Filed 9/19/17 P. v. Luna CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUNA, Defendant and Appellant.	B267333 (Los Angeles County Super. Ct. No. BA395226)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Reversed.

California Appellate Project, Jonathan B. Steiner and Joshua Schraer, 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, Assistant Attorney General, William H. Shin and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Luna raises a contention of trial error following his conviction of carrying a concealed firearm with a gang enhancement (Pen. Code, §§ 25400, subd. (a)(2), 186.22, subd. (b)).[1] For the reasons discussed below, the judgment is reversed.

FACTUAL BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence*.

At about 11:30 p.m. on March 16, 2012, security guards Erick Beltran and Faustino Zamudio were patrolling a parking lot at Fallas Paredes Shopping Center in Los Angeles. Beltran testified that he was driving and Zamudio was in the front passenger seat. As Beltran drove toward the parking lot exit, he saw three Hispanic men—later identified as defendant Luna, Javier Melendez, and Mauricio Melendez[2]—about 30 feet away. The men, who appeared to be gang members, were in the street, drinking alcohol, yelling at passing vehicles, and making hand gestures. Beltran believed those gestures to be gang symbols. He also testified that Luna had a beer bottle in his hand while he was making these gestures with both hands.

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

[2] Because Javier Melendez and Mauricio Melendez share the same last name, for clarity sake we will refer to them by their first names. Although Javier and Mauricio were jointly charged with Luna in the same information, they are not parties to this appeal.

Beltran drove toward the three men, who initially turned away from his headlights. But when Beltran got closer to them, Javier turned around, pulled a black revolver from his waistband, and pointed it at Beltran. Luna and Mauricio dropped their beer bottles. Then Javier starting shooting at Beltran's car; Beltran "could see the muzzle flash" and he heard gunshots. Beltran jumped out of his car. He then saw that Luna and Mauricio were also shooting in his direction; he could see muzzle flashes in the dark coming from where they were standing. Beltran had not yet drawn his own weapon, but he did so at this point.

Beltran shot at Javier about five times and Javier ran off. Luna and Mauricio were still shooting at Beltran, each of them firing three or four times at him. Luna and Mauricio then ran into an alley and, as they ran, shot back toward Beltran. Beltran and Zamudio called 9-1-1 and said that all three suspects had guns. Beltran testified he did not know what kind of gun either Luna or Mauricio had.

Zamudio's testimony was similar. Javier shot first and then Luna and Mauricio pulled out guns and began shooting. Zamudio could not identity what type of guns Luna and Mauricio had. Zamudio got out of Beltran's car and fired back. He confirmed Beltran's testimony that Luna and Mauricio retreated into an alley. Zamudio testified he had no doubt that all three suspects shot at him.

The police arrested Javier on Avenue 56. He had a spent .357 Magnum shell casing in his possession, and officers found a box of .357 shells in the area where he had been running. The police later arrested Luna and Mauricio in an apartment complex near Avenues 55 and 56. No firearms were recovered from either of them.

Los Angeles Police Officer Arshavir Shaldjian, a gang expert, testified about the history and culture of the Avenues street gang. He testified that Luna, Mauricio and Javier were members of this gang. Given a hypothetical based on the facts of this case, Shaldjian opined the crimes had been committed for the benefit of and in association with the Avenues gang.

2. *Defense evidence.*

Luna did not testify.

Javier testified Beltran shot at him first and that he merely shot back in self-defense. He was carrying a gun because he had been the victim of a robbery and an attempted robbery; he denied being a gang member. Javier also testified that neither Mauricio nor Luna was in possession of a weapon that night.

3. *Trial outcome.*

Luna, Javier and Mauricio were initially charged with a collection of offenses, including assault with a firearm, premeditated attempted murder, carrying concealed weapons, and shooting at an occupied motor vehicle. At their first trial, the jury found Luna guilty of only the concealed firearm charge (along with the gang enhancement), and deadlocked on the remaining charges. Luna was retried on the remaining counts, but he was acquitted.

DISCUSSION

Luna contends his conviction must be reversed because there was insufficient evidence to prove he had been in possession of a concealed firearm. We agree.

