Filed 12/20/12 P. v. Romero CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HERIBERTO ROMERO, Defendant and Appellant.	B232720 (Los Angeles County Super. Ct. No. VA112409)

APPEAL from a judgment of the Superior Court of Los Angeles County. Phillip H. Hickok, Judge. Affirmed with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Heriberto Romero appeals from a judgment entered after a jury convicted him of attempted murder (Pen. Code, §§ 664/187, subd. (a)) and assault with a firearm on a person (Pen. Code, § 245, subd. (a)(2)). He contends that the trial court committed reversible error when it failed to sua sponte instruct the jury on the lesser included offense of attempted voluntary manslaughter. Romero also requests that we conduct an independent review of the trial court's in camera hearing following his *Pitchess*[1] motion. Last, Romero asks us to correct a sentencing error.

The prosecution in a footnote seeks correction of the sentence to impose an additional $30 assessment for the second conviction.

We remand to the trial court with directions to correct the sentencing errors and in all other respects affirm the judgment.

FACTS AND PROCEEDINGS BELOW

I. Prosecution Evidence

The prosecution introduced the preliminary hearing testimony of Andrea Escobedo, the victim's girlfriend, who the court found to be unavailable to testify. Escobedo testified that on April 3, 2009, at around 3 p.m., she was sitting near Missouri Avenue and State Street, arguing with Michael Hernandez, the victim, when a girl wearing a hood and a Mexican teenaged male wearing glasses walked up. The male asked Hernandez, "Where are you from, Southside 13 Street."[2] The male then told the female to "pass him the handgun," Hernandez was "up and running" and the male "just started shooting." The male pointed the gun "towards where [Hernandez] was running" and shot seven times. Hernandez collapsed and Escobedo ran toward him. "Everything went by fast."

---

[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[2] According to a police expert, as of April 2009, Southside 13th Street was a gang with about 100 members and the intersection of Missouri and State was on the border of the territory they claimed in the city of South Gate.

Escobedo testified that the shooter was not in the courtroom but that she recognized Romero as a friend who she grew up with and knew as "Eddy." Escobedo was "certain" that Romero was not the person who shot Hernandez. During a photo array presented to her on the day of the shooting, she identified Romero as "the guy that [she] knew." But she was not picking out the person she believed to be the shooter. Underneath Romero's picture, she wrote "That's Eddy, but he looked different today." She did not recall telling an officer that she had seen the shooter before and that the shooter looked like someone she knew as "Little Eddy."

Officer Juan Gonzalez investigated the April 3, 2009 shooting and testified that he asked Escobedo on the day of the shooting whether she could recognize the shooter when he gave her the photo array and Escobedo responded "That's Eddie, but he looked a little different today."

The shooting victim, Michael Hernandez, testified that he was unable to identify his shooter and had never seen the shooter before. He stated that "Everything happened so, so fast," in a matter of seconds. He recalled being approached by a "black guy" walking down the street who looked at Hernandez so Hernandez said "What?" to the male, meaning "What was he looking at. Because I was there with my girl, it's none of his business." The male responded "What?" And Hernandez said "What do you mean 'What'?" Hernandez stood up and thought "we were going to fight." Hernandez did not walk towards the male who was about 18 feet away and did not have a weapon, but Hernandez did have his "hands in a fist, because if something was going to happen I wasn't going to get caught off guard." Hernandez believed that the conversation occurring "in front of my girlfriend, with a child inside her stomach" was "disrespectful."

Hernandez said, "What's up?" and the male called him "nigger" and Hernandez responded, "I'm not your nigger." The male then said "fuck you" and Hernandez responded, "What you mean? I'm not your nigger. I'm not black, don't call me a nigger." Hernandez then saw the gun, and thought "run," and ran. He was not sure how many shots were fired, but he had his back to the shooter running and was hit in the back

of the leg,[3] breaking the bone. A titanium plate was surgically inserted to help the bone heal and later surgically removed.

Hernandez said the male did not ask "where are you from?" He did not see anyone with the shooter. Hernandez said he did not know the term "SNR," denied he was a member of a street gang, but admitted that he used to be a member of a tagging crew.

