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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO MANZANERO,

Defendant and Appellant.

B280568

(Los Angeles County
Super. Ct. No. NA088921-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed in part; remanded with directions.

Valerie G. Wass, 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, Colleen M. Tiedemann and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

The prosecution presented substantial evidence defendant, Arturo Manzanero, gunned down an unarmed victim as the victim attempted to flee. The jury rejected defendant's self-defense claim and convicted him of first degree murder (Pen. Code,¹ § 187, subd. (a)) (count 1) and firearm possession by a felon (former § 12021, subd. (a)(1)) (count 2). The jury found a firearm enhancement allegation true (§ 12022.53, subd. (d)) and a gang benefit allegation not true. (§ 186.22, subd. (b)(1)(C).) Defendant admitted two prior serious felony convictions within the meaning of the Three Strikes law and section 667, subdivision (a)(1). At the prosecution's request, the trial court stayed the sentence on count 2 (§ 654) and dismissed three prior separate prison term enhancement allegations (§ 667.5, subd. (b)). The trial court sentenced defendant to 100 years to life in state prison plus 10 years.

On appeal, defendant argues: (1) it was an abuse of discretion to deny his *Romero* motion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497); (2) his sentence constitutes cruel and unusual punishment under the federal and state Constitutions; and (3) this case should be remanded so that the trial court may exercise its discretion to dismiss the firearm enhancement under subdivision (h) of section 12022.53 as amended by Senate Bill No. 620 effective January 1, 2018. We remand this matter to allow the trial court to exercise its

¹ Further statutory references are to the Penal Code unless otherwise noted.

discretion whether to dismiss or strike defendant's firearm enhancement. We affirm the judgment in all other respects.

II. THE EVIDENCE

The prosecution's evidence showed that on February 13, 2011, defendant and an unidentified companion were in the vicinity of a San Pedro park claimed by defendant's gang. Both were armed with guns. They attacked 19-year-old Israel Fierro. Defendant hit Fierro in the face. Defendant's companion attacked Fierro from behind, hitting him in the head with a solid object Fierro thought was a gun. Fierro heard defendant say, "[p]ass me" either a "burner" or "heat." Fierro fled. Sometime later, while waiting nearby for his mother to arrive, Fierro heard six to ten gunshots. Fierro was treated at a hospital for a head injury.

Defendant testified in his own defense. He denied he was armed; but he knew his companion was carrying a gun. Defendant admitted fighting with Fierro and asking his companion to "[p]ass me the burner," meaning the gun.

After Fierro fled, defendant and his companion engaged in a physical altercation with the murder victim, Jose Roman. (Roman was also a gang member. As noted above, however, the jury rejected an allegation the crime was gang-related.) After suffering an injury to his hand, defendant produced a gun and began shooting. When Roman ran, defendant chased him while repeatedly firing his weapon. Defendant shot Roman in the leg and then, fatally, in the back. Defendant fled the scene.

Defendant testified that during the scuffle with Roman a gun fell to the ground. Defendant picked it up and used it to

defend himself. Defendant said he acted in fear for his life after Roman, who was drunk, pointed a gun at him and tried to fire it. Defendant said he heard Roman's gun clicking. Defendant denied firing his gun at Roman while Roman was running away.

Defendant was the only witness who testified he saw Roman with a weapon. There was no other evidence Roman was armed.

III. DISCUSSION

A. *The Romero Motion*

Defendant challenges the trial court's denial of his *Romero* motion. We find no abuse of discretion.

Under section 1385, subdivision (a), and in furtherance of justice, a trial court may strike a prior felony conviction allegation under the Three Strikes law. (*People v. Romero, supra*, 13 Cal.4th at pp. 529-530.) In doing so, “the court . . . must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) The court must also state its reasons for dismissing a strike conviction allegation orally and, in some circumstances, in the court minutes (§ 1385, subd. (a)), but is not required to “explain its decision *not* to

exercise its power to dismiss’ [Citation.]” (*People v. Carmony, supra*, 33 Cal.4th at p. 376, italics added.)

In the trial court, defendant argued: this was a fistfight that escalated into a shooting, not a planned, cold-blooded murder; his strike convictions were low-level in that the narcotics offense was a serious felony only because it was gang-related and the robbery resulted in a sentence of only two years suggesting it was not a violent robbery; further, if the trial court did not dismiss the prior strike conviction allegations, the resulting sentence would be cruel and unusual. The prosecutor argued that since 2001, defendant had been either home on probation, in camp community placement, in state prison, on adult probation or on parole; moreover, while on parole, he committed the present offense—a brutal first degree murder. The trial court said it was “more than amenable to granting a *Romero* motion in an appropriate situation.” The court concluded, however, this was “unequivocally not” an appropriate case in which to grant such a motion.

Our review is for an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 375.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) It is defendant’s burden to establish the trial court’s decision was irrational or arbitrary. (*Id.* at p. 376.) That reasonable minds might differ is not enough. (*Id.* at p. 378.) Absent a showing the trial court’s decision was irrational or arbitrary, we presume the trial court acted to achieve lawful sentencing objectives. (*Id.* at pp. 376-377) “[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial

decision in conformity with the spirit of the law, we shall affirm the trial court's ruling’ [Citation.]” (*Id.* at p. 378.)

