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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARIO MONTEJANO, Defendant and Appellant.	B229753 (Los Angeles County Super. Ct. No. A027374)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed as modified.

Laura E. Rosenthal, 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, Senior Assistant Attorney General, Susan Sullivan Pithey and David Zamri, Deputy Attorneys General, for Plaintiff and Respondent.

Mario Monejano appeals from the judgment entered on his conviction of first degree murder. Before this court, appellant argues insufficient evidence supported the finding that the murder was premeditated and deliberate. As we shall explain, we disagree. Nonetheless as appellant properly argues and the Attorney General concedes, appellant's sentence contains errors and must be modified. Accordingly, we modify the judgment and, as modified, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Relationship Between Appellant and the Victim

In the early 1980s when the events at issue occurred, the Gaviotas Club was owned by Salvador Gonzales and Antonio Gonzales.[1] Antonio testified that the victim, Gloria Sanchez, had worked at the club as a bartender for a few months, and appellant was there almost every day. Appellant dated the victim, and frequently drove her to and from work at the Gaviotas Club. Appellant said he dated Gloria, among other women. At the time appellant was dating the victim, he was also married, and had two other girlfriends.

Appellant had a semiautomatic nine-millimeter gun. Antonio observed appellant with a gun on two occasions. On one of these occasions, Antonio testified he saw appellant struggling with the victim; the victim tried to prevent appellant from shooting at the man with whom appellant had an altercation, and Antonio told appellant not to shoot the man because he appeared to be unarmed.

Salvador had seen appellant at the bar almost every day while the victim worked there, and had witnessed appellant with a gun only four or five times. Salvador remembered two public fights between appellant and the victim, and saw bruises on her arm a couple of times. Salvador told police that one time he overheard appellant tell the victim that, "he was going to shoot her if she didn't come over and get in the truck."

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[1] Salvador Gonzales and Antonio Gonzales are not related. They are referred to in the facts by their first names to avoid confusion.

B. The Shooting

On July 16, 1983, the day of the shooting, Antonio and Salvador saw appellant drinking at the bar while the victim was working. When Salvador arrived at the bar, appellant introduced him to a man siting next to him. At around 9:20 p.m., the victim called Antonio and Salvador to ask for quarters. Shortly after, Antonio and Salvador were in the club office and heard shots and screaming coming from the club. Salvador heard a "boom," followed by screaming, and a series of "booms." Antonio opened the office door and saw people running. He asked some of the people what happened and was told that appellant had shot the victim.

Salvador saw appellant run. Appellant then appeared in the front doorway of the club, holding a gun. Appellant pushed his white cowboy hat upward, raised and lowered the gun while pointing it at Antonio, and then ran out of the front door. Antonio was too far away to see if appellant had actually tried to fire the gun at him.

Long Beach Police Department Sergeant Daniel Brooks arrived at the club at 9:44 p.m. and found the victim lying in a pool of blood behind the bar. Senior Deputy Medical Examiner Dr. William Sherry performed an autopsy and testified that there were 11 holes caused by seven gunshot wounds. The trajectory of the bullets varied, and some hit her in the front of her body and some hit her in the back of her body. The victim's death was not instantaneous, and it took a minimum of five minutes for her to die. Additionally, the shots were fired at close range, appellant either walked around the bar to shoot the victim, or leaned over into the bar area before firing.

After the shooting, appellant sold his gun, abandoned his truck on the side of the road in Compton, and fled to Mexico. He returned to the United States periodically to work in the fields and construction.

C. Appellant's Arrest and Interview

In 2008, appellant was arrested in Calexico attempting to cross the border into the United States.

On August 14, 2008, Detective Mendoza interviewed appellant. The interview was conducted in Spanish. Appellant initially answered questions about his wife and

companions, and the fields he worked in periodically in the United States. Appellant told Detective Mendoza where he liked to drink alcohol in the 1980's, and initially denied ever having been to the Gaviotas Club. Appellant said he had multiple girlfriends during the period, including the victim.

