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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ABRAHAM GONZALEZ,

Defendant and Appellant.

2d Crim. No. B291937
(Super. Ct. No. 2017023559)
(Ventura County)

Abraham Gonzalez appeals after a jury convicted him of first-degree murder (Pen. Code,¹ §§ 187, subd. (a), 189) and found true an allegation that in committing the murder he personally and intentionally discharged a firearm (§ 12022.53, subd. (d)). In a bifurcated proceeding, appellant admitted the special-circumstance allegation that he was an active gang member who intentionally killed his victim to further his gang's criminal activities (§ 190.2, subd. (a)(22)), and also admitted he committed the crime on behalf of his gang as provided in subdivision (b)(1) of

¹ All statutory references are to the Penal Code.

section 186.22. The trial court sentenced him to a state prison term of life without the possibility of parole (LWOP) plus 25 years to life. Appellant contends the court erred in sustaining a prosecutorial objection during the defense's closing argument. He also claims that his LWOP sentence is unconstitutional and that the court abused its discretion in denying his request to continue his sentencing hearing. We affirm.

STATEMENT OF FACTS

In February 2014, appellant was an active member of the Lemonwood Chiques gang in Oxnard. On the evening of February 23, appellant called fellow Lemonwood Chiques member Jacob Cabral² and told him, "Hey, it's gonna like get hot, you know, go home." Cabral understood this to mean "something was gonna happen" and that "a lot of activity was gonna go on."

That same night, David Burns, his adult niece Christina Sirotta, and neighbor Austin Martin were in the garage of Burn's Oxnard home with the garage door open. Martin was sitting on a couch playing a video game, Burns was on a love seat looking at his laptop computer, and Sirotta was sitting on the arm of the love seat with her iPad. Burns looked up and saw appellant standing near the front of the garage. Appellant was wearing a black hoodie sweatshirt and black pants and his face was partially covered. He pointed a gun at them and asked, "Where you guys from?"

² Cabral testified for the prosecution after acting as a confidential informant in the case. Cabral agreed to act as an informant and testify against appellant in exchange for a promise of leniency on unrelated charges in another case. Cabral ultimately pled guilty in that case to assault with a deadly weapon and admitted gang, firearm use, and great bodily injury allegations.

Burns, Sirotta, and Martin raised their hands and told appellant they were “from nowhere” and “didn’t gang bang.” Appellant referred to the Lemonwood Chiques, identified himself by his gang moniker “Lil One,” and walked away toward a neighbor’s yard.

Sirotta told Burns to close the garage door and got up to go inside the house. Seconds later, appellant reappeared in the driveway and Sirotta ran in the house and called 911. Appellant announced “[t]his is Lemonwood Chiques,” repeatedly fired his gun at Martin, and ran away. Martin suffered a fatal gunshot wound to his head. Later that night, appellant called Cabral and said, “Hey, I’m cool. I’m home. Some shit happened and I’ll talk to you tomorrow.”

Three Remington .22-caliber casings were found at the scene of the shooting. It was later determined that all three casings were fired from the same weapon.

The night after the murder, appellant came to Cabral’s house and showed him a news article about the crime. Cabral asked appellant why he had shown him the article and appellant replied, “Well, I did that shit, fool.”

Appellant told Cabral he was being driven to his girlfriend’s house by Lemonwood Chiques associate Alexis Bustillo when he saw several people in a garage with the door open. Appellant got of the car, walked up to the garage, and asked “where you fools from?” Appellant also said “Lemonwood Chiques” and started walking away. He then turned back toward the garage, cocked his gun, and repeatedly fired into the garage. He stopped firing when he saw Martin shake and sink into the couch. Appellant ran back to the car and Bustillo drove him home.

About four days later, appellant asked Cabral if he should dispose of the murder weapon and Cabral said to throw it into the waterway at the end of Perkins Road. Appellant brought a .22-caliber rifle to Perkins Road which Cabral was led to believe was the murder weapon. Appellant, Cabral, and another Lemonwood Chiques member fired three or four rounds each from the weapon before Cabral removed the clip and threw both the rifle and clip into the water. One of the men also threw a Ziploc bag of bullets into the water.

In January 2015, Oxnard Police Detective Kenneth Tougas received a letter from Cabral about Martin's murder. In the letter, Cabral identified appellant as the shooter and conveyed information about the crime that had not been publicly disclosed. The letter also identified the location where the .22-caliber rifle, clip and bullets had been discarded. In addition to conveying what appellant had told him about the murder, Cabral also stated he had recently learned that Martin was "the same person that would dog [appellant] out every time [appellant] would go to his girlfriend's house" and had sent appellant's girlfriend a Facebook message asking, "You're with that lame Abraham?"

