Filed 9/20/12 P. v. Garcia CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY EMILIO GARCIA,

Defendant and Appellant.

2d Crim. No. B233207
(Super. Ct. No. KA091665)
(Los Angeles County)

Danny Emilio Garcia appeals from the judgment following his conviction by jury of one count of second degree murder. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury also found allegations of firearm use (§ 12022.53, subd. (b)); personally and intentionally discharging a firearm (*id.*, subd. (c)); and causing great bodily injury or death (*id.*, subd. (d)) to be true. The trial court sentenced appellant to 40 years to life in state prison (15 years to life for second degree murder, and a 25-year-to-life great bodily injury or death enhancement). Appellant challenges the sufficiency of the evidence to support his conviction, and contends that the trial court erred and violated his constitutional rights by failing to instruct the jury with CALCRIM No. 570, the sudden quarrel/heat of passion voluntary

[1] All statutory references are to the Penal Code unless otherwise stated.

manslaughter instruction, and by excluding evidence regarding the victim's gang affiliation. He further contends, and respondent agrees, that the trial court erred during sentencing proceedings by imposing an assessment in the amount of $40, rather than the $30 assessment required by Government Code section 70373, subdivision (a)(1). Although the reporter's transcript reflects that the trial court's imposition of an unauthorized assessment, the minute order and abstract of judgment correctly reflect imposition of the $30 assessment. There is nothing more to do. We affirm the conviction.

Prosecution Evidence

In 2007, appellant often drove a black Dodge Durango "SUV" to visit his friend, Anthony Ramirez, who lived on Waco Street in Baldwin Park (the Waco residence). Anthony lived there with his uncles, Edgardo and Fernando Echeverria, and other relatives.

The Eastside Bolen gang (ESBP) operates in the neighborhood surrounding the Waco residence. Oscar Garcia, the victim, grew up across the street from the Waco residence and often visited Edgardo, Fernando and Anthony. Oscar also associated with people who had ESBP tattoos. He sold marijuana to Edgardo, and smoked it with him and Anthony.

On the night of November 26, 2007, Anthony was at the Waco residence, waiting for appellant to drive him to a party. Appellant arrived at approximately 7:30 p.m., and called Anthony to say he was outside eating a McDonald's meal. Anthony joined him on the sidewalk. After appellant finished eating, Anthony took his McDonald's meal trash, except for a drink cup, and threw it in a garbage can on the side of the house.

As Anthony walked back toward the sidewalk, he saw a Toyota Camry stop "very fast." Oscar got out of the Camry, and approached appellant. Oscar's hands were clenched at his side and "ready to fight." Anthony could not see anything in Oscar's hands. When Oscar stopped, facing appellant, with about five

feet between them, Anthony heard Oscar say, "You think you're big and bad, and you need to pay me for selling weed in my 'hood.'" Without saying anything, appellant reached into his waistband for a gun that was wrapped in a blue bandana. As Oscar reached for his waistband, appellant raised his gun and shot Oscar in the face.[2] Appellant and Anthony fled in appellant's black Durango.

Baldwin Park Police Department Officer Johnny Patino was nearby and heard a gunshot. He immediately drove to the Waco residence. Patino found Oscar in a pool of blood, lying in front of the residence. A Toyota Camry was parked in the middle of the street, with one front door open, its lights on, and its engine running. Patino also found a single nine-millimeter bullet casing near Oscar's body, a cell phone holder in his right hand, and a cell phone in the gutter.

Dr. Ajay Panchal, a Los Angeles County Coroner's Office deputy medical examiner, testified that Oscar died from a gunshot wound to his head. Dr. Panchal opined that the gun was fired from a distance of at least two feet, and that Oscar did not die instantly. He had marijuana and methamphetamine in his system. Los Angeles County Sheriff's Office Detective Howard Cooper attended the autopsy. He did not see any gang tattoos on Oscar's body.

