The People v. Anthony Ricardo Cuellar

2011 | Cited 0 times | California Court of Appeal | March 10, 2011

P. v. Cuellar

CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Affirmed as modified.

A jury found defendant and appellant Anthony Cuellar guilty of robbing several banks and a nail salon. On appeal, defendant contends: (1) the trial court erred in instructing the jury with a consciousness of guilt pattern instruction; and (2) the trial court erred in rejecting his requests for a special instruction on his duress defense and a modification to the pattern instruction on the necessity defense. Defendant further contends, and respondent concedes, that: (1) the trial court imposed an unauthorized indeterminate sentence on three counts; (2) the trial court erred in imposing but staying certain enhancements, and (3) several corrections to the abstract of judgment are required. We modify the judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As the only issues on appeal concern defendant's assertion of duress and necessity defenses and sentencing issues, we briefly summarize the prosecution evidence in accordance with the usual rules on appeal. (People v. Zamudio (2008) 43 Cal.4th 327, 357.) Between January and September 2007, defendant robbed six banks. He robbed two of the banks twice. He also robbed a nail salon. Defendant used a gun to carry out the robberies.[1] He committed the robberies alone, driving himself to each one and leaving by himself.

At his trial in October 2009, defendant testified. He admitted he had prior convictions for robbery and grand theft. He also admitted that he robbed the banks and the nail salon as alleged. However, defendant claimed that he was forced to commit the robberies by La Eme, or the Mexican Mafia. Defendant's testimony was as follows. While he was in a prison camp in 2001 or 2002, he reencountered a friend from high school, David Moreno. Defendant was in prison for robbery.

Moreno was a member of La Eme, and the "shot caller" at the camp, which meant he settled problems among inmates and did things for La Eme. Defendant became Moreno's "right-hand-man" and received benefits like a cell phone, beer, and protection while at the camp. Defendant saw Moreno "beat down" several people at the camp. Defendant also witnessed acts of violence against inmates carried out at the direction of La Eme, including when one inmate was stabbed with a screwdriver because he owed La Eme money.

When defendant was paroled in 2006, he got married and moved out of his old neighborhood. However, around two and a half weeks after defendant was "jumped out of [his] neighborhood," Moreno called him. At some point, defendant went with Moreno to a meeting or get together attended by several people from different neighborhoods, including a man known as Ferny, who ran the "Southeast area" for La Eme. Ferny told defendant he "owed," and "they" had things they wanted him to do. When defendant asked, "what do you mean I owe?" two of the men got up, and one untucked his shirt so defendant could see the handle of the gun he was carrying. Defendant said he did not really want to do anything; he was "kind of out of everything;" he had a wife and kids and was "straight." Moreno told defendant "that is how it's going to be," and asserted defendant owed money. When defendant continued to say that he did not want to do anything, Ferny told him if he did not do what they said, he would not see his family anymore, and that they would hurt his family. According to defendant, Ferny said, "We are going to get your family before we get you because we know that's where it hurts."

Defendant testified that he did not contact the police because he did not trust them and felt La Eme could get to him, even in protective custody. Eventually, defendant was told he had to rob banks to pay back what he owed. Moreno and one other man, Toro, told him which banks to rob. Over the 10-month period in which defendant carried out the robberies, Moreno periodically reminded defendant that if he did not do what they said, Ferny would "take care of" his family before him since that would hurt him the most. Moreno and Toro taught defendant how to rob the banks, informing him about dye packs, certain managers, and bank procedures.

Defendant testified that he did not keep the money, but instead gave it to Moreno or a woman named Vivianna. Moreno gave defendant a cut of the money. Defendant did not believe he could reject the cut without getting into a fight with Moreno. From January to August 2007, defendant was also working full time as a deliveryman. However, he was in debt; he had balances on several credit cards and negative or zero amounts in his bank accounts.

On cross-examination, defendant said he talked to his parole officer about moving, but he was not allowed to leave the state. He conceded that if he had explained the situation to his parole officer it was possible a move could have been arranged. During the 10-month period, defendant went to sporting events with his children every weekend and took his family on a trip to Disneyland. He admitted that he chose to associate with La Eme while in prison in order to receive protection.