On January 27, 2015, the police searched the waterway at the location identified by Cabral and found a modified Ruger 10/22 rifle with a pistol grip. After ballistics testing, the rifle was ruled out as the murder weapon.

After Cabral agreed to act as a confidential informant, he and appellant were placed in adjacent cells at the county jail. Over a three-week period, all of appellant and Cabral's conversations were recorded and the kites (jailhouse notes) appellant sent to Cabral were recovered. During their conversations appellant and Cabral discussed the location of the

murder, who was present, who had driven appellant there, and who else knew about it. They also talked about disposing of the murder weapon after firing it several times. In his kites, appellant wrote among other things that he had wiped down the murder weapon and hoped his DNA would not be found on it.

On April 1, 2015, appellant's residence was searched pursuant to a warrant. In addition to evidence of appellant's gang affiliation, officers found 13 live rounds of Remington .22-caliber ammunition.

DISCUSSION

Sustaining of Objection During Closing Argument

Appellant contends the trial court committed reversible error in sustaining an objection to defense counsel's closing argument regarding the discarded rifle that was later ruled out as the murder weapon. We are not persuaded.

In her opening statement, the prosecutor stated that appellant "was armed with a .22-caliber sawed-off rifle" when he shot Martin, that Cabral had told law enforcement he helped appellant discard the rifle in the waterway at the end of Perkins Road, and that Cabral's claim was corroborated when the police found "a .22-caliber sawed-off rifle." In her closing argument, the prosecutor conceded that the rifle had been conclusively ruled out as the murder weapon through ballistics testing and told the jury "[y]ou don't have to bring in the murder weapon. It's not required."

In his closing argument, defense counsel referred to the prosecutor's opening statement and said "I may have misheard, but it sounded like she was committing to that sawed-off shotgun as the murder weapon." The prosecutor objected to this remark as "[i]mproper argument" and the court sustained the objection,

struck the remark, and ordered the jury to disregard it. Defense counsel went on to tell the jury “[y]ou’ll have to remember what was said by [the prosecutor] about this gun and the murder weapon” and argued the ballistics evidence was “another . . . piece of physical evidence that the People intentionally did not share with you.”

We agree with appellant that the prosecutor’s objection should have been overruled. Both defense counsel and the prosecutor “ha[ve] wide latitude in describing the deficiencies in opposing counsel’s tactics and factual account.” (*People v. Winbush* (2017) 2 Cal.5th 402, 484.) Although the prosecutor did not expressly represent in her opening statement that the rifle recovered from the waterway was the murder weapon, she plainly implied that it was. Moreover, that implication was reinforced by her lack of any mention of the fact that the rifle had been conclusively ruled out as the murder weapon through ballistics testing.

Appellant fails, however, to demonstrate prejudice. As the prosecutor correctly told the jury, the People did not have to prove that the rifle appellant discarded in the waterway was the murder weapon. Moreover, the evidence of appellant’s guilt was overwhelming. Among other things, both eyewitnesses to the murder positively identified appellant as the shooter and the jury heard jailhouse recordings in which appellant admitted his involvement in the crime. In light of this evidence, it is not reasonably probable that appellant would have achieved a more favorable result had the prosecutor’s objection been overruled. Accordingly, the error in sustaining the objection was plainly harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant's Age-Related Claims

For the first time on appeal, appellant asserts that his sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment and also violated his rights to equal protection under the Fifth Amendment. He also claims the trial court abused its discretion in denying counsel's oral request to continue the sentencing hearing so counsel could collect and present evidence for a potential youthful offender parole hearing at some point in the future (§ 3051). Although appellant committed the murder as an adult, he claims he must nevertheless be treated as a juvenile for purposes of sentencing because he was "only slightly over the age of 18."

Appellant's constitutional claims were not raised below and are thus forfeited. In any event, appellant's assertion that he is entitled to the constitutional and statutory protections afforded to juveniles is contrary to well-established law. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 574 [161 L.Ed.2d 1] ["The age of 18 is the point where society draws the line for many purposes between childhood and adulthood' [citation], and that is the line the [United States Supreme Court] has drawn in its Eighth Amendment jurisprudence"]; *People v. Gamache* (2010) 48 Cal.4th 347, 405 ["We previously have rejected the argument that a death penalty scheme that treats differently those who are 18 years of age and older, and those younger than 18, violates equal protection"]; § 3051, subd. (h) [statute providing for youthful offender parole hearings "shall not apply . . . to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense [(i.e., murder)] that was committed after the person had attained 18 years of age"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Ryan J. Wright, Judge
Superior Court County of Ventura

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