

Filed 8/13/18 P. v. Cruz CA2/7

Received for posting 8/14/18

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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.

HERIBERTO CRUZ,

Defendant and Appellant.

B279345

(Los Angeles County
Super. Ct. No. BA423824)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall. Affirmed.

Jean Ballantine, 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 Pamela C.

Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted Heriberto Cruz of the first degree murder of his son Matteo. At the moment of death Matteo was 18 months old and alone with Cruz in an apartment. The jury heard two versions of this death. Cruz testified he put Matteo in a bath, left, and returned to find Matteo drowned. The prosecution argued Cruz intentionally killed Matteo as revenge against Matteo's mother, however, because that woman had just left Cruz for another man. By this account, Cruz paid her back by killing her only child on her birthday. On appeal, Cruz's main argument on appeal is there was too little evidence of premeditation to support the first degree murder conviction. We affirm.

I. Evidence of Deliberation and Premeditation Was Ample

Cruz first argues there was insufficient evidence to sustain a conviction for first degree murder on count one. (There were two counts charged. We discuss count two below.) We review the record in a light favorable to the prosecution to see if it contains reasonable evidence from which a rational jury could find Cruz guilty beyond a reasonable doubt. (*People v. Jackson* (2016) 1 Cal.5th 269, 345.)

Murder in the first degree requires a killing that is willful, deliberate, and premeditated. (Pen. Code, § 189.) (All statutory references are to the Penal Code.) A killing is deliberate if the killer carefully weighs considerations in forming a course of action. A killing is premeditated if the killer thinks it over in advance. (*People v. Brooks* (2017) 3 Cal. 5th 1, 58.) Requiring both deliberation and premeditation excludes merely unconsidered or rash homicides from murder of the first degree. (*Ibid.*)

Reviewing courts examine the trial record for evidence a defendant acted deliberately and according to a preconceived design rather than from a rash impulse. (*Id.* p. 59.) Proof of a long-standing motive is pertinent, as is evidence of a deliberate manner of killing. (*Id.* p. 59-60.)

Here the evidence of premeditation and deliberation was ample.

The prosecution's case was Cruz "killed his son to spite his wife because she was leaving him."

Cruz indeed was angry his wife, Christina Guevara, was ending their relationship. Cruz so testified.

Matteo died on Guevara's birthday. This was either a 1-in-365 coincidence, according to Cruz's version of events, or else evidence of Cruz's deliberate plan to traumatize the woman who was spurning him. A rational jury could conclude the timing was no coincidence.

Cruz fortified this no-coincidence conclusion by sending inculpatory messages to Guevara. Cruz testified Matteo died before noon on the day of Guevara's birthday. That same day, after Matteo's death and beginning at 5:32 p.m., Cruz texted Guevara the following messages:

"May everything work out for you in your life. Never forget what you did to us."

"It was entirely your fault."

"I hope I can forgive you someday."

"Although by then it will be too late."

"This is a day you will never forget."

"I hope you and your lover enjoy the evening -- And that you think about your son."

"And never forget why these things happen -- My son didn't deserve this -- This is your fault."

Cruz sent the last of these texts at 5:50 p.m. that day.

These messages are consistent with a jealous lover bent on retribution. The messages are inconsistent with a father grieving over his son's accidental death. A reasonable jury could infer Cruz, deliberately and with premeditation, killed Matteo to hurt the woman who had hurt him.

Autopsy evidence also fit deliberate murder. According to the medical examiner, Matteo died from suffocation and not drowning. The basis for this opinion included the lack of water in Matteo's lungs as well as blunt force trauma to Matteo's face that "should not be there in a drowning." "That bruising and abrasion on the right cheek is right next to the mouth which to me strongly suggests somehow there was an attack on the area of [Matteo's] airway."

A reasonable jury, moreover, could have rejected Cruz's story as incredible. Cruz did not suggest the child Matteo angered Cruz in some childish way, thus triggering Cruz's unconsidered or rash response. Rather, Cruz testified to a calm bath time routine: Cruz placed Matteo in the bath, left the bathroom, watched television, and returned 10 minutes later to find Matteo dead. Yet the medical evidence was that Matteo was a healthy and big boy who was perfectly capable of simply sitting up out of the water and getting out of the tub. The jury saw a video of Matteo standing in his bathtub without assistance eight months before his death. Cruz reported no sounds of slipping, splashing, or commotion. Neither did Cruz afterwards try to help Matteo, call 911, or seek aid. Rather, Cruz fled. When arrested, Cruz gave police a false name and date of birth. A rational jury could decide Cruz's story was illogical and the only believable explanation was that Cruz acted deliberately and with premeditation to destroy what was precious to the woman who had rejected him.

In his reply brief, Cruz does not try to rebut or explain this evidence. He states only that he concedes nothing and that absence of discussion merely reflects his “view that the issue was adequately addressed in [Cruz’s] opening brief.”