Mongols and Taglioretti Testimony

On cross-examination, defendant denied that Moreno was also "in with" the Mongols gang. When the prosecutor asked if defendant told FBI Special Agent Peter Taglioretti that Moreno was in with the Mongols, defendant responded: "He was friends with them, close ties. Never said he was a Mongol." The prosecutor also asked defendant to confirm that the first time he met with the FBI, he never mentioned anything about being threatened. Defendant said he was sure he did but he did not recall.

The prosecutor later offered the testimony of Special Agent Taglioretti. Taglioretti testified that at his first meeting with defendant after he was arrested, defendant did not mention that he was threatened. The first interview took place on a Friday; the following Monday, defendant's wife told Taglioretti that defendant wanted to speak with him. At the second meeting, defendant had "a lot of information . . . on different people," and he was concerned about threats made against him and his family. Defendant told Taglioretti he owed a debt to individuals in prison and they had him rob banks to pay off the debt. Defendant told Taglioretti he received 15 percent of the money from each robbery. Defendant did not mention anything about a meeting with Moreno and other La Eme gang members. He did not tell Taglioretti that La Eme threatened to burn his family. Defendant told Taglioretti that Moreno was close to the leadership of the Mongols and could introduce defendant to the Mongol gang. Taglioretti recalled that defendant mentioned La Eme and said La Eme was a southern Mexican prison gang. He did not recall defendant stating "they'd kill the family," but recalled that defendant was concerned for his family.

The parties subsequently stipulated that during Taglioretti's interview with defendant, defendant said: "La Eme, I don't fuck around with them. They'll kill me. If they don't kill me, they'll kill my family first. They know where I live. They'd kill me and my family."

The jury found defendant guilty of robbery as charged (Pen. Code, § 211).[2] On 40 of the counts the jury found true an allegation that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). The trial court subsequently found true the allegation that defendant suffered two prior strikes and serious felony convictions within the meaning of sections1170.12, subdivisions (a) through (d), section 667, subdivisions (b) through (i), and section 667, subdivision (a)(1). The court further found true the allegation that defendant had suffered three prison priors within the meaning of section 667.5, subdivision (b). The court sentenced defendant to a total of 1,948 years to life, composed of an indeterminate term of 1,118 years to life and a determinate sentence of 830 years.

DISCUSSION

I. The Trial Court Did Not Prejudicially Err in Giving CALCRIM No. 362

Defendant contends the trial court erred in instructing the jury with CALCRIM No. 362. We disagree and further conclude that even if the instruction was given in error, the error was harmless.

Over defendant's objection, the trial court instructed the jury with CALCRIM No. 362, which, as given, provided:

"If the defendant made a false or misleading statement related to the charged crime knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider [it] in determining his guilt. [¶] If you conclude the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."[3]

On appeal, both defendant and the People focus their arguments on whether defendant's trial testimony contradicted his pretrial statements. The People assert defendant's trial testimony was contradicted by his pretrial statements to Taglioretti, which did not include statements that La Eme threatened him or his family. Defendant argues the only difference between his pretrial statements and his trial testimony was that he purportedly did not tell Taglioretti about the gang meeting he attended with Moreno. Defendant asserts that because of this lack of contradiction, the effect of giving the instruction was to "inappropriately enhance the prosecution's theory that appellant was lying at trial."

However, the instruction could have applied to defendant's pretrial statements, his trial testimony, or both. At trial, Taglioretti testified that after defendant was arrested he said he owed a debt to people in prison and had to commit the robberies to pay off the debt; that he received a 15 percent cut of the robbery proceeds; that he was concerned for his family; that La Eme was a southern Mexican prison gang; and that Moreno was close to the Mongols gang. The parties stipulated that defendant on tape made statements regarding his fear that La Eme would kill him or his family.

