Filed 1/19/17 P. v. Tambriz CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MIGUEL TAMBRIZ,<br><br>Defendant and Appellant. | B268029<br><br>(Los Angeles County Super. Ct. No. BA430672) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed as modified in part; reversed in part.

Maggie Shrout, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

A jury acquitted defendant, Miguel Tambriz, of attempted murder, but convicted him of a lesser included offense, attempted voluntary manslaughter. (Pen. Code[1], §§ 664, 192, subd. (a), count 1.) The jury also convicted defendant of deadly weapon assault. (§ 245, subd. (a)(1), count 2.) Defendant was sentenced to three years in state prison on count 1. No sentence was imposed on count 2. We affirm the conviction and modify the judgment as to assessments and conduct credit. Upon remittitur issuance, defendant is to be sentenced as appropriate on count 2.

## II. THE EVIDENCE

The victim, Mateo Santay Chan, testified at trial as follows. On October 19, 2014, he had left work and was walking home. Mr. Chan was accompanied by Marvin Mejia, a friend and roommate. They stopped several times to purchase and consume beer. Around 1:30 a.m., Mr. Mejia went into a liquor store and Mr. Chan continued walking. Mr. Chan walked past four women. He heard someone say in Spanish, "Get his wallet." Mr. Chan started to run. Two people came up from behind and began attacking Mr. Chan. One person struck the back of Mr. Chan's head. The other person stabbed Mr. Chan multiple times with something sharp.

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

Mr. Chan started running but after a few steps he fell to the ground. Mr. Chan testified: "[S]ome people arrived . . . . I don't know who they are. Um, and I remember taking the wallet out of [my pants' pocket] and telling my friend that they tried to rob me." Mr. Chan lost consciousness. He woke up in the hospital. Mr. Chan denied he thought the women were prostitutes. He denied attempting to buy sex from them. He denied he told any police officer he had approached the women believing they were prostitutes. Mr. Chan was unable to identify his attackers.

Officer Juan Garcia arrived at the scene of the assault and interviewed Mr. Chan. Mr. Chan indicated he had approached four women he thought were prostitutes. He asked one of the women how much she charged for sex. She wanted $50. She became enraged after Mr. Chan said he did not have $50. She stabbed Mr. Chan while another person struck him in the head. Defendant repeated the same story to Detective Scarlett Martinez the day after the attack.

Mr. Chan's roommate, Mr. Mejia, was also interviewed by Officer Garcia. Mr. Mejia was walking with Mr. Chan. According to Mr. Mejia, Mr. Chan suddenly crossed the street and approached two people. The three of them walked out of Mr. Mejia's sight. After waiting a short while, Mr. Mejia crossed the street and saw the two people attacking Mr. Chan. As they walked past Mr. Mejia, one of the assailants said, "That's what he gets for being a . . . puto." "Puto" is slang for a gay man. Mr. Mejia appeared to Officer Garcia to be intoxicated.

An eyewitness, Jose Suazo, saw defendant and Jose Perez assaulting Mr. Chan. Ms. Perez attacked first. Ms. Perez is a transgender male and prefers to be referred to as a woman. Ms.

Perez was convicted and appealed. However, she has dismissed her appeal. Defendant repeatedly struck Mr. Chan in the back of the head with a high-heeled shoe. Ms. Perez stabbed Mr. Chan multiple times with a sharp object. Mr. Chan did not resist.

Defendant and Ms. Perez were located in a nearby donut shop. Ms. Perez had blood on her arms and feet. Ms. Perez told Officer David Gomez that a man had grabbed her, thrown her to the ground and tried to rape her. But according to Ms. Perez, a friend had stepped in and stabbed the man. Officer Gomez recovered a pair of scissors from the underside of a table where Ms. Perez had been sitting. Ms. Perez said defendant had hidden the scissors there. She said, "[T]he scissors were hidden underneath the table by my friend who protected me from the man who tried to rape me." In the surveillance videotape shown to the jury, defendant could be seen placing the scissors underneath the table. Mr. Chan's blood was on the scissors.