When questioned by Detective Mendoza, appellant identified a photograph of the victim, but initially stated he did not know what happened to her. But after examining the photograph, appellant said that it appeared the person depicted in the photograph had been shot, even though the picture did not show the lower portion of the body which had sustained the bullet wounds. The knowledge that the victim had been shot led Detective Mendoza to question appellant further. The appellant eventually replied, "this is what happened. What can I say, that's why we're going to where you wanted to arrive, well here goes…" Appellant then confessed to shooting the victim due to "some jealousy."

Appellant stated he loved the victim, and had "great affection" for her, but she answered him with "some bad words." This "blinded" appellant, which caused him to "commit the mistake." Appellant said he was jealous because the victim "rejected him," but also stated that he thought, "maybe she was going to break up with me."

D. The Charges, Trial and Verdicts

Appellant was charged in count 1 with premeditated and deliberate murder in violation of Penal Code section 187, subdivision (a) (murder). During trial the jury was given the transcript of appellant's interview with Detective Mendoza. The jury found appellant guilty as charged.

Appellant was sentenced to state prison for 25 years to life. The court awarded appellant 814 days of presentence credits. The court also imposed a $200 restitution fine, and a $200 parole revocation fine which was stayed.

Appellant appeals.

DISCUSSION

Appellant claims the evidence was insufficient to support his conviction and evidence in the record cannot support a finding that appellant acted with premeditation and deliberation when he shot and killed the victim. Appellant contends that based on the

evidence presented, the jury could not have found he acted without premeditation and deliberation, and thus should have convicted him of a lesser offense.

I. Sufficiency of the Evidence Supporting the Conviction

In an appeal raising a sufficiency of evidence challenge, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Nonetheless, on appeal, the test is whether there is substantial evidence to support the conclusion of the trier of fact, not whether guilt is established beyond a reasonable doubt. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1132.) We therefore review the record "in the light most favorable to the judgment below to determine whether it discloses substantial evidence" supporting each element of the crime, and we must presume in support of those findings the existence of every fact that one could reasonably deduce from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 562, 576.) "[S]ubstantial evidence" is "evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id*. at p. 578; *People v. Abilez* (2007) 41 Cal.4th 472, 504.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Majors* (2004) 33 Cal.4th 321, 331 [the reviewing court does not resolve evidentiary conflicts, but views the evidence in a light most favorable to the People, and presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence].) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) With these principles in mind, we consider the evidence of premeditation and deliberation presented by the record on appeal.

Here, substantial evidence showed that appellant shot and killed the victim in a manner consistent with premeditated and deliberate first degree murder. In *People v. Anderson* (1968) 70 Cal.2d 15, the California Supreme Court identified three types of

evidence used to sustain a finding of premeditation and deliberation: (1) planning activity leading to a homicide; (2) a relationship between the accused and the victim that would demonstrate a motive for the killing and thereby explain the homicide; and (3) a manner of killing consistent with careful thought or execution. (*Id.* at pp. 26-27.) Premeditation and deliberation can be formed quickly, "the test is not time, but reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." (*People v. Osband* (1996) 13 Cal.4th 622, 697; *People v. Thompson* (2010) 49 Cal.4th 79, 114.)

Sufficient evidence supports all three factors here. First, there is evidence from which the jury could infer *planning*, the first of the *Anderson* factors. Appellant confessed to killing the victim. Appellant had threatened to shoot the victim for disobeying him. Appellant subsequently and intentionally wore his gun to the club on the night of the shooting. (*People v. Romero* (2008) 44 Cal.4th 386, 401 [bringing a gun to a shooting shows planning].)

The second *Anderson* factor is established by appellant's violent and controlling history with the victim before the fatal shooting occurred, supporting *motive*. In his interview with Detective Mendoza, appellant indicated the killing was the result of the possibility that she may be breaking up with him, his loss of control over her and jealousy.

Importantly, the *manner* of the killing also indicated it was the result of calculation and deliberation. (*Anderson*, *supra*, 70 Cal.2d at p. 29 citing *People v. Cartier* (1960) 54 Cal.2d 300, 309 [finding the manner of killing must have been the result of calculation].) The evidence—that appellant took out a semiautomatic weapon and fired seven separate times. The victim suffered independent gunshot wounds inflicted at close range, and there was a discernable stop between the first shot and the subsequent shots. The medical examiner's report established that the shots continued as the victim flailed and fell to the ground. Appellant then fled the scene as the victim lay dying. (*People v. Manriquez* (2005) 37 Cal.4th 547, 588 [finding that multiple gunshot wounds at close range, when defendant continued to intentionally fire after hitting victim, characterized an intentional

murder].) Thus, the manner of the murder also supports a finding of premeditation and deliberation.

