Filed 4/12/12 P. v. Turner CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JARL TURNER,<br><br>Defendant and Appellant. | B230088<br><br>(Los Angeles County<br>Super. Ct. No. PA062301) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Burt Pines, Judge. Affirmed as modified and remanded for resentencing.

Christian C. Buckley, 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, Mary Sanchez and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jarl Turner, appeals the judgment entered following his conviction for voluntary manslaughter and possession of a firearm by a felon, with firearm use, prior prison term and prior serious felony conviction findings (Pen. Code, §§ 192, 12021, 12022.5, 667.5, 667, subd. (b)-(i)).[1] He was sentenced to state prison for a term of 34 years to life.

The judgment is affirmed as modified and remanded for resentencing.

**BACKGROUND**

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On the evening of June 26, 2008, Scott Goddard encountered defendant Turner, an acquaintance he had not seen for several years, at a liquor store in Sylmar. Turner was in the company of Charles Whitefield. Goddard chatted with Turner briefly and invited him over to his house for a visit. Goddard then purchased some beer and left. Later that night Goddard received a call from his half-sister saying Turner was at their house, so Goddard drove home. When he arrived, Turner and Whitefield were in the living room talking with Goddard's stepfather. Turner did not appear to be intoxicated.

Goddard, Turner and Whitefield went out to sit on the patio, talk and drink beer. Goddard had three or four beers. He wasn't keeping track of how much Turner drank, but he assumed Turner had been drinking about the same amount. Goddard talked about having purchased a new .40-caliber semiautomatic pistol. He went back into the house and retrieved the gun because he wanted to show it off. The magazine of the gun was loaded, but no round had been chambered.

Goddard and Turner talked about the gun and they each handled it. Then Turner and Whitefield began arguing about Whitefield's "friends being bad people that were out

---

[1] All further statutory references are to the Penal Code unless otherwise specified.

to get [Turner]." There was shouting, and Whitefield told Turner he didn't know what he was talking about. Turner had the gun in his hand but then he gave it back to Goddard.

Because of the argument, Goddard asked Whitefield to leave his house. Turner and Whitefield walked into the street, continued to argue, and shoved each other. Goddard and Turner told Whitefield to leave, but Whitefield said "he wasn't going anywhere." Turner walked over to Goddard and asked him for the gun. When Goddard refused, Turner said, "Don't worry, I'm not going to do anything," so Goddard gave it to him.

Turner then walked back toward Whitefield, pointed the gun at him and said, "You better get out of here." Either before or after pointing the gun, Turner "chambered the weapon." They were standing about 15 feet from each other. Whitefield said, "Fuck you, I'm not going anywhere. You may as well shoot me." Turner shot him in the chest. Whitefield put his arm across his chest, said, "Fuck you, shoot me again," and fell over.

Goddard asked Turner, "What did you do?" and Turner replied, "You got to get me out of here." Goddard described Turner's demeanor as panicked and angry. They got into Goddard's car and Turner directed him where to drive. When Goddard asked what had happened, Turner said something about Whitefield's "people were out to get him." Turner asked to be dropped off near a 7-Eleven a few blocks from Goddard's house.

Whitefield was pronounced dead at the scene. He had been shot once in the left chest. There was a small, unopened pocket knife in his pants. A single spent .40-caliber bullet casing was recovered from the street. A .40-caliber handgun, the gun's magazine, and eight live .40-caliber bullets were recovered from Goddard's car.

Stacy Lane and Turner were good friends. On the night of the shooting, Lane was at home in Sylmar around midnight when Turner knocked on his door. Turner was panicked and upset. He said there had been an altercation and he had shot their mutual friend Whitefield. Turner said Whitefield had been sent to kill him and that he had shot Whitefield in self-defense. Because Turner was yelling, Lane asked him to leave. Subsequently, Lane tried to convince Turner to turn himself in, but Turner decided to go to Texas instead.

