Filed 8/27/14 P. v. Benitez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM FAURICIO BENITEZ, Defendant and Appellant.	B247640 (Los Angeles County Super. Ct. No. BA392047)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed as modified.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant William Fauricio Benitez (defendant) appeals from his murder and attempted murder convictions, claiming reversible error due to the trial court's failure to instruct the jury sua sponte as to voluntary manslaughter and attempted voluntary manslaughter based upon heat of passion. Defendant also claims two additional days of presentence custody credit. We modify the judgment to include the two additional days; however, as we conclude that the trial court did not err in failing to instruct the jury regarding heat of passion, and that if it had erred, any such error would have been harmless. We affirm the judgment as modified.

BACKGROUND

Procedural history

In a four-count information, defendant was charged with the murder of Ramon Ortega-Garcia (Garcia), in violation of Penal Code section 187, subdivision (a),[1] and the attempted willful, deliberate and premeditated murder of Milton Gomez, Marlon Gomez,[2] and Yolani Verenice Flores (Flores), in violation of sections 664 and 187, subdivision (a). As to all four counts, the information alleged that defendant personally and intentionally discharged a firearm, causing great bodily injury to the victims within the meaning of section 12022.53, subdivisions (b), (c), and (d).

The jury found defendant guilty of counts 1, 2, and 3 as charged, and found the gun use allegations true as to those counts. As the jury was not able reach a verdict on count 4, the attempted murder of Flores, the trial court declared a mistrial and later dismissed that count. On March 8, 2013, the trial court sentenced defendant to a term of 25 years to life as to count 1 and consecutive terms of life with the possibility of parole as to each of counts 2 and 3. As to each of the three counts, the court imposed an enhancement of 25 years to life pursuant to section 12022.53, subdivision (d); imposed and stayed a 20-year enhancement under section 12022.53, subdivision (c); and imposed and stayed a 10-year enhancement under subdivision (b). The trial court imposed

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

[2] We refer to Milton and Marlon Gomez by their first names to avoid confusion.

mandatory fines and fees and awarded 443 actual days of custody credit. The parties later stipulated to a victim restitution order in the sum of $5,072.

Defendant filed a timely notice of appeal.

Prosecution evidence

During the late night of December 17, 2011, Milton went to La Casa Honduras restaurant for an evening of drinking and dancing with his wife Flores, her sister Wendy Rodriguez Pavon (Pavon), his brother Marlon, his cousin Garcia, and his sister Darly De Leon (De Leon). Defendant worked there occasionally as a disc jockey under the professional name, "MP3." Though he was not working that night, he was there as a customer with friends. Marlon arrived earlier and was in the bar area of the restaurant, while the rest of Milton's group sat a table near the dance floor. Garcia was already intoxicated when they arrived, and he soon put his head down on the table and slept much of the evening.

Defendant, accompanied by other men, arrived later than Milton's group. A few hours later, a fight broke out. Milton, Flores, De Leon, and Pavon testified about their observations.

According to De Leon, defendant walked to the far end of the bar while Marlon was talking to a woman De Leon had seen talking and drinking with defendant earlier in the evening. Although Marlon had not spoken to defendant or looked at him, defendant approached Marlon and the woman, looking as though he wanted to fight, and then said something to Marlon in English, which Marlon did not understand. Defendant cursed at Marlon, saying such things as, "Fuck you," and other offensive words, which caused Marlon to become agitated. The woman told defendant, "Don't get in, I'm just talking to him." Defendant continued to swear at Marlon, and the two men who were with defendant then approached and surrounded Marlon, looking as though they were going to fight. Milton then came running over and they all started fighting. Once the fight was broken up, defendant said, "You'll see what's going to happen."

Milton testified that he had been to that club about 20 times before and had seen defendant working there as a disc jockey about 10 times. While his group was at their

table drinking and dancing, he saw Marlon arguing with a woman in another part of the restaurant. He saw defendant then approach Marlon and the woman, and Marlon and defendant began arguing with each other. Milton then went to them and said, "He's my brother. If you have problems, talk to me." Milton then hit defendant in the face. Another man stepped in to defend defendant and a second man threw a punch at Marlon. After a security guard broke up the fight, defendant, who appeared to be upset said, "You're going to pay for it." Defendant was then removed from the restaurant and Milton and Marlon went back to Milton's table. Garcia was still asleep on the table and was not involved in the fight. He had no problems with anyone that night.