Defendant has not shown the trial court abused its discretion. Defendant committed his first criminal offense in 2001, when he was 16 years old. For the next nine years, defendant committed one crime after another. His crimes escalated in seriousness from drug possession to robbery and then murder. Defendant was twice sentenced to state prison. He repeatedly failed to satisfactorily perform on probation and parole. When he committed the present murder, he was 25 years old, on parole and unemployed.

Defendant persistently relapsed into crime. On January 3, 2002, the juvenile court sustained a petition alleging controlled substance possession for sale. The court ordered defendant to camp community placement. Eight months later, on September 3, 2002, a sustained petition for carrying a loaded firearm resulted in further camp community placement—for up to five years eight months. Two years later, on November 8, 2004, as an adult, defendant was convicted of or entered a plea to a felony controlled substance offense. The crime was a serious felony because it was committed for the benefit of a gang. (§ 1192.7, subd. (c)(28).) This was defendant's first strike. The trial court suspended imposition of sentence and placed defendant on formal probation for three years. Four months later, however, on March 11, 2005, the trial court revoked defendant's probation and imposed a three-year state prison sentence. While on parole, in 2007, defendant was convicted of or entered a plea to controlled substance possession, a felony. On August 14, 2007, the trial court once again suspended imposition of sentence and placed defendant on formal probation for three

years. However, less than a month later, on September 5, 2007, defendant committed a robbery, a serious and a violent felony. (§§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19).) This was defendant's second strike. It was also a violation of his parole in the 2004 controlled substance case. Defendant was sentenced to two years in state prison.² In November 2010, following his release from state prison, defendant was convicted of or entered a plea to inflicting corporeal injury on a spouse or cohabitant, a misdemeanor. On November 22, 2010, the trial court suspended imposition of sentence and placed defendant on summary probation for three years. On February 13, 2011, while on parole for the 2007 robbery, defendant committed the present murder. He was in state prison on a parole violation when he was arrested.

Defendant was a committed gang member whose prospects for the future were poor. He had numerous gang tattoos including two on his face. At trial, defendant told the jury he had been a gang member for 16 years; he was a well-respected member of his gang; he was proud of his membership; and he enjoyed life as a gang member because it facilitated his interactions with woman and allowed him to commit crimes.

The present murder was vicious and cold-blooded. After injuring his hand during a physical altercation with Roman, the victim, defendant produced a gun and began shooting. When Roman ran, defendant chased him repeatedly firing his weapon.

² Two years is the low term for second degree robbery. (§ 213, subd. (a)(2).)

Defendant shot Roman in the leg and then in the back, killing him.

Both the probation department and the investigating officer described defendant as a danger to the community. The probation department's evaluation states: "The defendant is an active gang member who is extremely dangerous. In the instant matter, he cold heartedly shot and killed the unarmed, fleeing victim following a mutual fist fight. . . . [¶] The defendant's misdemeanor and felony convictions have resulted in both probation and state prison sentences. Unfortunately, those dispositions did not deter him from taking the life of another human being. At this juncture, the defendant is neither eligible nor suitable for probation. Therefore, for the community's safety and to hold the defendant accountable for his actions, a state prison order is warranted." The investigating detective told a probation officer, "[T]he defendant is a violent gang member who likes to carry guns and is a danger to the community." Law enforcement officers thought defendant had been involved in other gang-related shootings.

Given the brutal circumstances of the present crime, defendant's recidivism, the fact that his multiple prior supervisions and incarcerations had failed to deter him from committing crimes, the escalating nature of his crimes, and the danger he posed to the community as a long-time, committed and violent gang member, the trial court reasonably concluded defendant did not fall outside the spirit of the Three Strikes law. The trial court's decision not to strike the prior felony conviction allegations was neither irrational nor arbitrary and did not constitute an abuse of discretion. (*People v. Carmony, supra*, 33

Cal.4th at pp. 378-379; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

Defendant contends the trial court considered only the nature of his present offense and his criminal history while ignoring other factors such as his age when he committed the murder (25) and that his strike offenses were “less serious than typical strike offenses.” Defendant concludes, “[I]t appears the trial court failed to consider all relevant sentencing factors and the alternate sentence it would be require[d] to impose, and as a result, it failed to properly exercise its discretion.” We disagree. The trial court was not required to explain its decision. (*People v. Carmony, supra*, 33 Cal.4th at p. 376.) That it did not specifically mention a particular aspect of defendant’s history or character does not mean the court did not consider all relevant factors. (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.) Moreover, it is clear from the record, including the hearing on defendant’s motion, that the trial court “‘balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law’ [Citation.]” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

B. *Cruel and Unusual Punishment*

Defendant contends his sentence of 100 years to life plus 10 years constitutes cruel and unusual punishment under the

federal and state Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17.)³ We disagree.