Leadell Ivory, who was Turner's cousin, lived in Dallas. In late June 2008, Ivory saw Turner at his aunt and uncle's house in Dallas and over the next several days they spent a lot of time together. Turner told Ivory "he was in a bit of a pickle or some trouble . . . in California, that he and some other guy got into it over [Turner's] little sister." Turner characterized the trouble as "a disrespect issue over his little sister." He said they were arguing and he had shot the guy in the "[l]eft chest plate." But Turner also gave other explanations for the shooting, saying he "and a guy had gotten into it over some money or some issue," and "that he was arguing with another male . . . and they had been drinking heavily and he didn't know exactly what had transpired." When Ivory pointed out the different versions, Turner did not say anything in response.

Four days after Turner arrived, Ivory contacted the Dallas Police Department and Turner turned himself in.

2. *Defense evidence.*

Detective Terence Keyzer testified he interviewed Goddard's sister, who said she had run outside when she heard the gunshot and did not see anything in Turner's hand.

3. *Verdict.*

During closing argument, defense counsel argued the gunman had been Goddard, not Turner. The jury was instructed on first degree murder, second degree murder, and voluntary manslaughter on heat of passion and imperfect self-defense theories. The jury convicted Turner of voluntary manslaughter.

**CONTENTIONS**

1. The trial court erred by refusing to instruct the jury on a voluntary intoxication defense.

2. The trial court improperly sentenced Turner on a five-year prior serious felony conviction enhancement.

## DISCUSSION

1. *Voluntary intoxication instruction was properly refused*

Turner contends the trial court erred by refusing to instruct the jury on the effect of voluntary intoxication. This claim is meritless.

a. *Legal principles.*

Section 22, subdivision (b), provides: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." However, a defendant is not entitled to an intoxication instruction merely because there is evidence he or she *used* an intoxicating substance: "A defendant is entitled to [a voluntary intoxication] instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677; see *People v. Seaton* (2001) 26 Cal.4th 598, 666 [defense counsel's failure to request intoxication instruction could not have been prejudicial because, although defendant smoked cocaine and drank gin, beer and wine, the evidence "did not strongly suggest [these substances] prevented him from forming the intent to commit" the charged crimes]; *People v. Williams*, *supra*, at p. 678 [intoxication instruction unwarranted because "no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [intoxication instruction unwarranted where no evidence that defendant's beer drinking "had any noticeable effect on his mental state or actions"].)

b. *Discussion*.

When denying Turner's request for an intoxication instruction, the trial court said: "Goddard's testimony on this issue was quite vague. I believe he said – he, Goddard, had as I recall three to four beers. When asked about the defendant's consumption, all Goddard said was he assumed that the defendant had about the same. It's just an assumption there and [when he] was asked specifically whether the defendant appeared to be under the influence . . . Goddard said no. There's no evidence here . . . supporting the

claim of intoxication." We agree. While there was evidence Turner had consumed an unknown quantity of beer, there was no substantial evidence about what effect, if any, this alcohol had on his relevant mental state.

Goddard testified Turner did *not* appear to be intoxicated when he arrived home in response to his half-sister's call. Goddard gave no opinion one way or the other about Turner's subsequent state of intoxication. In the aftermath of the shooting, Turner had the presence of mind to direct Goddard to drive him to a safe location. When Turner subsequently told Ivory about the shooting, he very precisely and accurately recounted having shot Whitefield in the left chest. Turner did not testify and his defense was that Goddard had been the gunman. What was missing here was substantial evidence Turner had actually been impaired by the unknown quantity of beer he drank. "Evidence of 'gross intoxication'. . . is not a prerequisite to the giving of [intoxication] instructions; what is required is evidence from which a reasonable jury could conclude defendant's mental capacity was so reduced or impaired as to negate the required criminal intent." (*People v. Marshall* (1996) 13 Cal.4th 799, 848; see *People v. McNeal* (2009) 46 Cal.4th 1183, 1198 ["evidence of actual impairment may include . . . slurred speech, impaired motor skills, slowed or erratic mental processing, and impaired memory or judgment"].)