The same evidence that allowed the jury to disbelieve defendant's trial testimony would have permitted the jury to also conclude that at least some of these pretrial statements were false or misleading. For example, defendant conducted the robberies alone, he did not tell his family about the threats, he did not attempt to move or remove his family from the area to protect them, and he did not make the statements immediately, but instead waited a few days. We reject defendant's contention that there was no evidentiary basis for the instruction.

Moreover nothing in the instruction suggested the jury was to use defendant's pretrial statements as a basis to find his trial testimony was false or misleading. But even if that were the case, we would find the suggestion harmless. People v. Beyah (2009) 170 Cal.App.4th 1241 (Beyah) considered a similar issue and is instructive here. In Beyah, the trial court instructed the jury with CALCRIM No. 362. On appeal the defendant argued that giving the instruction based upon trial testimony improperly singled out the defendant's testimony. The appellate court expressed its doubt that

CALCRIM No. 362 was intended to "permit an inference of consciousness of guilt based on knowingly false or intentionally misleading statements in a defendant's trial testimony," as opposed to pretrial statements. (Beyah, supra, at pp. 1248-1249.) But the court found the defendant was not prejudiced by the instruction because "California law makes clear that a defendant's false trial testimony may, in proper circumstances, be considered as evidence of consciousness of guilt." (Id. at p. 1249.)

The court further explained:

"As applied to this case, CALCRIM No. 362 did nothing more than state this principle, i.e., that if the jury concluded that defendant intentionally gave false or misleading testimony, it may infer that defendant is aware of his guilt and may consider that inference-along with other evidence-in determining defendant's guilt. And although it might be said that the instruction singles out the defendant's testimony as subject to heightened scrutiny compared to other witnesses, that is true only because the principle involved is uniquely applicable to the defendant. That is not, however, a legitimate ground for concluding that the instruction unconstitutionally burdened defendant's choice to testify or resulted in any improper inference of guilt based on the jury's evaluation of his testimony. Thus, defendant's first argument challenging the instruction in this case fails." (Beyah, supra, at p. 1250, fn. omitted.)

This reasoning applies here. To the extent CALCRIM No. 362 applied in this case to defendant's trial testimony as opposed to his pretrial statements alone, defendant suffered no prejudice. The jury could appropriately conclude defendant's trial testimony was false or misleading, based on either a comparison of the testimony with his pretrial statements or other evidence. The jury could then infer defendant was aware of his guilt and could consider that inference along with other evidence to reach a verdict.

Further, defendant concedes the California Supreme Court has held that a consciousness of guilt from false statements instruction is not an improper argumentative or pinpoint instruction. (People v. Kelly (1992) 1 Cal.4th 495, 531-532; People v. McGowan (2008) 160 Cal.App.4th 1099, 1103.) The instruction in this case did not mention any specific evidence and appropriately left it up to the jury to determine if it believed defendant made false or misleading statements before or at the trial. It also explicitly stated that the evidence of a false or misleading statement could not prove guilt by itself. We assume the jury followed the instruction given and find no basis for reversal. (People v. Yeoman (2003) 31 Cal.4th 93, 139.)

II. The Trial Court Did Not Err in Rejecting Defendant's Requests for a

Special Instruction on Duress or a Modification of the Necessity Instruction

A. Duress Instruction

The People v. Anthony Ricardo Cuellar

2011 | Cited 0 times | California Court of Appeal | March 10, 2011

At trial defendant requested a special instruction on duress. Defendant's proposed instruction read:

"The prosecution must prove that the defendant committed _____ with the required criminal intent and/or mental state. The defendant contends that (he/she) did not have the require [sic] [intent] [and] [or] [mental state] due to duress which caused (him/her) to reasonably believe that (his/her [or] someone else's) life would be in immediate danger if (he/she) refused a demand or request to commit the [alleged] crime. The prosecution must have prove [sic] that the defendant committed the [alleged] crime without duress as defined above. [¶] The defendant does not have to prove that (he/she) committed the [alleged] crime under duress. If you have a reasonable doubt about whether the prosecution has met this burden you must find the defendant not guilty."