1. *Legal principles.*

a. *Standard of review.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light

most favorable to the judgment to determine whether it discloses substantial evidence—that is, 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.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "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.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].'

[Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

b. *Elements of the charged offense.*

Section 25400, subdivision (a)(2), provides: "(a) A person is guilty of carrying a concealed firearm when the person does any of the following: [¶] . . . [¶] (2) Carries concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person." Section 16530, subdivision (a), provides: "As used in this part,[3] the terms 'firearm capable of being concealed upon the person,' 'pistol,' and 'revolver' apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length.

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3 Section 16530 is found in Part 6 (Control of Deadly Weapons), Title 1 (Preliminary Provisions) of the Penal Code; section 25400 is found in Part 6 (Control of Deadly Weapons), Title 4 (Firearms).

These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length."

2. *Discussion.*

Luna contends there was insufficient evidence to prove the "firearm capable of being concealed upon the person" element of the charged offense because there was no evidence proving that he had in his possession a gun having either "a barrel less than 16 inches in length" or "a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length."

Although the parties' initial briefing focused on the question whether there was evidence proving that Luna's gun had been concealed before he began shooting at Beltran and Zamudio, we asked for supplemental briefing on a different point: whether there was sufficient evidence that Luna's weapon was a "firearm capable of being concealed upon the person" within the meaning of sections 25400, subdivision (a)(2) and 16530, subdivision (a). If the answers are in the negative, then Luna's conviction must be reversed.

a. *Section 16530 requires a specific barrel length.*

In their supplemental briefing, both Luna and the Attorney General agree that section 16530, subdivision (a), applies to this case. However, they disagree fundamentally about what the statute means. As noted, the statute states that "the terms 'firearm capable of being concealed upon the person,' 'pistol,' and 'revolver' *apply to and include* any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, *and that has a barrel less than 16 inches in length*" or "*that has a barrel 16 inches or more*

in length which is designed to be interchanged with a barrel less than 16 inches in length." (§ 16530, subd. (a), italics added.) The Attorney General argues the phrase "*apply to and include*" must be read *inclusively*: "The plain meaning of 'apply to' and 'include' indicates that firearms under 16 inches long and firearms over 16 inches which are designed to be interchanged with a barrel less than 16 inches are merely *examples* of concealable weapons." Luna, on the other hand, argues: "The length requirement in section 16530 is an element of a violation of section 25400. As with all elements, the People have the burden of proving it beyond a reasonable doubt."

We agree with Luna that the statute's language "is clear and its meaning is straightforward. . . Any [weapon] that has a barrel less than 16 inches in length constitutes a weapon within the meaning of the statute. Any such device that has a barrel 16 inches or more in length but that is designed to be interchanged with a barrel less than 16 inches in length constitutes a weapon within the meaning of the statute. And any such device that has a barrel of 16 inches or more that is not designed to be interchanged with a barrel less than 16 inches in length does not constitute a weapon within the meaning of the statute."

As Luna points out, this is exactly the interpretation given an earlier version of this statute (when the statutory barrel length was 12 inches) by *People v. Boyd* (1947) 79 Cal.App.2d 90 (*Boyd*). The *Boyd* court reversed a conviction for possession by an ex-felon of a firearm capable of being concealed upon the person: "While there is no direct evidence that the barrel of this gun was less than twelve inches in length the respondent makes two contentions in support of the judgment. It is first contended that

it is not necessary in such a case to prove that the gun in question has a barrel less than twelve inches in length. It is argued that the real purpose of this law, as material here, is to prohibit the carrying by an exconvict of a firearm which is capable of being concealed on the person; that the portion of the statute which reads 'the terms "pistol," "revolver" and "firearms capable of being concealed upon the person" as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length' was not meant to exclude firearms with barrels longer than twelve inches; and that it follows that the length of the barrel of the gun need not be proved. *This contention is without merit*. The wording of the statute, in defining these terms for the purpose of the statute as applying to and including all firearms having a barrel less than twelve inches in length, was clearly intended to make the statute inapplicable to firearms having a barrel twelve inches or more in length." (*Id.* at p. 93, italics added.)