Flores testified that when defendant first entered the restaurant he passed by the group's table and gave them a "mean stare." Later in the evening she saw Marlon at the bar arguing with defendant, who was with three or four other men. Thinking that the men were going to fight, she told Milton to go help his brother. Flores heard Milton tell defendant that whatever he had against Marlon, he had it against Milton, too, because they were brothers. Flores did not hear the response but saw defendant and Milton start swinging at each other. As defendant and his friends were hitting Milton, Flores and De Leon came to help. Flores tugged on Milton in an attempt to separate him from the others. The fight lasted only a couple of minutes, and altogether, four or five men were involved, including Marlon, Milton, defendant, and defendant's friends.

Pavon testified that she saw Marlon at the bar with his friend "Pundi" when defendant started a fight. Milton intervened to defend his brother. After defendant was taken outside, she, Marlon, Milton, and De Leon remained inside because the security guard would not let them leave until everyone had calmed down.

The restaurant's owner, Jose Alvarado (Alvarado), testified that he did not see the fight, but talked with defendant outside after defendant had been ejected. Alvarado saw no bruises on defendant or any other sign that he had been in a fight. Defendant did not appear to be intoxicated. Alvarado told defendant to leave, though defendant told him he wanted to wait for the people still inside. Alvarado told defendant: "William get out of here. Get out of here. I don't want no problem. Get out of here, get out of here."

As Milton's group watched through the glass door, defendant left in his SUV with a companion. Milton's group left at closing time, about 10 minutes later, and drove about five minutes to De Leon's home. A red car followed them closely until they reached De Leon's house. De Leon recognized the two women in the car as having been with defendant and his companions in La Casa Honduras that evening. When they arrived, Milton parked in the driveway. De Leon, Milton, and Flores went inside, and Milton and Flores came back out with their young daughters. They fastened the children into the backseat with Pavon and Pundi, and remained there for awhile, chatting while Marlon drank another beer. Flores sat on the hood of the car, while Garcia, Marlon, and Milton sat on the nearby sidewalk.

A short time later, defendant and another man walked through the gate and up the driveway, each holding a gun. They were both wearing black clothing and black knit caps. They said nothing, and just started shooting. Flores heard someone call out, "Watch out, Yolani," and as she heard gunfire, she saw Marlon and Garcia run off in the same direction. Marlon ran when he saw defendant firing his weapon about 10 feet away, and when defendant was within a few steps of him, Marlon was struck by a bullet in each leg. Marlon saw defendant pointing his gun at Milton and Flores, and saw Garcia get shot. Milton ran in another direction and jumped over a wall. Defendant came looking for Milton, who tried to hide, but defendant found him and chased him down an alley where defendant shot Milton in the head. Flores did not run away because her daughters were in the car. When defendant fired his weapon in her direction, she fell. She attempted to shield herself with her hands as defendant came closer, and said to him, "What's wrong with you?" His only reply was to shoot her in the foot.

The time of the shooting and the length of time after the fight took place were not clear. The restaurant normally closed at 2:00 a.m., but Marlon testified that the group left about 1:20 a.m., and that the bar closed right after they left. The shooting apparently occurred at least 20 to 30 minutes later, considering the time needed to load the cars, the five-minute drive, placing the children in Milton's car, and the subsequent conversation. The police were on the scene by 2:29 a.m.

Garcia died of multiple gunshot wounds. Flores had surgery on her foot three days later. Marlon was hospitalized for five days, and at the time of trial was still unable to walk normally. Milton spent one month in the hospital where a bone was removed from his head, requiring him to wear a helmet at all times.

Los Angeles police officers recovered projectile fragments and nine expended nine-millimeter shell casings at the crime scene. Detective John Ferreria searched defendant's SUV, removed the console cover, and recovered a nine-millimeter gun magazine and six bullets of a different size hidden below the air conditioning and stereo controls. Detective Ferreria obtained a time-stamped surveillance video taken from a building near De Leon's house, where the shootings occurred. The video shows defendant's SUV traveling through the area at 2:03 a.m., 2:20 a.m. and 2:24 a.m.