The trial court denied defendant's request for a special instruction but gave CALCRIM No. 3402:

"The defendant is not guilty of robbery if he acted under duress. The defendant acted under duress if, because of threat or menace, he believed that his or someone else's life would be in immediate danger if he refused a demand or request to commit the crimes. The demand or request may have been express or implied. [¶] The defendant's belief that his or someone else's life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been immediate. [¶] The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of robbery."

The trial court did not err in denying defendant's request for a special instruction on duress. "A defendant is entitled, upon request, to a nonargumentative instruction that pinpoints his or her theory of the case. [Citation.]" (People v. Ledesma (2006) 39 Cal.4th 641, 720.) Here, the trial court instructed the jury on defendant's theory of the case, using CALCRIM No. 3402. On appeal, defendant does not argue CALCRIM No. 3402 was inaccurate or failed to include concepts his special instruction covered. Defendant's only argument is that he was entitled to his own special instruction covering the same subject matter. However, the instruction the trial court gave on duress was more complete than defendant's special instruction while including the same points. The trial court also instructed the jury on specific intent or mental state , as well as reasonable doubt and the prosecution's burden of proof.

Defendant identifies no authority, and we are aware of none, indicating the trial court must use defendant's requested language in a jury instruction.[4] In fact, case law provides otherwise. A trial court may properly deny a defendant's requested special instruction if it is duplicative of other instructions already given. (People v. Noguera (1992) 4 Cal.4th 599, 648.) As explained in one treatise, "[a]lthough the language of [section] 1127 implies that the judge must give any correct instruction requested by counsel, the only positive requirement is that the judge correctly instruct on any

pertinent matter. ([Section 1093, subdivision (f).]) Hence, the judge may modify any proposed instruction to correct defects in its statement of the law, in its form, or in its applicability to the case; the judge may reject a pertinent instruction that is substantially correct in content and form, and substitute his or her own correct and pertinent instruction; or the judge may reject the bulk of the defendant's instructions and substitute his or her own relatively complete set, provided that they fairly cover the issues." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 608, p. 867, italics omitted.)

Defendant contends the trial court should have given defendant's special instruction to "amplify" CALCRIM No. 3402. But, as we have noted, a trial court may reject a defense request for an instruction that is duplicative of other instructions. (People v. Catlin (2001) 26 Cal.4th 81, 152; People v. Dieguez (2001) 89 Cal.App.4th 266, 277.) All of the issues addressed in defendant's proposed duress instruction were covered by either CALCRIM No. 3402 or the court's other instructions. CALCRIM No. 3402 explicitly stated that it was the prosecution's burden to prove that defendant did not act under duress, and if the prosecution did not make that showing the jury had to find the defendant not guilty. Thus, the trial court did not err in denying defendant's request that his instruction be given instead of or in addition to CALCRIM No. 3402.

B. Necessity Instruction

Defendant further contends the trial court erred by refusing to modify the necessity instruction. The trial court informed the parties it would instruct the jury with CALCRIM No. 3403 on necessity. After describing the elements of the defense, CALCRIM No. 3403 states: "The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true." Defendant requested that the court change the instruction to read: "This is a lesser standard of proof than proof beyond a reasonable doubt."

We need not discuss the substance of defendant's contention because even if the trial court erred it is clear there was no prejudice to defendant under any standard. CALCRIM No. 3403 accurately defined the preponderance of the evidence standard for the jury; whether "different" or "lesser," the jury had the critical information about the standard--what it is and what the defendant had to prove to meet it. The trial court also instructed the jury on the reasonable doubt standard, so the jurors were able to discern for themselves that the reasonable doubt standard was more demanding than a preponderance of the evidence. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citations.]" (People v. Sanchez (2001) 26 Cal.4th 834, 852.) Even if the trial court's refusal to accept defendant's modification to the necessity instruction was error, it was harmless beyond a reasonable doubt.