## III. DISCUSSION

### A. Prosecutorial Misconduct

Defendant asserts the prosecutor committed misconduct in argument to the jury by shifting the burden of proof on self-defense from the prosecution to the defense. The challenged argument was as follows: "[Deputy District Attorney Melissa C. Lyons:] Now, you've heard instructions with respect to self-defense. And it is the People's burden to prove to you beyond a reasonable doubt that self-defense is not applicable here. [¶] Okay? [¶] So let's go through it. What do I need to show? Or what needs to be shown? I shouldn't say what I need to show.

What needs to be shown is that the defendant reasonably believed that he was in imminent danger of being killed, raped, or suffering great bodily injury. So in order for you to find self-defense. . . ."

At this point, Deputy Public Defender Michael Pentz, representing Ms. Perez, requested permission to approach the bench where the following transpired: "The Court: The Court is at sidebar outside the presence of the jury with counsel. [¶] Yes, Mr. Pentz. [¶] Mr. Pentz: I apologize for interrupting. I don't do it lightly, but what Ms. Lyons just said, initially, she said truthful people have the burden of proof that it didn't happen, and she went in to begin the elements and she said what needs to be shown. [¶] Then she said what I need to show, then she corrected, no, not what I need to show but what needs to be shown. Taken all together now, at least the suggesting, that the burden is on the defense to show that the - - that they acted in self-defense rather than the people's burden to show that it did not happen; and I'm not saying it was intentional. The way it came out is shifting the burden, and I want a curative instruction. [¶] The Court: Okay."

Ms. Lyons was asked to respond and the following ensued: "Ms. Lyons: I - - I don't need to show those elements which is why I stated it as I did. In order for them to find self-defense, they need to see that these elements are there; and that's why I stated it the same way. I was very particular in making sure I didn't say the defense needs to show. [¶] Mr. Pentz: And I agree she didn't say that, but she said what needs to be shown. [¶] The Court: Hold on a second. [¶] Ms. Lyons, just make it clear to the jury that it's your burden to prove that it didn't happen in self-defense, and that's what the instructions say. And make sure

when you're talking about self-defense that you make the - - you don't make the same mistake that I did with regard to the instructions which is there's a difference between self-defense to attempted murder versus self-defense to assault with a deadly weapon. [¶] . . . [¶] The Court: Thank you."

Ms. Lyons continued: "Okay. [¶] As I was saying. What you have to show or has to be shown to you via the evidence for self-defense to apply is that the defendant reasonably believed that he was in imminent danger of being killed, raped, or suffering great bodily injury. That the defendant reasonably believed that the - - the use of force was necessary to defend against that danger. And that the defendant used no more force than was reasonably necessary to defend against that danger. [¶] And, again, members of the jury, it is the People's burden to show you beyond a reasonable doubt that self-defense is not applicable here. [¶] Okay? [¶] So let's talk about the evidence of self-defense that you have."

The jury was instructed that self-defense or defense of another is a defense to: attempted murder; attempted voluntary manslaughter; and deadly weapon assault. Moreover, the jurors were instructed the burden was on the prosecution to prove defendant did not act in self-defense or defense of another. With respect to attempted murder or attempted voluntary manslaughter, the trial court instructed: "The defendant is not guilty of attempted murder or attempted voluntary manslaughter if she was justified in attempting to kill someone in self-defense or defense of another. [¶] The defendant acted in lawful self-defense or defense of another if: [¶] . . . [¶] . . . The People have the burden of proving beyond a reasonable doubt that the attempted killing was not justified. If the People have not met

this burden, you must find the defendant not guilty of attempted murder or attempted voluntary manslaughter."

With respect to deadly weapon assault, the trial court instructed: "The defendant is charged in Count 2 with assault with a deadly weapon other than a firearm in violation of Penal Code section 245. [¶] To prove the defendant is guilty of this crime, the People must prove that: [¶] . . . [¶] And, five, the defendant did not act in self-defense or in defense of someone else." Further, the jury was instructed: "Self-defense is a defense to assault with a deadly weapon. The defendant is not guilty of that crime if he or she used force against the other person in lawful self-defense or defense of another. [¶] The defendant acted in lawful self-defense or defense of another if: [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense or defense of another. If the People have not met this burden, you must find the defendant not guilty of assault with a deadly weapon."