Defendant was arrested two days after the shooting. The same day he spoke on the telephone to an unidentified person from the jail. The conversation was recorded. The person on the telephone told defendant he had defendant's "bag and everything inside my house" and that the bag contained defendant's "underwear and all that stuff." Defendant told the caller to throw away the "other thing" and referring to the clothes he wore on the day of the incident, defendant said, "make it hookah." Officer Christopher Valento testified that "hookah" is a term used by Spanish speakers to mean "to have it disappear, make it go up in smoke" as a hookah pipe would do.

Defense evidence

Defendant's sister, Kimberly Benitez (Benitez) testified that she was home around 2:00 a.m. on December 18, 2011, about two blocks from La Casa Honduras. She woke to her cell phone at 2:14 a.m. when defendant called and asked her to open the door for him. When she did, he entered the home carrying his disc jockey equipment. He appeared to be upset. Benitez was acquainted with the woman who was at the bar that night though Benitez denied that she had been at Casa Honduras that night. She also denied that she would lie to help her brother.

DISCUSSION

I. Heat of passion

Defendant contends that the trial court erred by failing to instruct sua sponte on the lesser offenses of voluntary manslaughter and attempted voluntary manslaughter based on heat of passion. He further contends that this error resulted in a denial of due process under the federal constitution.

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.) "Manslaughter is a lesser included offense of murder. [Citations.] The mens rea element required for murder is a state of mind constituting either express or implied malice. A person who kills without malice does not commit murder. Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted (*Beltran*); see § 192.) In murder cases, the trial court must instruct the jury sua sponte as to heat of passion, whenever the theory is supported by substantial evidence and even when the defendant did not rely on such a theory, failed to request the instruction, or objected to the instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).) We independently determine whether the instructions should have been given. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).) We view the evidence in the light that most favors a duty to give the instruction, even in the face of inconsistencies created by the defense, and we do not evaluate the credibility of witnesses. (See *Breverman, supra,* at pp. 162-163.)

"Heat of passion arises if, '"at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."' [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or

a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*Beltran*, *supra*, 56 Cal.4th at p. 942.)

Heat of passion "'has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . "[It] must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances". . . . [Citation.]' [Citations.]" (*Manriquez*, *supra*, 37 Cal.4th at p. 584.) Thus, "[t]he provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59-60.)

Further, "[t]he provocation . . . must be caused *by the victim* [citation], or be conduct reasonably believed by the defendant to have been engaged in *by the victim*. [Citations.]" (*People v. Lee*, *supra*, 20 Cal.4th at p. 59, italics added.) Defendant does not contend that Garcia or Marlon engaged in any provocatory conduct. Defendant does not contend that Garcia did or said anything to defendant, and there is no evidence which suggests that defendant was provoked by Garcia. Indeed, uncontradicted evidence established that Garcia put his head down on the table, slept much of the evening, was not involved in the fight, and had no problems with anyone that night. Garcia was sitting on the sidewalk when defendant and his companion arrived at the house holding guns, and he was shot while running away. Similarly, defendant does not claim that Marlon engaged in any provocatory behavior. Marlon was either speaking or arguing with an acquaintance of defendant's, but nothing suggested that it was a heated argument or that Marlon touched the woman or defendant; and Marlon had not spoken to defendant or looked at him before defendant approached uttering obscenities.

Defendant argues that Milton engaged in the provocatory conduct that warranted the instructions regarding lesser crimes committed not only against Milton, but also against Garcia and Marlon. Provocation caused by one victim cannot negate malice as to a different victim. (*People v. Verdugo* (2010) 50 Cal.4th 263, 294.) As there is no

evidence of provocation *by Garcia*, the trial court was not required to give an instruction on voluntary manslaughter based upon heat of passion. And as there was no evidence of provocation *by Marlon*, there was no obligation to instruct the jury on attempted voluntary manslaughter as to the shooting of Marlon. We thus turn to defendant's arguments regarding Milton's conduct.

