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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY EDWARD DIAZ II,

Defendant and Appellant.

B279931

(Los Angeles County
Super. Ct. No. BA429595)

APPEAL from the judgment of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Henry Edward Diaz II appeals from the 16-year sentence he received following his conviction for voluntary manslaughter (Pen. Code,¹ § 192, subd. (a)), with the finding that he personally used a firearm (§ 12022.5, subd. (a)). Diaz contends the trial court erred by imposing the high term on the firearm allegation, and asks that the matter be remanded for the trial court to exercise its discretion to strike the firearm enhancement pursuant to the recent amendment to section 12022.5, subdivision (c).

We affirm.

STATEMENT OF FACTS

On August 29, 2014, Lamont Jones, and his fiancée, Latasha Lumpkin, were involved in the deposit and cashing of a check with Marvin Carroll, Diaz's cousin.

There was a dispute about the proceeds of the check and on September 1, 2014, Jones, Lumpkin, and Mario King, a friend of Jones, confronted Carroll, Diaz, and some other friends while they were washing Carroll's car at a carwash. A heated argument over the check ensued. Diaz took out a gun and shot King twice. Diaz paused and shot him a third time as he ran away. Diaz then shot Jones in the back as he fled the scene.

King died from multiple gunshot wounds, one of which went through his heart. Jones died from a single gunshot wound to the back.

Diaz testified that King and Jones made statements and gestures which he took to be threatening. Diaz said he that retrieved a gun from under the passenger seat, but was not going to shoot unless a threat materialized and decided that he would

¹ All statutory references are to the Penal Code.

shoot King if King pulled a gun. King walked toward Diaz and told him that if he did not get the money from the check in five minutes, he was going to kill them.

King put his hand on his waist and Diaz walked up behind him. Diaz was afraid and “forced” himself to shoot King. Diaz felt that it was a “kill or be killed” situation. King was not looking at Diaz when he fired but his body was facing toward him.

Diaz was charged with the murders of Jones and King. (§ 187.) Both counts alleged a multiple-murder special circumstance and the use of a firearm. (§§ 190.2, subd. (a)(3), 12022.53, subds. (b), (c) & (d).) Diaz was found guilty of the voluntary manslaughter of Jones (§ 192, subd. (a)) and the allegation that he used a firearm in the commission of the offense was found true (§ 12022.5, subd. (a)). He was acquitted of all other charges.

Diaz was sentenced to an aggregate term of 16 years, comprised of the midterm of six years for voluntary manslaughter and the high term of 10 years for the firearm enhancement.

Diaz filed a timely notice of appeal.

DISCUSSION

1. The Upper Term Was Properly Imposed on the Firearm Enhancement

Diaz first contends the trial court abused its discretion by sentencing him to the high term on the firearm allegation. We find no error.

Diaz acknowledges that his trial counsel filed a sentencing memorandum that sought probation but did not object to or discuss the term on the firearm enhancement. He further acknowledges that although the trial court stated its reasons for

choosing the upper term on the firearm enhancement before imposing it, his trial counsel failed to interpose an objection. Accordingly, we find the error forfeited under the well-worn principles most recently enunciated in *People v. Scott* (2015) 61 Cal.4th 363, 406.

We nonetheless consider the merits of the appeal, as Diaz contends his trial counsel was ineffective for failing to object. “To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant.’” (*People v. Johnson* (2015) 60 Cal.4th 966, 979–980; accord, *In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Here, the trial court made a thoughtful and thorough analysis of the sentencing choices, and exercised them with great care and diligence. In considering the facts of the crime and the sentencing factors, the trial court stated, in pertinent part:

“The defendant . . . used the gun and killed a human being. Indeed the video evidence shows Mr. Jones posed no physical danger to the defendant in terms of what he was physically doing as the defendant shot him. While the jury exonerated the defendant of one of the homicides, the fact remains in the moment he acted, the defendant killed two human beings with the use of a firearm.

“. . . The video shows Mr. Jones attempted to flee when he was shot in the back. The defendant’s act in killing Mr. Jones, which is the basis of the conviction on voluntary manslaughter, is not less

serious than other voluntary manslaughter cases I have handled in my 18 years on the bench.

“The defendant further claims he participated in the crime under circumstances of great provocation. When witnesses, including Marvin Carroll, were initially interviewed, no one said anything about a comment by Jones or King to retrieve a gun or that King threatened to shoot everyone unless they were paid. To be sure, the verbal argument about the check in the parking lot was getting out of hand. Even the bystander who took the video footage from the drive-through line thought something was about to happen.

“The elevated nature of the verbal confrontation does not, however, mean defendant acted because of great provocation. Carroll did not think his life was in danger. Defendant’s acts surprised him.

“... I ... agree, [with the probation report], that the defendant engaged in violent conduct which indicates a serious danger to society; that the crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness, or callousness; and that the defendant was on probation [or parole] at the time the crime was committed.

“... As for the personal use of a firearm enhancement, the court finds that the defendant has engaged in a pattern of violent conduct which indicates a serious danger to society. The crime also involved great violence which shows viciousness and callousness towards other human beings. I also find that the defendant was on probation at the time the crime was committed. Because of these aggravating factors, the imposition of the high term of ten years is appropriate for the enhancement on the firearm.”