As our Supreme Court explained in *People v. Hill* (1998) 17 Cal.4th 800, 819: "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v.*

*Espinoza, supra,* 3 Cal.4th at p. 820.)' (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 . . . .)"

A prosecutor has wide latitude in arguing a case to a jury. (*People v. Peoples* (2016) 62 Cal.4th 718, 792; *People v. Hill, supra,* 17 Cal.4th at p. 819.) However, a prosecutor can commit misconduct if he or she misstates the law on burden of proof. (*People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Hill, supra,* 17 Cal.4th at p. 831; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215.) *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353; *People v. Williams* (2009) 170 Cal.App.4th 587, 635.) The question is whether it is reasonably likely the jury applied the complained-of remark in an objectionable manner. (*People v. McDowell* (2012) 54 Cal.4th 395, 437; *People v. Samayoa, supra*, 15 Cal.4th at p. 841; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072*,* disapproved on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.)

Defendant has not shown misconduct. The jury was repeatedly instructed it was the prosecutor's burden to show defendant did not act in self defense. Ms. Lyons both prefaced and concluded the quoted argument by emphasizing the burden of proving the absence of self defense rested with the *prosecution*. Ms. Lyons never said it was defendant's burden to prove he acted in self-defense or defense of others. There is no reasonable likelihood the jury construed Ms. Lyons's argument as requiring defendant to prove he acted in self-defense.

B. Count 2

Defendant argues the trial court should have stayed the count 2 sentence under section 654, subdivision (a). However, the trial court failed to impose *any* sentence on count 2. The sentence is therefore legally unauthorized. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472; *People v. Cheffen* (1969) 2 Cal.App.3d 638, 641-642.) It was the trial court's duty to impose a sentence. (*People v. Duff* (2010) 50 Cal.4th 787, 795-796; *People v. Alford, supra*, 180 Cal.App.4th at pp. 1468-1469.) Thus, upon remittitur issuance, the trial court is to impose a sentence on count 2. (*People v. Cheffen, supra*, 2 Cal.App.3d at pp. 641-642; *People v. Taylor* (1971) 15 Cal.App.3d 349, 353; see *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1121-1122 [trial court stayed imposition of sentence on enhancements].)

The parties point to a minute order and an abstract of judgment, both of which reflect a concurrent three-year sentence on count 2. However, it is the oral pronouncement of judgment that controls. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) There was no oral pronouncement of judgment on count 2. After further briefing, the parties agree we must order sentencing on count 2.

C. Assessments

The trial court orally imposed a $30 court facilities assessment and a $40 court operations assessment. (Gov. Code, § 70373, subd. (a)(1); § 1465.8, subd. (a)(1).) However, because defendant was convicted of two counts, and even if count 2 is stayed, the assessments should have been in the amounts of $60 and $80 respectively. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484-485; *People v. Crittle* (2007) 154 Cal.App.4th 368, 370-371; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6) .) The oral pronouncement of judgment must be modified to so provide. The abstract of judgment is correct in this regard and need not be amended.

D. Credit

Defendant was in presentence custody for 375 days from October 19, 2014 to October 28, 2015. The trial court awarded 375 days of custody credit and 375 days of conduct credit. However, under section 4019, defendant was entitled to only 374 days of conduct credit. (*People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1358-1360; *People v. Chilelli* (2014) 225 Cal.App.4th 581, 588.) The judgment must be modified and the abstract of judgment amended to so provide.

## IV. DISPOSITION

The judgment of conviction is affirmed. The judgment is modified to reflect: a $60 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)); an $80 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)); and an award of 374 days' credit for good conduct. Following remittitur issuance, defendant is to be sentenced on count 2. The superior court clerk is to then prepare an amended abstract of judgment and deliver a copy of the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

BAKER, J.

KUMAR, J.*

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