Cruz’s opening brief summarizes the evidence favorable to him. Cruz testified at trial that Matteo had drowned accidentally during a bath, when Cruz left to watch television. Cruz said that, when he discovered his son had drowned, Cruz did not touch Matteo or call 911 because he panicked and was overcome with shock and despair. Cruz did not try to revive Matteo because he did not know how. Instead, Cruz immediately tried to commit suicide, first by hanging, then by cutting his wrists, and finally by drinking rat poison. When these efforts failed, Cruz left the apartment without his money or identification documents. Cruz testified he loved Matteo and would have done anything for him. Cruz also called Dr. Harry Bonnell, a pathologist who testified that Matteo died by drowning and that no evidence supported a diagnosis of death by smothering or suffocation.

If the jury had believed the defense evidence, it could have reached a different conclusion. This possibility, however, does not diminish the substantial evidence supporting the jury’s verdict.

At trial, the only alternative to Cruz’s self-serving account of an accidental drowning was the prosecution’s explanation of a premeditated revenge killing. The jury was entitled to accept the prosecution’s account.

II. Prosecutorial Misconduct Could Not Have Prejudiced Cruz

Cruz’s second argument is that, during closing argument, the prosecutor grossly misstated the law of premeditation and

deliberation by referring to the decision to proceed through an intersection as an example.

The prosecutor told the jury: “Deliberate and premeditated murder. These terms are defined. Willful means you intended to kill. The text messages are replete with this, okay? So these are not words of panic. Those are words of communication. Yes, they come after, but they are the words of a man who had committed to do something, to punish his wife by depriving her of her son.

“Deliberate is defined the follow[ing] way: People sometimes get hung up on this. Now, the law does not require someone to sit in a cave or an apartment somewhere and scheme for minutes, hours, days, weeks now to kill someone. You’ve heard that a cold, calculated decision to kill can be reached quickly. You have to weigh the consequences which he surely did, right?

“And one of the ways this is explained sometimes is *you do this all the time*. When you come to a stop sign or stop light or whatever, you stop. The light’s red. It turns green. There’s a momentary hesitation where you’re scanning in front of you to see is it safe to go? And then you step on the gas and you go. *And that split-second decision, the one you make every day, involves some amount of deliberation and premeditation*. And it’s no different really even when the consequences are the most grave. So there it is. Ample, if not overwhelming, evidence of premeditation in this case.” (Italics show Cruz’s emphasis.)

Cruz concedes his trial counsel did not object to the prosecutor’s statements during closing argument and did not ask the trial court to admonish the jury, thus forfeiting his prosecutorial misconduct claim on appeal. (*People v. Jackson*, *supra*, 1 Cal.5th 269,349.) We consider the merits of the claim, however, because Cruz argues his trial counsel’s failure to object

and request an admonition constituted ineffective assistance of counsel.

The burden of sustaining a charge of ineffective assistance of counsel is upon Cruz. The proof must not be speculative. There is a presumption the challenged action might be considered sound trial strategy. On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007-1008.) One rational tactical purpose for not objecting is that an objection and ruling would make no difference to the trial's outcome.

A prosecutor's comment is misconduct when it so infects the trial with unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves deceptive or reprehensible methods. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821.) The term prosecutorial "misconduct" is something of a misnomer because it suggests a prosecutor must act with a culpable state of mind. A better term would be prosecutorial error. (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.)

Assuming without deciding this prosecutorial argument about the stop sign was prosecutorial error, neither it nor Cruz's counsel's failure to object could have prejudiced Cruz. Assuming there was error, it was harmless beyond a reasonable doubt.

The stop sign illustration was but a fleeting portion of a lengthy and proper argument. The prosecutor went on to describe in detail how the evidence supported the conclusion Cruz

had premeditated and deliberated as required for first degree murder. The prosecution's argument particularly emphasized several points: Cruz's concocted story about the manner in which he bathed Matteo; Cruz's motive to punish Guevara for leaving him; and the fact Cruz killed Matteo on Guevara's birthday and left the child in the bathtub "perfectly" covered by the blue tub for Guevara to find. The prosecution stressed "the most significant thing is the text messages." The prosecutor argued "[t]his was a cold, calculated murder" based on this evidence. (*People v. Covarrubias, supra*, 1 Cal.5th at p. 894 ["[w]e consider the assertedly improper remarks in the context of the argument as a whole"].)

Moreover, both the trial court and the prosecutor repeatedly reminded the jury to apply the specific definitions of premeditation and deliberation in CALCRIM No. 521. Further, the trial court directed the jury to follow these instructions and not the attorneys' comments in the event of any conflict. (CALCRIM No. 200; see also CALCRIM No. 222 ["[n]othing the attorneys say is evidence[; i]n their opening and closing arguments, the attorneys discuss the case, but their remarks are not evidence"].) The jury had copies of all of the instructions to use in the jury room. (CALCRIM No. 200.) We presume the jury followed all of the court's instructions, including the instruction that the jury must be guided by what the court said, not what counsel said. (*People v. Seumanu, supra*, 61 Cal.4th at p. 1336 ["absent some indication to the contrary, we assume a jury will abide by a trial court's admonitions and instructions"].)