Diaz concedes that he was on probation at the time of the commission of the offense in this case and that the third factor in aggravation is established by the record. However, he argues that the record does not support the findings that the crime involved “act[s] disclosing a high degree of cruelty, viciousness, or callousness” and that his violent conduct “indicates a serious danger to society.”

In determining whether the use of a firearm is “cruel, vicious, or callous” in the context of a specific case, we must consider the circumstances of that case within the “entire spectrum” of firearm use. (*People v. Collins* (1981) 123 Cal.App.3d 535, 538–539.) The use of a firearm can run the gamut from simply displaying the firearm (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1472), to cocking the gun and training it on the victim over a significant period of time (*Collins*, at p. 538), to killing another human being by discharging the firearm. Based on a review of the facts of this case, where Diaz killed two people with the firearm, one by shooting him in the back as he attempted to flee, we find that Diaz’s use of the firearm does reflect “a high degree of cruelty, viciousness, or callousness.”

People v. Nevill (1985) 167 Cal.App.3d 198, 206 (*Nevill*), upon which Diaz relies, does not aid his cause. In *Nevill*, the defendant shot his disabled wife 10 times with a high-powered assault rifle while her small child stood next to her. As Diaz observes, the Court of Appeal held that a trial court must look beyond a “casual reading” of the factors in aggravation in order to find the use of a firearm to be aggravated under California Rules of Court, rule 4.421(a)(1). (*Nevill*, at p. 206.) Further, a trial court must look at callousness on the part of the *perpetrator* in

determining whether the shooting “transcend[s] that which is necessarily inherent in an intentional killing.” (*Ibid.*) The Court of Appeal found the “slaughter” in *Nevill* to be particularly “cruel, vicious, or callous,” beyond the statutory definition of voluntary manslaughter.

While the facts underlying the gun use in *Nevill* are certainly more egregious than those presented here, the firearm use in this case still “transcends” that which is inherent in an intentional killing and was particularly “cruel, vicious, or callous.” Diaz shot Jones, who was defenseless and posed no threat, in the back as he was attempting to flee after Diaz shot King multiple times. As the trial court noted, while Jones’s conduct may have contributed to the confrontation at the carwash, he did nothing to suggest that he was personally armed. This demonstrated exactly the “cruelty, viciousness, or callousness” that aggravates a charge. (See *People v. Young* (2005) 34 Cal.4th 1149, 1231–1232.)

In order for violent conduct to be considered to aggravate a sentence, the circumstances of the crime must demonstrate violence that exceeds the force necessary to commit the crime itself. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1472; *People v. Key* (1984) 153 Cal.App.3d 888, 901, fn. 18.) We find that the circumstances of this crime support the trial court’s conclusion that its violence exceeded that which was necessary to its commission.

By his own admission, Diaz was aware there were bystanders and small children nearby when he began shooting, seemingly indiscriminately. Moreover, Diaz reacted to the perceived threat in the most violent way possible, shooting and killing two people, even though neither of them had displayed a

weapon and Jones was fleeing at the time he was shot in the back. Before either man was shot, Diaz had a tactical advantage because he had his weapon out, loaded, and ready to fire. Notwithstanding that, he took no action to resolve the dispute by anything other than killing Jones and King. These facts supported the trial court's decision that the gun use reflected violent conduct that made Diaz a danger to society.

In sum, we find that counsel was not ineffective for failing to object to the imposition of the high term on the firearm enhancement given that the trial court properly relied on the sentencing factors it enunciated. Likewise, given the court's statements, we find it is not reasonably probable that a lesser sentence would have been imposed on the enhancement had he done so.

2. Remand Is Not Required

On January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect, which amends section 12022.5, subdivision (c), to remove the prohibition against striking the gun use enhancements under this and other statutes. (Stats. 2017, ch. 682, § 1.) The discretion to strike a firearm enhancement under section 12022.5 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; see also *People v. Brown* (2012) 54 Cal.4th 314, 323.) Here, the parties do not dispute that Diaz's case was not yet final and the law applies retroactively to him. We agree. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 [“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 [“[a] judgment becomes final when the availability of an appeal

and the time for filing a petition for certiorari have expired”]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 [“The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.”].)

The Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) to argue remand is unwarranted because there is no reasonable possibility the court would exercise its new discretion to strike the firearm enhancement. In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence, which included an enhancement for a prior strike conviction and two other discretionary enhancements. (*Id.* at p. 1896.) While the defendant’s appeal was pending, the Supreme Court held that trial courts have discretion to strike three strikes prior convictions in the furtherance of justice. The Court of Appeal, however, declined to remand for resentencing. The court reasoned it was obvious the trial court would not exercise its newfound discretion given it increased the defendant’s sentence beyond what it believed was required by the Three Strikes law and stated the maximum sentence was appropriate. (*Ibid.*)

The same is true in this case. Here, the trial court stated that it did not have authority to strike or dismiss the section 12022.5, subdivision (a) firearm allegation, but went on to make detailed findings that more than justified the imposition of the high term for the enhancement. Diaz points to nothing in the record that hints that the trial court would strike or dismiss the firearm enhancement that was found to be so aggravated that it warranted the maximum sentence, a determination that was well within its discretion and amply supported by the evidence.

DISPOSITION

The judgment is affirmed.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.