Filed 11/17/16 P. v. Luna CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDDIE A. LUNA, Defendant and Appellant.	B266559 (Los Angeles County Super. Ct. No. VA122795)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama

R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Eddie A. Luna appeals from the judgment entered after his jury conviction of seven counts of assault on a peace officer with a semiautomatic firearm and one count of possession of a firearm by a felon. (Pen. Code, §§ 245, subd. (d)(2), 29800, subd. (a)(1).)[1] Defendant argues that the trial court prejudicially erred by admitting into evidence statements he made to police in violation of *Miranda v. Arizona*.[2] Defendant also argues that the sentence for his firearm possession conviction should have been stayed as it was incidental to his conviction for assault. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012, several officers responded to a 911 call from defendant, who stated that he was armed with a gun at the Knights Inn in Pico Rivera. The officers found defendant in the middle of a service road. He had arrived at the inn earlier armed with a gun. The officers gave commands to

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

[2] *Miranda v. Arizona* (1966) 384 U.S. 436, 478–479 (*Miranda*).

defendant to put his hands up and get on the ground. He did not comply. Instead, he pulled a gun out of his pocket and pointed it toward the officers. Two officers fired their guns. Defendant turned and ran while shooting his gun at the same time. Five officers testified that the gun was aimed in the officers' direction.[3] Defendant fell, and the officers approached and arrested him.

Defendant was taken to a hospital for treatment of his wounds. Two officers provided security for him for approximately two and a half hours. Without being questioned by the officers, defendant casually began to talk to them. One of the officers took notes on what he said. Defendant stated, "'I called my family and told them I was going to die. I even shot at the cops and I'm still here.'" Defendant also stated, "'I shot at them and they only got me in my ass and knee.'"

Defendant was charged with seven counts of assault on a peace officer with an automatic firearm (counts 1-7) and one count of possession of a firearm by a felon (count 8). (§§ 245, subd. (d)(2), 29800, subd. (a)(1).) A jury convicted him as charged. The trial court sentenced him to an aggregate term of 67 years. The court imposed a sentence of 38 years for count 1. For both counts 2 and 3, the court

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[3] In his own defense, defendant testified that he pulled out his gun and shot back only after the officers had shot at him. He further testified that he only pointed and shot the gun to the ground and never pointed the gun in the direction of the officers.

imposed consecutive sentences of 11 years and four months. The court imposed concurrent sentences in counts 4 through 7. The court imposed a consecutive sentence of one year and four months in count 8, and a consecutive five-year term for the serious felony prior. This timely appeal followed.

DISCUSSION

I

The *Miranda* admonitions must be given before a suspect's statement made during a custodial interrogation may be admitted into evidence. (*People v. Elizalde* (2015) 61 Cal.4th 523, 527.) A suspect is under interrogation when he or she is subject to express questioning or its functional equivalent, which includes any words or actions that the police should know are reasonably likely to evoke an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300–301.) The perceptions of the suspect, rather than the intent of the police, are central in determining whether the police's actions constitute an interrogation. (*Id.* at p. 301.)

Defendant argues that his statements in the hospital should have been suppressed because the actions of the officers constituted a custodial interrogation within the meaning of *Miranda*. "'We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statements were illegally obtained.' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 385.)

Here, the officers did not expressly question defendant. The officers' presence in defendant's room and their note taking are not the "functional equivalent" of express questioning. Defendant argues that he perceived the officers' speaking to him for more than two hours while taking notes as a design to elicit an incriminating response. However, the officers were in the hospital room to provide security, and their mere presence, by itself, was not likely to evoke an incriminating response. Likewise, note taking involves no form of questioning and gives no reason to respond. It also is not clear whether defendant was aware that an officer was taking notes. No reasonable person could perceive these actions together as an effort to evoke an incriminating statement. Because defendant's incriminating statements were voluntarily given and given in the absence of interrogation, they were properly admitted into evidence.

Even if the statements were obtained in violation of *Miranda*, any error in admitting them was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [a federal constitutional error must be harmless beyond a reasonable doubt].) When properly admitted evidence is overwhelming and the contested statement is merely cumulative of other direct evidence, even when confessions are involved, the error will be deemed harmless. (*People v. Houston* (2005) 130 Cal.App.4th 279, 296.) Here, five officers testified that defendant pointed and shot at the officers. Moreover, defendant's testimony that he was

shooting back towards the ground is not meaningfully different from the officers' testimony.

II

Defendant also argues that the sentence for his firearm possession conviction should have been stayed under section 654, which provides that persons convicted of a single act punishable in two different ways can only be punished under one of them. (§ 654, subd. (a).) He contends that because his possession of a firearm was incidental to and simultaneous with the primary offense of assault, section 654 precludes the imposition of sentence on both offenses. We do not agree.

When an ex-felon commits a crime using a firearm and arrives at the scene already in possession of the firearm, the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1141.) Here, defendant arrived at the inn already armed with a firearm. Before his assault on the officers, he already had committed an independent, punishable crime. Section 654 does not bar punishment for that crime as well as the subsequent assault with a firearm.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.