More particularly, the trial court instructed the jury: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the

considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act or acts that caused death.

“The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate or premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. . . .” (CALCRIM No. 521.)

Counsel’s attempt to clarify the jury’s task by relating it to a more common experience must not imply that the task is less rigorous than the law requires. (*People v. Centeno, supra*, 60 Cal.4th at p. 671 [prosecutor’s attempt to explain the reasonable doubt standard “risk[ed] misleading the jury by oversimplifying and trivializing the deliberative process”].) Here, however, the prosecutor’s closing argument specifically referred the jury to the trial court’s instruction on “[d]eliberate and premeditated murder” (CALCRIM No. 521) and reiterated that, as the trial court had instructed, “[t]hese terms are defined.” Tracking the language of this instruction, the prosecutor emphasized, as “[y]ou’ve heard,” “a cold, calculated decision to kill can be reached quickly. You have to weigh the consequences which [Cruz] surely did, right?”

In the context of the whole argument and the instructions given, there is no reasonable likelihood the jury misunderstood or misapplied the prosecutor’s traffic example in finding Cruz guilty of first degree murder. The failure to object was not ineffective assistance of counsel.

We also reject Cruz’s assertion that the prosecutor’s argument created a substantial likelihood the jury found premeditation and deliberation based on an incorrect standard and speculation. Cruz argues there was no evidence to show that, even if Cruz deliberately smothered, suffocated, or drowned Matteo, that act was done with the necessary premeditation and deliberation, which is far more than the thought process which goes into deciding to step on the gas and go through an intersection. Cruz’s argument ignores the record, as we have explained.

III. No Error In Jury Instructions Harmed Cruz

The jury convicted Cruz on two counts. Count one was first degree murder under Penal Code section 187. Count two was Penal Code section 273ab, which outlaws assault causing death of a child under eight. On count two, relying on *Stringfield v. Superior Court* (S.D.Cal. 2016) 166 F.Supp.3d 1144, 1154, Cruz argues the trial court should have instructed the jury on involuntary manslaughter as a lesser included offense.

Subdivision (a) of section 273ab provides that “[a]ny person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child’s death, shall be punished by imprisonment in the state prison for 25 years to life.”

We assume without deciding Cruz is right that involuntary manslaughter is a lesser included offense for section 273ab. (Contra *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 261-262, *People v. Stewart* (2000) 77 Cal.App.4th 785, 796, and *People v. Malfavon* (2002) 102 Cal.App.4th 727, 744.)

Omitting this involuntary manslaughter instruction was harmless beyond a reasonable doubt. The jury, in response to

other and properly given instructions, necessarily resolved the factual question this omitted instruction posed. The jury's resolution was adverse to Cruz. (*People v. Lujano* (2017) 15 Cal.App.5th 187, 195-196; accord, *People v. Wright* (2006) 40 Cal.4th 81, 98.) In such a case the issue has not been removed from the jury's consideration. Rather the jury resolved the issue in another context. There can be no prejudice to Cruz because the jury rejected the evidence that would support a finding favorable to him. (*People v. Gana* (2015) 236 Cal.App.4th 598, 610; accord, *People v. Wright, supra*, 40 Cal.4th at p. 98.)

Omitting an instruction about involuntary manslaughter on count two could not have harmed Cruz because the court gave an involuntary manslaughter instruction on count one. On that count, the jury not only rejected Cruz's story of an accidental drowning but also rejected potential verdicts of involuntary manslaughter and second degree murder. The jury instead found Cruz murdered Matteo on Guevara's birthday so she would suffer for the pain she caused Cruz. The jury's findings of premeditation and deliberation on count one mooted the issue of involuntary manslaughter as a lesser included offense of count two.

Cruz's lawyer explained this point to the jury. Cruz's counsel acknowledged Cruz was guilty of assault as charged in count two if Cruz was guilty of murder as charged in count one. Cruz's attorney said "an assault is an application of force. [Cruz] took [Matteo's] head, held it under the water or he took his hand, put it on his mouth. [¶] It will be nonsense to find murder and not assault causing death or the alternative. Either you believe the prosecutor that beyond a reasonable doubt he—I guess we'll go either one—drowned forcibly or took his hand and smothered the child. If you believe that[,] *he's guilty of both*. [¶] The guy held the kid underwater until he was dead. He meant to kill him.

If he put his hand on his mouth and suffocated the life out of him[,] he meant to kill him. There's no argument there." (Italics added.)

The People's opposition brief notes this point about a lesser included being, at most, harmless error. Cruz's reply omits response to this harmless error argument.

DISPOSITION

The judgment is affirmed.

WILEY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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