The Attorney General urges us not to follow *Boyd*, arguing that its interpretation of the pivotal language is "contrary to the plain meaning and legislative intent of statutes barring the possession of concealed firearms," and that "no published opinion has applied *Boyd's* interpretation to former section 12001 (current section 16530) to hold that a firearm capable of being concealed upon the person means *only* weapons with barrels less than 16 inches long." We are not persuaded. The Attorney General's interpretation of the statutory language renders entirely superfluous the statute's final sentence, which reads: "These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length." (§ 16530, subd. (a).) "The

words of the statute must be construed in their context. [Citation.] We also generally avoid a reading that renders any part of a statute superfluous. [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1030; see *In re Young* (2004) 32 Cal.4th 900, 907 ["This interpretation would avoid rendering the term 'additional' superfluous."].) We agree with Luna that there is no conceivable purpose of the barrel-length language other than to exclude guns with barrel lengths of 16 inches or more that are not designed to be interchanged with a shorter barrel.

Although no published case has relied on *Boyd*, the case of *People v. Osterman* (1970) 4 Cal.App.3d 763 (*Osterman*), came to precisely the same conclusion. *Osterman* was interpreting the language of a former version of section 12001 in connection with a felon-in-possession conviction when the statutory barrel length was 12 inches: "One element of the charge is that the firearm possessed by defendant has a barrel 'less than twelve inches in length.' " (*Osterman*, at p. 765.) After noting the allegedly offending firearm had been admitted into evidence, *Osterman* concluded: "As the exhibit itself establishes, the length of the *barrel* is 12 3/8 inches overall (including that portion extending through the frame), and hence the weapon is not one within the purview of Penal Code sections 12021 or 12001, which define a 'firearm capable of being concealed upon the person.' " (*Ibid*.)

Moreover, in support of the People's claim that Luna's statutory interpretation contradicts the purpose of the Dangerous Weapons Control Law, the Attorney General cites *People v. Heffner* (1977) 70 Cal.App.3d 643 (*Heffner*) for this statement: " 'The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their

purposes be too easily nullified by overrefined inquiries into the meaning of words." (*Id*. at p. 649.) But the Attorney General has ignored the actual holding of *Heffner*, which concerned whether a taser device qualified as a "weapon" for purposes of section 12031, subdivision (a). With regard to that question, *Heffner* came to the same conclusion as *Boyd* and *Osterman*: "The statute fails to define the term 'firearm.' However, Penal Code section 12001 defines concealable firearms and it may, with reason, be inferred that if the Taser is a firearm at all it is a concealable firearm, like a pistol or revolver, and unlike a rifle or shotgun. That being so, for the Taser to be a firearm within legislative contemplation it must satisfy the definition of section 12001, which reads in relevant part: ' "Pistol," "revolver," and "firearm capable of being concealed upon the person" as used in this chapter shall apply to and include any device, designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and which has a barrel less than 12 inches in length.' *Reduced to checklist form, a concealable firearm must be a device* (1) designed to be used as a weapon, (2) which expels a projectile, (3) by the force of any explosion or other combustion, and (4) *having a barrel less than 12 inches in length*." (*Heffner*, at p. 647, italics added.) *Heffner* went on to state: "The most serious point of controversy with respect to application of the section 12001 definition of a concealable firearm is whether the Taser has a barrel less than 12 inches in length. The only parts of the Taser which lend themselves to description as 'barrels' are the chambers into which the barbed contactors are placed and from which they are expelled; if they are barrels they are certainly less than 12 inches in length." (*Id*. at p. 648, fn. omitted.) Ultimately, the court

concluded the Taser met these requirements and affirmed the conviction. (*Id.* at pp. 649, 655.)