After leaving the Waco residence, appellant drove to East Los Angeles with Anthony. Anthony called Fernando and told him to get rid of the McDonald's cup. A friend of appellant drove him and Anthony to a hotel near East Los Angeles where they spent one night. After spending several days in various southern California locations, they went to Mexico, where they stayed for

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[2] The above-described sequence of events is based on Anthony's trial testimony. It is inconsistent with his preliminary hearing testimony that Oscar reached for his waist as he approached appellant, before appellant "did anything." Anthony testified under a grant of immunity at both proceedings.

several months. Anthony returned in June 2008, and spoke with Detective Cooper about the shooting the day after his return.

Appellant returned to Los Angeles in November 2008. When Cooper interviewed him on August 18, 2010, appellant said that he was not familiar with Waco Street and did not know Anthony.

Defense Evidence

Los Angeles County Sheriff's Office Detective Steven Skahill testified for the defense as a gang expert. Skahill explained that gang members "hit up" people they do not recognize by asking where they are from. Not all gang members have tattoos and some gang members carry guns. Gangs demand money or "tax" people who conduct business in the gang's territory. People who fail to pay taxes risk retaliation, including severe injury.

Appellant testified that in 2007, he and Anthony were close friends and "hung out" together three or four times a week. Appellant developed a close relationship with Anthony's uncles, Edgardo and Fernando. Edgardo smoked marijuana with appellant and Fernando invited him to parties and bought him beer. The Waco residence is in a dangerous part of Baldwin Park. Appellant sold marijuana to several people in 2007, but he did not sell it to anyone in Baldwin Park except Anthony.

In the 30 days before the shooting, Oscar confronted or threatened appellant several times. On the first occasion, he was in front of the Waco residence with Fernando when Oscar drove by in a blue SUV and "threw a gang sign." When he asked who it was, Fernando answered, "That's Conner from Eastside Bolen." Every other incident occurred when appellant was driving his Durango. Once, Oscar pulled up next to him, told him to pull over and asked, "Where you from?" Their exchange continued briefly and Oscar sped away. About a week later, appellant was driving in Baldwin Park, when Oscar and another person followed and asked him where he was from. He tried but failed to evade

them. Oscar then told appellant, "You got to pay taxes." Oscar and others also visited Anthony to inquire about appellant, and where he lived. They told Anthony that appellant needed to pay taxes, and that Oscar would be "looking for him." Another time, as appellant left the Waco residence, he saw Oscar in a car "full of people throwing up gang signs." It made a U-turn and chased him, but none of its occupants spoke to him. In their final encounter before November 26, 2007, Oscar chased appellant, pulled up next to his car, and pointed a gun at him. Appellant was afraid of Oscar, but he did not report any of their encounters to the police; nor did he stop selling marijuana in Baldwin Park. He obtained a gun by trading marijuana for it. The gun was wrapped in a dark blue bandana when he received it.

On November 26, 2007, appellant and Anthony had plans to attend an evening party. At about 7:30 p.m., appellant drove toward the Waco residence. Because it was in a dangerous area, and appellant was "afraid for [his] life," he took his gun, still wrapped in the blue bandana, and tucked it into his waistband. He stopped at McDonald's on his way to the Waco residence. When he arrived, he telephoned Anthony and said he was outside eating his meal. Anthony joined him, then briefly stepped away to dump the trash from appellant's meal (except for a drink cup). While Anthony was dumping the trash, a car pulled up "fast," and stopped in the middle of the street, with its engine running. Appellant thought there would be a "drive-by [shooting]."

Oscar got out of the car and yelled, "'Think you're bad ass? You think you're the shit? This is my neighborhood. You got to pay taxes." Because Oscar had recently pointed a gun at him, appellant was scared and just stood there. Oscar approached him and continued yelling. Appellant saw a tattoo on Oscar's neck and possibly on his leg. He thought Oscar was a gang member and might shoot him. He saw Oscar reach for his waistband, with his right hand, toward a black handle that appeared to be a gun. Appellant then pulled out his gun and shot Oscar in the face, without removing the blue bandana.

Appellant testified that he was "shocked" after the shooting. Anthony said, "Let's go," and they left in appellant's Durango. Anthony told him that the McDonald's drink cup was still at the Waco residence. He borrowed appellant's phone, called Fernando, and told him to get the cup.