According to Detective Derek O'Malley, a police gang expert, as of April 2009, Southside 13th Street was a gang with about 100 members, including Romero and his brother, and that the intersection of Missouri and State Streets was on the border of the territory they claimed in the city of South Gate. The expert testified that Southside 13th's rival at the Missouri and State intersection was Lynwood Varrio El Segundo and it's clique SNR or Show No Respect and that Hernandez and his cousin are members of SNR.

The police expert also testified that the phrase "where you from?" in gang culture is a challenge, a sign of disrespect, to put the other person on the spot. One of the most important things a gang member has is respect and if a member of a gang is attacked or beaten by a rival gang the expected response is to retaliate to show power and control and not show weakness. Shouting out the name of one's gang before committing a violent act is meant to show power and control and disrespect a rival gang in the neighborhood, as well as to intimidate the local citizens.

The expert also opined that after a member of Southside 13th Street had been beaten up by a rival gang and a member of Southside 13 went to the area of Missouri and State, approached Hernandez, asked him, "Where are you from," shouted out "Southside 13th Street" and then took a gun and fired six shots, one of which hit the victim in the leg, this would have been done to benefit Southside 13 by showing their power and their

---

[3] The doctor who treated Hernandez testified that the wound was on "the front middle" of his left leg.

swiftness with the violence and the intimidation factor and would have assisted, furthered or promoted future criminal conduct by members of Southside 13.

Officer Scott Guerrero testified that about five months after the shooting, on September 30, 2009, he spotted Romero on the stairs of his apartment building and asked Romero to place his hands up. Romero ran and ignored orders to stop. After the building was surrounded by police and other occupants exited, Romero was arrested and interviewed. Portions of the audio recording of Guerrero's interview of Romero were played to the jury.

In his police interview, Romero stated that on April 3, 2009 at about 3 p.m., he got into an argument with "some skinny guy" (Hernandez) at the intersection of Missouri and State Street. The male was there with his girlfriend (Escobedo), who Romero knew "since [he] was a little kid." Romero said that the male "tried to act rowdy with me and . . . I had friends around you know, I don't know, just everything happened."

Romero said that the argument arose out of Hernandez beating up Romero's friend, Danny Lopez, at school earlier. Lopez was part of Romero's crew, Straight Out Mexicans or SOM. Because Romero knew "all of them," apparently referring to the people involved in the fight at school, he knew where to go to "see like what's going on." He knew that Andrea (Escobedo) was "his [Hernandez's] girl" and asked, "What's up?" and Hernandez responded "What the fuck?" and "was just trying to act violent to me" and "acting rowdy with me." Romero told Hernandez and Escobedo "I know all you fools" and Hernandez responded, "fuck you fools."

Romero had a friend with him who handed him a .38-caliber handgun. When handed the gun, Romero said he "didn't think" and "wasn't trying to do nothing" and that he pointed the gun down, not at Hernandez, and pulled the trigger six times. Romero saw Hernandez fall and knew Hernandez had gotten shot. Romero then walked away and threw the gun down on State Street.

When asked again why he shot, Romero said, "'[c]ause I didn't think" and that he was trying to talk and "I turned and he [the friend] just handed it to me." Romero said

that he "pointed to the floor and shot" and that "I didn't really want to." Romero also said, "honestly, I was scared like 'cause he gave me this gun, you know."

When asked why he shot so many times, Romero responded "I felt like 'cause they were already following me and then like I had like he was [getting rowdy] with me and then – and so this person would have killed me."

Before the shooting, Romero went to an apartment complex to talk, and saw "a gang of people" and thought "they probably don't know why I'm coming here for" and he ran away. Romero was chased and eventually met up with his friend, telling his friend, "I'm being followed." The two of them then came across Escobedo with her boyfriend.

II. Defense Evidence

Petrina Kelley, an employee of the teen center located at the corner of Missouri and State Street, testified that she was at work on April 3, 2009 at about 3:00 or 3:15 p.m. when she heard five gunshots. Thinking that one of the center's students may have been shot, Kelley ran out the door and stood on State Street, peeking around the corner. She saw a small, skinny, Hispanic female with dyed blond or red hair running on Missouri with a individual she believed at the time to be a "male"[4] who was short, stocky Hispanic with short bangs and very long hair down to the "rearend," before separating with the "male" running toward Kelley and calling to the female "Come this way." The "male" saw Kelley watching and slowed to a walk, looking Kelley in the eye and passing less than two feet in front of her. Kelley saw the "male" put what she was "pretty sure" was a gun into the belt line of his jeans. Kelley did not see Hernandez.

