Filed 7/31/12 P. v. Jones CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PHILIP JONES, Defendant and Appellant.	B233106 (Los Angeles County Super. Ct. No. MA044546)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed as modified.

Maureen L. Fox, 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, Eric E. Reynolds and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Philip Jones appeals from the judgment entered following his convictions by jury of attempted murder (Pen. Code, §§ 187, subd. (a), 664; count 1),[1] attempted carjacking (§§ 215, subd. (a), 664; count 2), and carjacking (count 3). As to all counts, the jury found true the attendant firearm-enhancement allegations (§ 12022.53, subds. (b), (c) & (d)). In a bifurcated proceeding, the trial court found Jones had served two separate prison terms for felonies (§ 667.5, subd. (b)). Jones was sentenced to an aggregate state prison term of 55 years to life. Jones contends the evidence was insufficient to support his conviction for attempted carjacking, the trial court erred in failing to instruct the jury sua sponte on attempted voluntary manslaughter and trial counsel rendered ineffective assistance. Jones also asserts sentencing error; he is correct. We affirm as modified.

FACTUAL BACKGROUND

At approximately 8:00 a.m. on January 10, 2009, Loretta Maddox drove her family to the Lancaster Metrolink train station on Sierra Highway in Los Angeles County. Sitting next to her was ex-husband Julius Hall and sitting in the back seat were granddaughter, Anzuira H. and Hall's step-brother, Jimmy Shelton. Maddox parked in the first stall by the ticket booth and waited in the car with Anzuira, while Hall and Shelton left to smoke a cigarette. Maddox saw Jones standing next to the ticket booth. The two of them made eye contact.

When Hall and Shelton returned, the family walked over to the ticket booth and bought tickets. Anzuira noticed that Jones was about three feet behind them. He was walking around and staring at the family. After buying tickets, the family returned to the car. Maddox got into the driver's seat, and Anzuria sat behind her in the back seat. Hall and Shelton wanted to know when the train was leaving. Hall left to ask some people in the station, and Shelton decided to look for a conductor. Minutes later, Hall was coming back to the car and passed by Jones, who asked where Hall was traveling. Hall replied he

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

was headed for the San Fernando Valley. Jones said, "I don't think you are gonna make it."

At that point, Maddox called out to Hall. He walked up to driver's side window and spoke to Maddox about Jones's comments. While they were talking, Jones approached the front of the car, stopping five to seven feet away from Maddox. Jones told Hall, "Tell your wife to give me a ride." Hall responded, "No, we don't know you." Maddox also told Jones she would not give him a ride because she did not know him. Jones then yelled angrily twice, "Get the kid out [of] the car," referring to Anzuria in the back seat. Anzuria was frightened.

Maddox thought there was going to be a confrontation between Hall and Jones. Hall was frightened for his granddaughter. He rushed towards Jones, bent down and attempted to grab Jones's legs in an effort to flip him onto the ground. Maddox was about to get out of the car to help Hall, when she saw Jones take a step back, pull out a gun and shoot Hall. After being shot, Hall leaned against the hood of the car. Jones fled across Sierra Highway.

Shortly after the shooting, Jones carjacked Walter Herrera's pickup truck at gunpoint, in front of a nearby car wash.

DISCUSSION

1. *Sufficient Evidence Supports the Attempted Carjacking Conviction*

Jones contends his conviction for attempted carjacking must be reversed because the evidence is insufficient to support the verdict. Specifically, Jones challenges the evidence to support the specific intent element of the offense, arguing the prosecution failed to show he engaged in acts that indicated a certain, unambiguous intent to deprive Maddox of her car within the meaning of section 215, subdivision (a).

Our constrained assessment of the evidence to support the conviction is guided by well-defined rules. To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.

[Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

"'"Carjacking" is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.' [Citation.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035; § 215, subd. (a); see also *People v. Coryell* (2003) 110 Cal.App.4th 1299, 1302.) "The owner or possessor of a vehicle may be deprived of possession not only when the perpetrator physically forces the victim out of the vehicle, but also when the victim remains in the car and the defendant exercises dominion and control over the car by force or fear." (*People v. Gray* (1998) 66 Cal.App.4th 973, 985.)

To establish the offense of attempted carjacking, the prosecution was required to show Jones intended to commit elements of the offense and took a "direct unequivocal overt act toward its commission." (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861; § 21a; see also *People v. Herman* (2002) 97 Cal.App.4th 1369, 1385.) Under section

21a, an attempt to commit a crime may be shown, where a defendant, acting with the specific intent to commit the crime, "performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action." (*People v. Toledo* (2001) 26 Cal.4th 221, 230; see also *People v. Post* (2001) 94 Cal.App.4th 467, 480-481.) "'Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and in themselves, are an immediate step in the present execution of the criminal design will be sufficient.' [Citations.]" (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

There is sufficient evidence in this case of Jones's specific intent to deprive Maddox of her car within the meaning of section 215, subdivision (a). The record shows Jones began watching Maddox and her family upon their arrival, followed them as they were purchasing tickets, told Hall he was not going to make his train and angrily demanded that Maddox give him a ride and that Anzuria be removed from the car. Jones's coercive and frightening behavior constitutes sufficient evidence of his unambiguous intent and attempt to deprive Maddox of possession of her car through force and fear. Jones is not entitled to reversal of the attempted carjacking conviction.