Whether a punishment is cruel and unusual presents a question of law. (*People v. Abundio* (2013) 221 Cal.App.4th 1211, 1217.) We view any underlying disputed facts in the light most favorable to the judgment. (*Ibid.*) The defendant’s burden when challenging a sentence as cruel and unusual is “considerable.” (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

The Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only sentences that are grossly disproportionate to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 23-24.) A punishment violates the California Constitution if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.)

Under both the federal and state Constitutions, courts consider three factors in determining a sentence’s proportionality to the offense and to the defendant’s circumstances: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.’ [Citation.]” (*Ewing v. California, supra*, 538 U.S. at p. 22; *In re Lynch, supra*, 8 Cal.3d at pp. 425-427; *id.* at p. 425 [court should consider “the nature of the offense and/or

³ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted.” (U.S. Const., 8th Amend., italics added.)

“Cruel *or* unusual punishment may not be inflicted or excessive fines imposed.” (Cal. Const., art. I, § 17, italics added.)

the offender, with particular regard to the degree of danger both present to society”].) Here, defendant argues only that the sentence imposed is unconstitutional as applied to him. He does not discuss sentences imposed in this or other jurisdictions. Therefore, we consider only the first factor.

“To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant’s involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant’s acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.]” (*People v. Panah* (2005) 35 Cal.4th 395, 501.)

Defendant has not met his considerable burden to show his sentence is cruel and unusual. A sentence is not cruel and unusual under either the state or federal Constitution by virtue of the fact it exceeds a defendant’s life expectancy. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 572; *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383; see also *United States v. Mathison* (8th Cir. 1998) 157 F.3d 541, 551; *United States v. Saccoccia* (1st Cir. 1995) 58 F.3d 754, 786, fn. 28.) “[I]t is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state

Constitution [citation] or the federal Constitution. [Citation.]” (*People v. Byrd, supra*, 89 Cal.App.4th at p. 1383.)

Defendant was a 25-year-old gang member when he committed this murder. At trial, he acknowledged his dedication to his gang. He testified he appreciated the benefits the lifestyle afforded him. Defendant is also a recidivist—a relevant consideration that weighs against him. (*Ewing v. California, supra*, 538 U.S. at pp. 24-28.) Beginning at age 16, defendant repeatedly committed crimes. Each time he was released from custody, he committed a new offense. His criminal acts escalated in seriousness. He performed poorly on probation and parole.

The sentence defendant challenges was imposed after he reacted to a fistfight by murdering an unarmed and fleeing man. Defendant asserts there was substantial evidence (his own testimony) that the victim provoked the incident and defendant acted, at least initially, in self-defense. Regardless of how the physical altercation started, defendant’s reaction was extreme and cruel. He chased the unarmed victim firing repeatedly. He shot the victim in the leg and then, fatally, in the back. Moreover, although defendant claimed self-defense, the jury found defendant committed a willful, deliberate and premeditated murder.

The penalty imposed reflects the circumstances of the murder, defendant’s recidivism, and his character and prospects. Having considered the nature of the offense and the offender, we conclude defendant’s sentence is not disproportionate to his culpability and does not violate the state or federal constitutional prohibitions against cruel and unusual punishment.

C. *The Firearm Enhancement*

As noted above, the jury found defendant personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) The trial court imposed a consecutive 25-years-to-life sentence. At the time, that sentence was mandatory; the trial court had no discretion to strike or dismiss the firearm enhancement. (Former § 12022.53, subd. (h); Stats. 2010, ch. 711, § 5, eff. Jan. 1, 2012.) Pursuant to Senate Bill No. 620, effective January 1, 2018, however, a trial court has discretion to strike or dismiss a section 12022.53 firearm enhancement in the interests of justice. (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018.) The amendment applies to defendant because his case is not yet final. (*People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 76; *In re Estrada* (1965) 63 Cal.2d 740, 742, 745, 747-748; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.)

Defendant seeks a remand to allow the trial court to exercise its discretion under section 12022.53, subdivision (h) as amended. The Attorney General argues, however, that no remand is necessary because, given the manner in which defendant committed this murder, it would be an abuse of discretion for the trial court to strike the firearm enhancement.⁴

⁴ The Attorney General asserts: “[S]ubstantial evidence of the manner of which [defendant] shot and killed the victim demonstrated that he fired multiple shots from behind his victim as his victim continued to flee from him. Given these facts, it would be an abuse of discretion for the trial court to strike the firearm enhancement in this situation. Thus, [u]nder the

We are not prepared to hold that any decision by the trial court to strike the firearm enhancement would constitute an abuse of discretion, even on these admittedly brutal facts. In our view, it is the trial court that should consider, in the first instance, whether to exercise its discretion to dismiss or strike defendant's firearm enhancement.

IV. DISPOSITION

We remand this matter to permit the trial court, if it so chooses and within the confines of Penal Code section 1385, to exercise its discretion whether to dismiss or strike defendant's Penal Code section 12022.53 firearm enhancement. In all other respects, the judgment is affirmed.

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KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

circumstances, no purpose would be served in remanding for reconsideration.' [Citation.])"

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