In our view, the jury was provided with sufficient evidence to support the reasonable inference that appellant acted with premeditation and deliberation.

II. Sentencing Errors

The trial court awarded appellant with 814 days of presentence credit, consisting of 814 actual days and 0 days of conduct credit. Appellant argues the sentence imposed in this case violates the principles of ex post facto and must be modified. Appellant contends that in addition to the award of actual days in custody, he is also entitled to 406 days of presentence custody conduct credit under the 1983 Penal Code. Appellant also contends that his $200 restitution fine and his $200 parole fine must be stricken. As the Attorney General concedes, appellant is correct.

Before 1972, there was no statutory authority in California for an award of credit for presentence confinement. (*In re Banks* (1979) 88 Cal.App.3d 864, 868). The calculation of presentence conduct credit for murderers was implemented in 1972 when sections 2900.5 and 2900.6 were added to the Penal Code. Subsequently "these statutes were revised and combined into the present section 2900.5," and in 1978, section 2900.5 was amended to include conduct credits pursuant to section 4019. (*Ibid*.) Although the calculation for presentence conduct credit for those convicted of murder has changed, in 1983 section 4019, subdivision (a) stated that, "[f]or each six day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his . . . period of confinement . . . ."

The ex post facto clause of the California Constitution is interpreted identically to its federal counterpart. (*People v. McVickers* (1992) 4 Cal.4th 81, 86.) Specific types of retroactive legislative action are prohibited, including: legislation "[1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." An ex post facto violation occurs "where laws setting the

length of a prison sentence are revised after the crime to contain either a longer mandatory minimum term, or a higher presumptive sentencing range." (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 182.)

Although the current versions of the Penal Code have eliminated the award of such credits for convicted murderers, the pertinent statutory language did not go into effect until after defendant's crime on July 16, 1983, and the limitations on presentence conduct credits cannot be applied to defendant. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308.) The trial court did not grant appellant any conduct credit for his presentence custody of 814 days. The relevant provision controlling presentence conduct credit in 1983 was section 4019, subdivision (f), which awarded credit of two days for every 4 days spent in jail. Accordingly, appellant is entitled to 406 days of conduct credit. (See *In re Marques* (2003) 30 Cal.4th 14, 16 [calculation of conduct credits].)

Under the same ex post facto principle, California "courts have consistently held restitution fines qualify as punishment for purposes of the ex post facto clause. Therefore, although the purpose of a restitution fine is not punitive, we believe its consequences to the defendant are severe enough that it qualifies as punishment for purposes of the ex post facto clause." (*People v. Callejas* (2000) 85 Cal.App.4th 667, 670-671.)

Section 1202.4, subdivision (b), effective January 1, 1984, provides that, "[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine . . . ." Additionally, section 1202.45, effective August 3, 1995, provides, "[i]n every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of section 1204.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of section 1204.4. . . ."

In July of 1983, when appellant committed the crime, California did not have statutory authority in place imposing a restitution fine or a parole revocation fine. The trial court ordered appellant to pay a $200 restitution fine and a $200 parole revocation

fine. However, because appellant's crime predates the implementation of these fines, neither of the fines may be applied to him. Accordingly, the restitution and parole revocation fines were improperly imposed.

In addition, the trial court failed to impose a $40 criminal conviction assessment pursuant to Government Code section 70373. The imposition of these court fees does not violate the constitutional protection against ex post facto laws, and a judgment may be modified on appeal to include a mandatory fee the lower court failed to impose. (*People v. Alford* (2007) 42 Cal.4th 749, 750; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1328.) Accordingly, the judgment must be modified to impose the mandatory $40 criminal conviction assessment fee.

DISPOSITION

The judgment is modified and corrected as follows: (1) to reflect a total 1,220 days of presentence custody credit (814 days of credit for time actually served in presentence custody plus 406 days of presentence conduct credits) (2) to strike the $200 restitution fine and $200 parole revocation fine; and (3) to impose a $40 criminal court assessment fee. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.