2. *Trial Court Did Not Err in Failing to Instruct on Attempted Voluntary Manslaughter*

Jones did not request an instruction on attempted voluntary manslaughter as a lesser included offense of attempted murder. However, he now contends the trial court was required sua sponte to instruct the jury on this theory. Jones argues the doctrines of imperfect self-defense and heat of passion should have been applied because Hall's sudden attack amounted to provocation that caused Jones either reasonably or unreasonably to fear he was about to suffer serious harm or death and to act rashly by shooting Hall in the heat of passion. This contention is without merit.

A trial court must instruct the jury sua sponte on general principles of law applicable to the case. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) This requirement includes instruction on lesser included offenses supported by the evidence.

(*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) Because attempted voluntary manslaughter is a lesser included offense of attempted murder (*People v. Lewis* (1993) 21 Cal.App.4th 243, 257; *People v. Heffington* (1973) 32 Cal.App.3d 1, 11), whether or not requested, the trial court was required to give the attempted voluntary manslaughter instruction if there was substantial evidence to support it – that is a reasonable jury could conclude that the lesser included offense rather than the greater offense was committed. (*People v. Breverman, supra,* at p. 162.) The evidence was insufficient here.

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in "limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense.' [Citation.]." (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

Unreasonable or imperfect self-defense requires the defendant to have an actual, if unreasonable, belief that he was in imminent danger of loss of life or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) In such circumstances, the defendant is deemed to have acted without malice and cannot be convicted of murder but only of manslaughter. (*Ibid*.) However, imperfect self-defense, like perfect self-defense, cannot be invoked by a defendant who, through his or her own wrongful conduct has created the circumstances under which his or her adversary's attack or pursuit is legally justified. (*In re Christian S*. (1994) 7 Cal.4 th 768, 773, fn. 1; *People v. Seaton* (2001) 26 Cal.4th 598, 664.)

Jones initiated the events leading to his confrontation with Hall. As previously discussed, Jones stalked the family, and told Hall he would not make his train, before he menacingly approached Hall and attempted to commandeer Maddox's car. Only then did Hall lurch towards Jones and reach for his legs in an effort to flip Jones on his back. Consequently, because Jones was the original aggressor, as a general matter, he was precluded from asserting imperfect (or perfect) self-defense until he withdrew from the confrontation, and gave clear notice to Hall that he was doing so.

There is an exception to the rule an aggressor must first withdraw. "[W]hen the victim of simple assault responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense." (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201; *People v. Crandell* (1988) 46 Cal.3d 833, 871-872, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.) Nonetheless, Jones cannot avail himself of this exception because there was no "sudden and deadly" counterassault. The undisputed evidence is that Hall did not use deadly force. He did not employ any weapon, nor throw any kicks or punches, but merely tried to grab Jones's legs.

Nor was Jones entitled to instructions on attempted voluntary manslaughter on the heat of passion theory. "Although section 192, subdivision (a), refers to 'sudden quarrel or heat of passion,' the factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) A person who is provoked by a sudden quarrel or acts in the heat of passion to kill lacks malice. A conviction of manslaughter based on heat of passion requires proof of (1) an objective element that there was sufficient provocation "to cause an 'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment" (*People v. Breverman, supra*, 19 Cal.4th at p. 163); and (2) a subjective element that the defendant's reason was, in fact, overcome by an overwhelming passion. (*Ibid*.)

But a defendant may not provoke a confrontation as an aggressor, and, without first seeking to withdraw, kill an adversary and expect to reduce the crime to manslaughter by merely asserting it was provoked by a sudden quarrel or acted in the heat of passion. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) "The claim of provocation cannot be based on events for which the defendant is culpably responsible." (*Ibid.*)[2]

---

[2] Because we conclude there was no evidentiary support for instructions on voluntary manslaughter, we do not reach Jones's claim his trial counsel rendered ineffective assistance by failing to request the instructions.

3. *Trial Court Committed Sentencing Error*

The trial court sentenced Jones to an aggregate state prison term of 55 years to life, consisting of the upper term of nine years for attempted murder of Maddox (count 1), plus 25 years to life for the section 12022.53, subdivision (d) firearm enhancement, plus two years for the two prior prison term enhancements; plus the upper term of nine years for carjacking (count 3) plus 10 years for the section 12022.53, subdivision (b) firearm enhancement. Sentence on count 2 and the remaining firearm enhancements attendant to counts 1 and 2 were stayed pursuant to section 654.

Jones contends and the People concede the trial court imposed an unauthorized sentence for carjacking on count 3. As the subordinate consecutive term, the sentence on count 3 should have been 1 year 8 months (one-third of the middle term of five years) for carjacking, plus three years four months (one-third of the 10-year term) for the firearm enhancement. (§ 1170.1, subd. (a).) Thus, Jones's aggregate state prison sentence should be modified from 55 years to life to 41 years to life.

DISPOSITION

The 19-year sentence imposed on count 3 is modified to five years for an aggregate sentence of 41 years to life rather than 55 years to life. As modified the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.