Appellant and Anthony got on the freeway, drove around, and eventually stopped in a shopping center parking lot in East Los Angeles and discussed what they would do. They were both concerned about gang retaliation. They left the Durango at appellant's house in Baldwin Park. They spent the next few days in several southern California communities. While they were in San Diego, appellant received a text message from Edgardo regarding "getting smoked," which meant that Edgardo's family was in danger. On the Saturday after the shooting, Anthony and appellant went to Mexico and stayed there for several months. While they were in Mexico, Anthony was afraid and did not want to go home. After several months, he and appellant decided to go home. Anthony went home first. Appellant stayed longer and returned to Los Angeles. He never returned to Baldwin Park because he feared its gang members.

When Detective Cooper interviewed him in August 2010, appellant denied that he knew Anthony. He did that because he had sold him marijuana, and did not want to get himself or Anthony in trouble. When Cooper mentioned murder, it surprised appellant because he felt that the shooting was not murder, but self-defense.

DISCUSSION

Substantial Evidence Supports the Judgment

Appellant claims, in essence, that there is not sufficient evidence to support his murder conviction because the uncontroverted, credible testimony established as a matter of law that he shot Oscar in self-defense. The record belies his claim.

In reviewing claims of insufficient evidence, """. . . we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial . . . evidence that is reasonable, credible, and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]"' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) "'. . . [W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*Ibid.*) """If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) Reversal is warranted only where it appears "'that upon no hypothesis what[so]ever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

As appellant concedes, issues arising out of self-defense, including whether the circumstances would cause a reasonable person to perceive the necessity of defense, whether the defendant actually acted in defense of himself, and whether the force he used was excessive, are normally questions of fact for the trier of fact. (See *People v. Clark* (1982) 130 Cal.App.3d 371, 379, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.) Appellant nonetheless argues that in this case, there was not substantial, credible evidence to support the conviction, self-defense was established as a matter of law. We disagree.

The trial court instructed the jury on justifiable homicide based on reasonable self-defense, and on manslaughter based on unreasonable or imperfect self-defense, which reduces murder to voluntary manslaughter. (CALCRIM Nos. 505, 571.) It also instructed the jury on the difference between murder and manslaughter (*id.*, No. 500); on murder with malice aforethought (*id.*, No. 520);

and on the difference between first and second degree murder (*id*., No. 521). Appellant's counsel forcefully argued the self-defense and imperfect self-defense theories to the jury. The jury rejected those theories and found that appellant committed second degree murder. Viewing the evidence in the light most favorable to the judgment, as we must (*People v. Wilson*, *supra*, 44 Cal.4th at p. 806), there is no basis for us to disturb the jury's finding that appellant was guilty of second degree murder.

Sudden Quarrel/Heat of Passion Voluntary Manslaughter Instruction

Appellant further contends the trial court erred in failing to instruct the jury, sua sponte, on voluntary manslaughter based on sudden quarrel or heat of passion. We disagree.

A trial court must instruct on general principles of law closely and openly connected to the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) This duty extends to instructions on lesser included offenses supported by substantial evidence, which is evidence from which a reasonable jury could find the defendant guilty of the lesser offense, but not the charged offense. Manslaughter is a lesser included offense of murder. *(People v. Moye* (2009) 47 Cal.4th 537, 556.)

A defendant who intentionally kills in a sudden quarrel or heat of passion is guilty of manslaughter rather than murder. (§ 192, subd. (a); *People v. Moye*, *supra*, 47 Cal.4th at p. 549.) The heat of passion theory has an objective and subjective component. To satisfy the objective component, the defendant's passion must be due to "'sufficient provocation'" caused by the victim. (*Moye*, *supra*, at pp. 549-550.) "'Sufficient provocation'" requires victim conduct which would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Id*. at p. 550.) To satisfy the subjective component, the defendant must have killed while actually in a heat of passion which was caused by objectively sufficient provocation. (*Ibid*.)

The defense theory at trial was that appellant killed in self-defense or imperfect self-defense. The trial court instructed the jury on those theories. There is not substantial evidence of a killing under a sudden quarrel or in the heat of passion. By his own testimony, appellant feared Oscar, and armed himself because of that fear, following several encounters with Oscar. He took his gun to the Waco residence on November 26, 2007, because he was afraid for his life. He testified that when Oscar left the empty car in the middle of the street, he thought there would be a drive-by shooting. When he saw Oscar reach toward his waist, appellant shot him, without saying a word. He shot Oscar because he was afraid for his life.