For instance, in *Marshall* there was evidence the defendant shot the victims while under the influence of having consumed champagne, brandy and malt liquor. The arresting officer described defendant as dazed, in a state of shock, and displaying abnormal behavior. There was also evidence that three hours after his arrest the defendant's blood alcohol level was .10 percent. *Marshall* held this evidence "did not require the giving of the requested instructions on intoxication. Although the offenses were committed after defendant had gone virtually without sleep for approximately 24 hours, and after he had drunk an unspecified number of alcoholic drinks over a period of some hours, *evidence of the effect of defendant's alcohol consumption on his state of mind is lacking*. One arresting officer testified that in his opinion defendant was sober when taken into custody. Although another officer testified defendant seemed 'dazed,' this falls short of a reasonable basis for concluding defendant's capacity to entertain the

mental state required for murder was diminished. Defendant's blood-alcohol content, tested about three hours after the shootings, suggested some impairment, as might have rendered him an unsafe driver, but *the record does not support a conclusion that at the time of the offenses defendant was unable to premeditate or form an intent to kill*.[2] Accordingly, because no reasonable jury would have so found, the trial court did not err in refusing the requested instruction." (*People v. Marshall, supra,* 13 Cal.4th at p. 848, italics added.)

Turner does not suggest, nor would we agree, the missing quantum of evidence can be derived from his statement to Ivory that he and the victim "had been drinking heavily and he didn't know exactly what had transpired." This lone statement was insufficient to establish that Turner's ability to formulate intent had been affected by the unknown quantity of alcohol he drank. The statement did not even amount to an assertion he was so drunk he could not remember having shot Whitefield. As our Supreme Court has instructed: " 'A trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the evidence should prove minimal and insubstantial,

---

[2] Turner argues, "Merely the consumption of four beers over a one hour period would likely have rendered appellant 'intoxicated' for purposes of California's drunken driving laws." But Turner's reliance on the DMV's blood alcohol level chart is misplaced. *People v. Ramirez, supra,* 50 Cal.3d 1158, pointed out the chart is based on certain assumptions: "By their own terms, the charts . . . do not purport to establish that a person of a given weight who has ingested a certain number of drinks will have a certain blood-alcohol level, or even that he or she will probably have such a level within a given margin of error. Instead, the document expressly provides that 'the charts have been constructed so that fewer than 5 persons in 100 will exceed these limits when drinking the stated amounts on an empty stomach.' Thus, many, perhaps most, persons who consume the specified number of drinks will have a lower blood-alcohol level than that indicated on the charts. [¶] Accordingly, defendant's blood-alcohol level cannot be 'extrapolated' from the charts. Any attempt to prove his blood-alcohol level from the number of drinks he consumed would require expert evidence taking account of defendant's individual characteristics. No such evidence was offered at trial." (*Id*. at pp. 1180-1181, fn. 10.)

however, the court need not instruct on its effect.' " (*People v. Ramirez, supra*, 50 Cal.3d at p. 1180.)

The trial court did not err by refusing to give a jury instruction on voluntary intoxication.

2. *Sentencing error must be corrected*.

Turner contends the trial court erred by imposing a five-year prior serious felony conviction enhancement in connection with count 2 (possession of a firearm by a felon, § 12021, subd. (a)(1)). As the Attorney General properly concedes, this claim has merit.

Section 667, subdivision (a)(1), provides for a five-year enhancement for "any person convicted of a serious felony who previously has been convicted of a serious felony." However, "a violation of section 12021, subdivision (a) is not a serious felony as defined in section 1192.7, subdivision (c), and is therefore not subject to section 667, subdivision (a)." (*People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Because the trial court here struck a one-year prior prison term enhancement finding (§ 667.5) in connection with count 2, on the ground it arose from the same underlying conviction as the section 667, subdivision (a), enhancement, the Attorney General asserts we should impose that one-year term in place of the improper five-year term. Turner disagrees, asserting we should do no more than strike the improper five-year term.

Neither position is correct. The proper thing to do is remand to allow the trial court to consider restructuring Turner's sentence in light of the sentencing error. (See *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614 [remand for resentencing proper where original sentence contained unauthorized enhancement]; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455-1458 [remand for resentencing proper where original sentence violated "double-the-base-term" rule].)

## DISPOSITION

The judgment is affirmed as modified and remanded for resentencing. The five-year section 667, subdivision (a), enhancement on count 2 is vacated, and the matter is remanded for resentencing and correction of the abstract of judgment in accordance with this opinion. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.