Kelley told police what she observed and gave a description, stating that she would be able to identify the "male" but probably not the female. Police never contacted Kelley for any follow-up investigation, and she was never asked to view photographs of suspects.

---

[4] After the incident, Kelley saw the "male" doing community service at the teen center and discovered that the "male" was in fact a female.

III. Prosecution Rebuttal

The prosecution did not introduce any rebuttal evidence.

IV. Conviction and Sentence

The jury deliberated for about three hours over two days before it convicted Romero of one count of attempted murder, in violation of Penal Code sections 664/187, subdivision (a), finding to be true the allegation that the attempted murder was willful, deliberate and premeditated within the meaning of Penal Code section 664, subdivision (a), and of one count of assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2). As to the attempted murder count, the jury found that Romero had personally and intentionally used a firearm, discharged a firearm and discharged a firearm which caused great bodily injury within the meaning of Penal Code section 12022.53, subdivisions (b) to (d), and that the offense was committed for the benefit of a criminal street gang within the meaning of Penal Code section186.22, subdivision (b)(4), (5). As to the assault with a firearm count, the jury further found that Romero personally inflicted great bodily injury upon Hernandez within the meaning of Penal Code section 12022.7, subdivision (a), that Romero used a firearm within the meaning of Penal Code section 12022.5, and that the offense was committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1)(B)(C).

In bifurcated proceedings on prior convictions, the court dismissed a prior juvenile strike on prosecution's motion. The court sentenced Romero to "life plus 40 years to life" and "a minimum parole of 15 years" as well as to various assessments and fines.

DISCUSSION

On appeal, Romero raises three issues: he contends the trial court erred in failing to sua sponte instruct on the lesser included offense of attempted voluntary manslaughter, asks us to independently review the *Pitchess* hearing, and seeks to correct an error in the abstract of judgment.

I. Duty to Instruct Sua Sponte on Lesser Included Offense of Attempted Manslaughter

On appeal, we apply a de novo standard of review for claims of instructional error. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581 (*Manriquez*); *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

It is settled law that the trial court must instruct on lesser included offenses even in the absence of a request where the evidence raises a question as to whether all elements of the charged offense are present. (*People v. Barton* (1995) 12 Cal.4th 186, 195 (*Barton*).) "[I]n a murder prosecution, this includes the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied." (*People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*).) The Penal Code defines murder as "the unlawful killing of a human being . . . with malice aforethought" and defines manslaughter as "the unlawful killing of a human being without malice." (Pen. Code, §§ 187, 192.) Although generally the intent to unlawfully kill constitutes malice, malice is presumptively absent when the defendant acts on the unreasonable, but good faith belief, that deadly force is necessary in self-defense (the imperfect self-defense doctrine) or when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 153-154; *Manriquez*, *supra*, 37 Cal.4th at pp. 583-584; see Pen. Code, § 192, subd. (a).) These principles apply to attempted murder and the lesser included offense of attempted voluntary manslaughter. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 833-834.)

A trial court must sua sponte instruct on attempted voluntary manslaughter as a lesser included offense of attempted murder whenever there is substantial evidence to support the instruction, regardless of the tactics or objections of the parties or the relative strength of the evidence on alternate offenses or theories. (*Breverman*, *supra*, 19 Cal.4th at pp. 162, 169; *Barton*, *supra*, 12 Cal.4th at pp. 194-195, 201.) In this context, substantial evidence is defined as evidence which is sufficient to deserve consideration by

the jury, i.e., evidence from which a jury composed of reasonable persons could have concluded that the lesser, but not the greater, offense was committed. (*Breverman, supra*, 19 Cal.4th at p. 162.) The courts should not evaluate the credibility of witnesses. (*Ibid.*)

