-in-chief. According to the prosecutor's offer of proof, Delgado would testify as to what Cruz said during a post-arrest interrogation at the hospital emergency room on the morning of October 15, 2003. Defense counsel objected on the grounds that (1) Delgado's testimony would not counter defense evidence and (2) when Delgado testified during the prosecution's case-in-chief, "[n]o effort was made at that particular point in time by the People to solicit from him the defendant's statements."

In response to defense counsel's objection, the prosecutor asserted Delgado's testimony was both exculpatory and inculpatory, and was relevant to show "consciousness of guilt." The trial court disagreed, stating "[t]he only way I see you get any of this stuff in is for impeachment purposes." The prosecutor then asserted Delgado's testimony would rebut defense exhibit H, the transcript of Cruz's 911 telephone call on the night of October 14, 2003. The court permitted Delgado to testify for that limited purpose.

Delgado testified he interviewed Cruz on October 15, 2003 in the hospital emergency room. Delgado advised Cruz, who had already been placed under arrest, of his *Miranda* rights. After waiving those rights, Cruz stated he had gone to the apartment the previous night because Vazquez had told him to pick up a toolbox he had left there. Cruz claimed that he did not know another man was living in the apartment and that he was not aware his daughter was home. When Delgado told Cruz he had seen the fight with Bojorquez, Cruz denied having a knife.

B. Delgado's Rebuttal Testimony Was Proper as a Response to Defense Exhibits G and H



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The prosecution's rebuttal evidence "is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (People v. Daniels (1991) 52 Cal.3d 815, 859.) "Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid 'unfair surprise' to the defendant from confrontation with crucial evidence late in the trial." (People v. Young (2005) 34 Cal.4th 1149, 1199.)

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion." (People v. Young, supra, 34 Cal.4th at p. 1199.)

The trial court did not abuse its discretion by permitting Delgado to testify to rebut defense exhibits G and H. Defense counsel offered exhibits G and H as part of Cruz's case-in-chief to show Cruz was not "crazed" or "wildly jealous" on the night of October 14, 2003, but was genuinely concerned for his daughter's safety. Defense counsel argued Cruz went to the apartment in the early morning of October 15 to determine whether his daughter was "either crying [or] harmed." Delgado's rebuttal testimony tended to discredit exhibits G and H by establishing that Cruz told the police he had gone to the apartment to remove his toolbox-not to check on his daughter's safety-and did not know his daughter or Bojorquez were there. Delgado's rebuttal testimony was not "a material part of the case" and did not "tend[] to establish the defendant's commission of the crime" (People v. Carter (1957) 48 Cal.2d 737, 753) because the testimony tended to be exculpatory. Delgado testified that Cruz stated he had gone to the apartment the previous night to pick up a toolbox, did not know Bojorquez was living in the apartment, was not aware his daughter was home, and did not have a knife.

Permitting Delgado to testify in rebuttal was consistent with the purposes for imposing restrictions on rebuttal evidence. The prosecution presented his rebuttal testimony out of order-before the close of Cruz's case-in-chief-but the record does not suggest the jury was confused. Presenting Delgado's rebuttal testimony before the defense rested lessened the impact it might have had were it given at the very end of trial. We perceive no unfair surprise from Delgado's rebuttal testimony because Cruz apparently had the police report of the hospital interview for some time. Delgado's testimony was brief and, though relevant, was not crucial to proving guilt.

If the trial court erred in permitting Delgado's rebuttal testimony, the error was not prejudicial. Error in the admission of rebuttal evidence is prejudicial only if it was reasonably probable the jury would have reached a result more favorable to the defendant in the absence of the error. (People v. Crew (2003) 31 Cal.4th 822, 854; see People v. Watson (1956) 46 Cal.2d 818, 836.) Here, the evidence of guilt was strong. Cruz's claim of acting in self-defense after being punched through the apartment window screen was improbable and belied at every step by the evidence. "Thus, it is not reasonably likely that the jury would have reached a . . . verdict more favorable to [Cruz] without [Delgado]'s testimony." (People v. Crew, supra, 31 Cal.4th at p. 854.)



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II. The Trial Court Erred by Not Staying Imposition of Sentence on Count 4

The trial court sentenced Cruz to a term of life with possibility of parole on count 1 and sentenced him to a concurrent four-year term on count 4. Cruz asserts Penal Code section 654 required the trial court to stay imposition of sentence on count 4 because residential burglary was part of an indivisible course of conduct with a single objective. We agree.

Section 654, subdivision (a), reads 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." The purpose of section 654 is to prevent multiple punishment for a single act or omission even if the single act or omission violates more than one statute or constitutes more than one crime. (*Neal v. State of California* (1960) 55 Cal.2d 11, 20 (*Neal*).) Under section 654, "[i]nsofar as only a single act is charged as the basis for the conviction, . . . the defendant can be punished only once." (*Neal*, at p. 19.)

Under the multiple and independent criminal objectives test, "if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1212.) The multiple and independent criminal objectives test pertains, however, to cases in which the defendant's conviction was based on an indivisible course of conduct. That test arose in reaction to *Neal*, which stated, "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of [Penal Code] section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal*, supra, 55 Cal.2d at p. 19, italics added.)

In *People v. Latimer*, supra, 5 Cal.4th 1203, the California Supreme Court criticized *Neal*, but reaffirmed it as established law. Despite *Neal*, "cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*People v. Britt* (2004) 32 Cal.4th 944, 952.) The decision whether the defendant had multiple objectives is generally a question of fact for the trial court, and will be affirmed on appeal if supported by substantial evidence. (*Neal*, supra, 55 Cal.2d at p. 17; *People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.)

The evidence established that Cruz harbored the single criminal objective of murdering Bojorquez. Cruz committed the burglary only to effectuate this single objective. The prosecution successfully prosecuted Cruz on the theory he armed himself with a knife and pry bar and went to the apartment with that objective of killing Bojorquez. Notwithstanding the prosecution's theory, the Attorney



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General argues Cruz broke into the apartment with an objective other than to murder Bojorquez, discovered Bojorquez, and then decided to kill him. Under the evidence, however, Cruz must have formed his intent to kill Bojorquez before breaking into the apartment. In his 911 call on October 14, Cruz told the dispatcher he believed Vazquez was living with a new boyfriend. Cruz told Delgado in the hospital emergency room that someone punched him through the window screen and, at that point, he retrieved a pry bar to defend himself. Vazquez testified that when she heard Cruz outside the apartment, she yelled at him to go away. Cruz did not leave or ask about his daughter, but broke into the apartment and charged toward Bojorquez, who had fled into the bedroom.

Because Cruz acted with a single, indivisible intent, Penal Code section 654 required the trial court to stay imposition of sentence on count 4.

Disposition

The judgment is modified to stay imposition of sentence on count 4 pursuant to Penal Code section 654. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and send a certified copy of it to the Department of Corrections and Rehabilitation.

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