We conclude that section 16530 applies to the weapons offense charged in this case and requires proof that the weapon in question either had a barrel length of less than 16 inches, or had a barrel length of more than 16 inches but was designed to be interchanged with a barrel less than 16 inches in length.

b. *There was no evidence that Luna's gun met this barrel length requirement.*

The Attorney General contends that, even if section 16530, subdivision (a), requires that a concealable firearm have a barrel length less than 16 inches, "there was nevertheless sufficient circumstantial evidence to satisfy that requirement in this case." After acknowledging there was no direct evidence regarding barrel length—because both Beltran and Zamudio testified they knew Luna was shooting at them only because they saw muzzle flashes and heard gunshots—the Attorney General argues: "Nevertheless, there was evidence from which the jury could reasonably infer that appellant's weapon had a barrel less than 16 inches. The evidence supported an inference that appellant had a revolver similar to that used by codefendant Javier Melendez. In this regard, no casings were recovered from the area where appellant and codefendants fired at the victims and an officer testified a revolver did not eject casings but retained them. . . . Beltran and Javier both testified Javier had a revolver. Based on this evidence, the prosecutor argued that appellant and both codefendants each had a revolver. None of the parties argued about the length of the barrel. Further, to presume that appellant's firearm was somehow over 16 inches would ignore common sense because a larger weapon is logically easier to see

when taken from concealment and more difficult to conceal in the first instance. [¶] Also, unlike *Boyd*, there was no evidence in this case indicating that the gun was longer than 16 inches."

We are not persuaded. Although the prosecutor argued to the jury that all three defendants were using revolvers, this argument was based on speculation (except for the absence of shell casings at the crime scene) and the evidence showing that Javier used a revolver.[4] But even assuming that Luna was using a revolver, the crucial question was the *barrel length* of Luna's gun. The People did not prove the barrel length even of Javier's gun, nor did they prove that all revolvers have barrels less than 16 inches in length.

It is the People who were required to prove that the barrel length was less than 16 inches; Luna was not required to prove anything. The Attorney General's reference to *Boyd* in this regard is misplaced. In *Boyd*, as here, "[t]he gun was never recovered and the People put on no direct evidence as to the length of its barrel." (*Boyd*, *supra*, 79 Cal.App.2d at p. 91.) Both Boyd and his wife testified the barrel was more than 12 inches long. Boyd's conviction was reversed because the prosecution failed to prove that Boyd's revolver had a barrel length less than

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[4] The prosecutor told the jury: "First of all, what is the first gang act that they do? And it is not out in the streets; it is what they do before they get on the streets. [¶] They arm themselves with guns. They arm themselves with revolvers. Not only do they arm themselves with revolvers; they hide the revolvers." But this assertion was based on nothing more than the evidence showing that Javier used a revolver and the absence of shell casings at the crime scene. The gang expert did not testify that members of the Avenues gang exclusively or usually carried revolvers rather than semi-automatic pistols.

12 inches: "It was incumbent upon the prosecution to prove beyond a reasonable doubt that the barrel of this gun was less than twelve inches in length. While the evidence here relied on may be sufficient to raise a suspicion it is not, in our opinion, sufficient to establish the required fact beyond a reasonable doubt. In a criminal case, the judgment should rest upon some substantial evidence proving the required facts, and the jury should not be allowed to decide such facts upon mere surmise and conjecture. [¶] The judgment is reversed." (*Id.* at pp. 93–94.)

The Attorney General relies on the "common sense" that "a larger weapon is logically easier to see when taken from concealment and more difficult to conceal in the first instance." Even if we acknowledge that, as a matter of common sense, it is obvious a smaller gun is easier to conceal than a larger gun, this says nothing about whether the barrel length of Luna's gun was 15 inches rather than 17 inches. To achieve this last inference, the prosecution had to rely on mere speculation, which it was not allowed to do. (See *People v. Lewis* (2001) 26 Cal.4th 334, 369 ["Defendant's evidence supporting the request for accomplice instructions was not substantial but speculative. Substantial evidence is 'evidence sufficient to "deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak" ' "]; *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416 [reasonable inference cannot be based on suspicion, imagination, speculation, supposition, surmise, conjecture, or guess work].)

In sum, we conclude there was insufficient evidence to prove the barrel length of Luna's gun and we will, therefore, reverse his conviction.

DISPOSITION

The judgment of conviction is reversed.

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EDMON, P. J.

We concur:

LAVIN, J.

BACHNER, 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.