A. Imperfect Self Defense

"'"Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." [Citation omitted].'" (*Manriquez, supra*, 37 Cal.4th at p. 581.) As the Supreme Court has explained, "'imperfect self-defense is not an affirmative defense, but a description of one type of voluntary manslaughter. Thus the trial court must instruct on this doctrine, whether or not instructions are requested by counsel, whenever there is evidence substantial enough to merit consideration by the jury that under this doctrine the defendant is guilty of voluntary manslaughter. [Citation omitted.]'" (*Ibid.*)

The doctrine of imperfect self-defense, however, is narrow and "requires without exception that the defendant must have had an *actual* belief in the need for self-defense. We also emphasize what should be obvious. Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. "'The peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*' . . ." [Citations omitted.]'" (*Manriquez, supra*, 37 Cal.4th at p. 581.) Here, Romero's belief, even if actual, was not of imminent danger.

Romero argues that he was "scared"[5] and thought he might be killed, and that because of gang culture, that Hernandez's verbal disrespect for a rival's gang as

---

[5] Romero explained that he was "scared like 'cause he gave me this gun.'" He also stated that "this person would have killed me" possibly referring to Hernandez.

illuminated by the police expert, can result in violence or death and that from the totality of the circumstances there was substantial evidence to support an imperfect self-defense instruction. We disagree.

Although Romero had been chased earlier and may have been fearful, he was not followed to his encounter with Hernandez when he decided to continue trying to talk about the fight at school earlier. Romero's decision to continue trying to talk about the fight after being chased, does not suggest that he was fearful or believed he was in imminent peril. Likewise, although the encounter with Hernandez became hostile and confrontational, Hernandez was unarmed, standing 18 feet away from Romero and not moving closer when Romero took the gun from his companion. Hernandez ran away from, not toward, Romero with his back to Romero as Romero shot. This evidence likewise does not suggest that Romero feared serious imminent harm. To the extent Romero feared gang retaliation of some sort, such a fear would have been of a future harm as there was no substantial evidence showing that defendant actually, but unreasonably, believed he was in imminent danger of death or great bodily harm. As such, the evidence was clearly insufficient to require the trial court sua sponte to give an instruction regarding imperfect self-defense.

B. Sudden Quarrel or Heat of Passion

To justify an instruction of attempted voluntary manslaughter under the sudden quarrel or heat of passion theory, there would have to be substantial evidence that "'"'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'"'" (*Manriquez*, *supra*, 37 Cal.4th at p. 584; *Breverman*, *supra*, 19 Cal.4th at p. 163; *People v. Cruz* (2008) 44 Cal.4th 636, 664.) "[T]he passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion'"' [citation] other than revenge." (*Breverman*, *supra*, 19 Cal.4th at p. 163.)

As the Supreme Court has explained, "'Although section 192, subdivision (a), refers to "sudden quarrel or heat of passion," the factor which distinguishes the "heat of

passion" form of voluntary manslaughter from murder is provocation.'" (*Manriquez*, *supra*, 37 Cal.4th at p. 583.) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation] . . . or reasonably believed by the defendant to have been engaged in by the victim. (*People v. Lee* (1999) 20 Cal.4th 47, 59; *Manriquez*, *supra*, 37 Cal.4th at p. 583.) The provocative conduct by the victim may be physical or verbal; no specific type of provocation is required. (*Manriquez*, *supra*, 37 Cal.4th at pp. 583-584; *Breverman*, *supra*, 19 Cal.4th at p. 163; *People v. Wickersham* (1982) 32 Cal.3d 307, 326.)

The heat of passion requirement for manslaughter has both an objective and subjective component. (*Manriquez*, *supra*, 37 Cal.4th at p. 584; *Wickersham*, *supra*, 32 Cal.3d at pp. 326-327.) "The defendant must actually, subjectively, kill under the heat of passion." Plus, objectively, "'"the heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances."'" (*Manriquez*, *supra*, 37 Cal.4th at p. 584.)

Romero argues that the provocation of Hernandez's initiation of a confrontation, "'dissing'" of Romero's gang, verbal insults, and pugnacious posture spurred a sudden quarrel with Romero and spurred him to act rashly and out of passion.