In arguing that the evidence would support a sudden quarrel or heat of passion finding, appellant misplaces his reliance on *Breverman*. Nothing in *Breverman* suggests that a heat of passion instruction is required in every case in which the only evidence of heat of passion is that a defendant is threatened and consequently fears for his life. (*People v. Moye*, *supra*, 47 Cal.4th at p. 555.) The evidence below did not support a finding that the events would have aroused the passion of the ordinarily reasonable person in the same situation. (*Id.*, at pp. 540-541.)

Even if the trial court had erred by failing to instruct on sudden quarrel/heat of passion voluntary manslaughter, the error would have been harmless. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 177-178 [*People v. Watson* (1956) 46 Cal.2d 818 standard applicable to instructional errors].) In deciding whether evidence is sufficiently substantial to require a lesser included offense instruction, the trial court determines only its bare legal sufficiency, not its weight. (*People v. Moye*, *supra*, 47 Cal.4th at p. 556.) "'Appellate review under *Watson*, on the other hand, takes an entirely different view of the evidence. Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. . . .'" (*Ibid.*) In this case, "it is

reasonable to assume the jury considered all of the defense evidence bearing on defendant's state of mind and the question whether he harbored malice when it entertained and *rejected* his claims of reasonable and unreasonable (or imperfect) self-defense." (*Ibid.*) Having rejected those claims, it is not reasonably likely that the jury would have reached a different verdict with a sudden quarrel/heat of passion manslaughter instruction. (*Id*. at p. 557.)

Exclusion of Defense Evidence

Appellant argues that the trial court violated his due process right to a fair trial and his Sixth Amendment right to present a defense by excluding evidence of Oscar's gang affiliation. We disagree.

Although the federal Constitution guarantees criminal defendants an opportunity to present a defense, states retain broad latitude to establish rules excluding evidence from criminal trials, provided that the rules are neither arbitrary nor disproportionate to the purpose they serve. (*United States v. Scheffer* (1998) 523 U.S. 303, 308; *Crane v. Kentucky* (1986) 476 U.S. 683, 689-690; *California v. Trombetta* (1984) 467 U.S. 479, 485.) In particular, established rules of evidence such as Evidence Code section 352, which permit trial courts to exclude evidence whose probative value is outweighed by factors such as prejudice, undo consumption of time, confusion of the issues, or the potential to mislead the jury, do not impair a defendant's right to present a defense. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325; *Crane*, *supra*, at pp. 689-690; *People v. Boyette* (2002) 29 Cal.4th 381, 427-428; *People v. Jennings* (1991) 53 Cal.3d 334, 372.) The trial court possesses broad discretion to determine the relevance of evidence. (Evid. Code, § 350; *People v. Crittenden* (1994) 9 Cal.4th 83, 132.)

Defense counsel sought to present the testimony of Marisol Zambrano, Oscar's girlfriend and the mother of his child, regarding Oscar's ESBP gang affiliation. During an Evidence Code section 402 hearing, Zambrano testified that eight years before trial, when she and Oscar were teenagers, he used to say that

he was going to "hang out" with ESBP gang members and that his nickname was "Conner." She saw him write "Conner" on notebook paper. Zambrano further testified that after Oscar moved to Montclair, he went to Baldwin Park, but he never said he was going there to see gang members. She never saw him with gang members, and she did not know his friends in Baldwin Park. Oscar had tattoos, but no ESBP gang tattoos. To Zambrano's knowledge, Oscar was not an ESBP gang member.

The trial court concluded that the probative value of Zambrano's testimony regarding the gang was outweighed by its speculative nature, and excluded it pursuant to Evidence Code section 352. It properly excluded that evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684 [Evidence that allows only speculative inferences is irrelevant evidence and is inadmissible].) The exclusion of that speculative gang affiliation evidence did not violate appellant's constitutional rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Robert M. Martinez, Judge

Superior Court County of Los Angeles

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

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