III. Sentencing Issues and Abstract of Judgment Corrections

A. Unauthorized Sentence on Counts 1, 2, and 3

The parties agree that the trial court erred in imposing an indeterminate sentence of 26 years to life on counts 1, 2, and 3. Under sections 667, subdivision (e)(2)(A)(i)-(iii) and 1170.12, subdivision (c)(2)(A)(i)-(iii), the trial court was required to select the highest penalty of three choices: three times the term otherwise provided as punishment for the third "strike;" a 25-year state prison term; or the term for the underlying conviction including any enhancements. For each of the 43 counts, the trial court selected the high term of five years for robbery, added 10 years for the two enhancements under section 667, subdivision (a), added 10 years for the firearm enhancement under section 12022.53, and added one additional year for the prison term prior under section 667.5, subdivision (b), for a total of 26 years per count. This was the highest of the three possible sentencing choices. (§ 667, subd. (e)(2)(A)(iii); People v. Dotson (1997) 16 Cal.4th 547, 552-553.) However, a 10-year firearm use enhancement was not alleged as to the first three counts. As a result, the lengthiest sentence for those three counts was 25 years to life. (§§ 667, subd. (e)(2)(A)(ii), 1170.12, subd. (c)(2)(A)(ii).)

We may correct this error on appeal. (People v. Welch (1993) 5 Cal.4th 228, 235.) The indeterminate sentence on counts 1, 2, and 3 is modified to 25 years to life instead of 26 years to life.

B. Appellant's Three Prison Priors Should Have Been Stricken

The parties further agree the trial court erred in imposing but staying defendant's three prison priors. We agree. "Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]" (People v. Langston (2004) 33 Cal.4th 1237, 1241; People v. Jones (1992) 8 Cal.App.4th 756, 758.)

Defendant asks us to strike the enhancements. The People ask us to remand to the trial court to either impose or strike the enhancements. The trial court indicated it was imposing but staying two of the prison priors because they were subject to section 654, and, on the third, the trial court stated it was exercising its discretion to stay the enhancement in the "interest of justice." Further, the sentence here is an exceptionally long one. We see no need for a remand and modify the judgment to strike, rather than stay, the three prior prison enhancements.

C. Additional Abstract of Judgment Corrections

In addition to the modifications to the judgment described above, the parties agree two additional corrections to the abstract of judgment are required: (1) instead of listing 10 years as the principal or consecutive time imposed for all 43 counts, the abstract should reflect 25 years for counts 1 through 3, and 26 years for the remaining 40 counts; and (2) in section 14 regarding credit for time served, in the segment for local conduct credits, the box next to 2933.1 should be checked. In addition, we agree with the People that on the pages of the abstract reflecting the indeterminate terms, the box

indicating the sentence was pursuant to section 667, subdivisions (b) through (i) or 1170.12 should be checked.

DISPOSITION

As modified, the judgment is affirmed. The trial court is directed to correct the abstract of judgment as described above in part III, and to forward copies to the Department of Corrections and Rehabilitation.

We concur: RUBIN, J. FLIER, J.

1. In one of the robberies defendant used a pellet gun. He did not fire a gun in any of the incidents. According to defendant he used a real gun in only two of the bank robberies, and a pellet gun for the others because he did not want to hurt anyone.

2. All further statutory references are to the Penal Code unless otherwise noted.

3. In August 2009, the first sentence of CALCRIM No. 362 was revised to read: "If [the] defendant made a false or misleading statement before this trial relating to the charged crime. . . ." (CALCRIM No. 362 (2009 rev.) (2009-2010 ed.), italics added.)

4. The cases defendant cites mostly stand for the proposition that the defendant is entitled to instructions on the defense theory of the case. (See e.g., People v. Wright (1988) 45 Cal.3d 1126 [defendant entitled to have an instruction on factors to consider when evaluating eyewitness testimony]; Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1061, fn. 2 [civil case; footnote in dissent cites a Judicial Council note that recommends use of pattern instructions but also cautions that trial judges should give party-proposed jury instructions no less consideration than standard ones]; People v. Saille (1991) 54 Cal.3d 1103 [defendant entitled to "pinpoint" instructions upon request].) That is a different proposition from the one defendant advances here, namely that the trial court must use the exact language the defendant has requested.