There was no substantial evidence in this case showing that Romero's reason was in fact obscured at the time he chose to shoot at Hernandez. Likewise, there was no substantial evidence from which a juror could conclude that at the time of the shooting appellant's reason was obscured or disturbed by passion to such an extent as would cause a reasonable person to act rashly and without deliberation and reflection. The evidence showed either that Romero shot Hernandez without provocation, that Hernandez was verbally hostile saying, "'What?'" and "'I'm not your nigger'" before he was shot, or that Hernandez was verbally belligerent saying, "fuck you fools" and "acting rowdy" before Romero shot him. Assuming Hernandez was belligerent and yelling "fuck" to Romero, it is not substantial evidence from which a juror could conclude that the provocation was sufficient to cause an ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection. The evidence was, therefore, clearly insufficient

to require the trial court sua sponte to give an instruction regarding heat of passion or sudden quarrel.

II. Pitchess Motion

Before trial, Romero made a *Pitchess* motion for discovery of records that reflect "propensity for dishonesty" and "bias" as to Officer Guerrero. Romero claimed that he "never shot at any individuals" and "was coerced or intimidated into making the statement to the officer." Romero alleged that Officer Guerrero "pressured the defendant into making the incriminating remarks by telling the defendant that he would harass and bother defendant's mother and family if the defendant did not admit to shooting at the victim."

The trial court granted Romero's *Pitchess* motion and conducted an in camera review of the records of Officer Guerrero "regarding any allegations of coerced interrogation." No discoverable material was found.

On appeal, Romero requests that we independently review the in camera proceedings to determine whether the trial court properly exercised its discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228, 1232; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

The record indicates that the court complied with the procedural requirements of a *Pitchess* hearing. There was a court reporter present and the custodian of records was sworn prior to testifying. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228, 1229, fn. 4; *People v. White* (2011) 191 Cal.App.4th 1333, 1339-1340.) The custodian of records complied with the requirement to bring all the relevant personnel records and ultimately submitted them for the court to review and determine which documents were relevant. (*People v. Wycoff*, *supra*, 164 Cal.App.4th at pp. 414-415.) We note, however, that counsel for real party in interest, South Gate Police Department, erroneously believed that it would be sufficient simply for the custodian to testify that the custodian had reviewed the records and no investigations were relevant, without allowing the court to review the files. Here, as the trial court correctly realized, the trial court has a duty to review the files to make its own determination and ultimately did so.

We have conducted an independent review of the transcript and the documents, and find no error occurred during the *Pitchess* hearing in chambers.

III. Amending Abstract of Judgment

On appeal, Romero contends the abstract of judgment overstates the total time in state prison as "'life plus 40 years to life'" when the correct amount of prison time should be 40 years to life. The prosecution agrees.

At the sentencing hearing, the court indicated that the sentence "[f]or count 1, the attempted murder, that would be a life term. And because of the use of the gun, that would be an additional 25 to life pursuant to [Penal Code section]12022.53(d). In addition to that, because of the gang enhancement, I believe that is another life term with a 15 year minimum eligible for parole." The court asked the prosecution if that was correct, and the prosecutor responded "yes," but went on to clarify that the Penal Code section "186.22(b)(5) the court was mentioning ups the parole eligible date on the willful, premeditated attempt murder from 7 to 15 consecutive, to 25 to life for the gun, for a total commitment of 40 years to life."

Penal Code section 186.22, subdivision (b)(5) provides in relevant part: "[A]ny person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." As the Supreme Court has explained, "[u]nlike an enhancement, which provides for an *additional term* of imprisonment, the 15-year minimum term in section 186.22(b)[(5), formerly subdivision (b)(4)] sets forth an *alternate* penalty for the underlying felony itself." (*People v. Jefferson* (1999) 21 Cal.4th 86, 101.) Accordingly, the abstract of judgment should be amended to correct the sentence.

The prosecution also notes that the court should have assessed a $30 criminal conviction assessment pursuant to Government Code section 70373 for each of Romero's convictions. The trial court, however, only imposed a single $30 assessment. Accordingly, another $30 criminal conviction assessment should have been imposed.

DISPOSITION

The sentence is vacated and the cause remanded to the trial court with directions to correct the abstract of judgment to reflect a sentence of 40 years to life in state prison and to impose another $30 criminal conviction assessment. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.