The objective component of heat of passion requires defendant to demonstrate that the victim's conduct was "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*Manriquez*, *supra*, 37 Cal.4th at pp. 583-584.) "To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection." (*Beltran*, *supra*, 56 Cal.4th at p. 949.) However, a passion for revenge will never negate malice. (*People v. Rich* (1988) 45 Cal.3d 1036, 1112; *People v. Logan* (1917) 175 Cal. 45, 49.)

Defendant contends that this component is satisfied by Milton's testimony that when he saw defendant and Marlon arguing, he approached them, told defendant that Marlon was his brother and to talk to him if he had any problems with Marlon, and then, without waiting for a response, hit defendant in the face. Defendant describes Milton's conduct as an "unprovoked sucker punch" and a "violent, unprovoked act" that would cause a reasonable person to feel intense emotion, particularly in his place of employment.

Milton, who testified through an interpreter, gave very few details of the encounter, so most of the detail came from other witnesses. Milton simply testified that when he saw defendant approach Marlon and argue with him, he told defendant to talk to Milton, and then he hit defendant. The evidence -- Flores's testimony -- establishes without contradiction, that defendant responded to Milton, but she could not hear the words. There was no evidence that the blow was violent, closed-fisted, or amounted to a "sucker punch." Neither the type of blow nor the force of the blow was described by anyone, and Alvarado testified that it left no mark on defendant. Thus defendant's claim that Milton's conduct was provocative does not find support in inferences drawn from

substantial evidence, but merely "speculation, conjecture, surmise, suspicion, and the like [which] cannot rise to the dignity of an inference. [Citations.]" (*People v. Massie* (2006) 142 Cal.App.4th 365, 374.) The evidence cited by defendant is thus insufficient to permit the conclusion that Milton's conduct would, under the circumstances presented here, "cause an emotion so intense that an ordinary person would simply *react*, without reflection." (*Beltran, supra*, 56 Cal.4th at p. 949.)

Moreover, as defendant notes in his brief, Milton's conduct "escalated what was solely a verbal confrontation between Marlon and [defendant]." That verbal confrontation was initiated by defendant when he approached Milton's brother, cursed him, and argued with him. Verbal abuse of the victim's family may cause a defendant to be "culpably responsible" for the victim's reaction, even though defendant had not physically touched or threatened them. (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1309, 1311-1312; see also *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83-84 [defendant may not provoke a fight with words and gestures, then claim that victim's reaction was sufficient provocation].)

In any event, assuming for this discussion that Milton's blow was sufficient to satisfy the objective component, defendant has failed to demonstrate that substantial evidence supported an inference that defendant's "reason was actually obscured as the result of a strong passion." (*People v. Breverman, supra*, 19 Cal.4th at p. 163.) There was negligible evidence concerning defendant's state of mind. There was no direct evidence of his state of mind, as defendant did not testify, and defendant presented no witnesses other than an alibi witness.

Defendant suggests that his state of mind can be inferred from the following "passionate words" spoken while defendant appeared to be "extremely" upset after the security broke up the fight: "You're going to pay for it"; and "You'll see what's going to happen." Taking a partial quote from *People v. Spurlin* (1984) 156 Cal.App.3d 119, 126, defendant also argues that the restaurant owner, Alvarado, could discern defendant's "intense, high-wrought reaction," as demonstrated by Alvarado's statement to defendant, "I don't want no problem. Get out of here, get out of here." Defendant compares his

angry reaction to the "uncontrollable rage" felt by the defendant in *People v. Brooks* (1986) 185 Cal.App.3d 687, 696, when he learned from witnesses at the crime scene that his brother had been stabbed to death. Finally, defendant argues that his actions at the scene of the shooting demonstrated that although his reason was obscured by passion, it was not a passion for revenge, because he merely shot Flores in the foot without replying when she said, "What's wrong with you?" And then, rather than shooting to kill her, he continued his pursuit of Milton.

Despite defendant's use of adjectives or adverbs such as passionate, intense, high-wrought, extremely, and uncontrollable, the cited evidence shows at most that defendant was angry and upset; whether it caused him to act without reflection remains speculative.

Regardless, we agree with respondent that even assuming that the trial court erred in failing to instruct the jury as to heat of passion, any such error was harmless. We apply the test for harmless error enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman*, *supra*, 19 Cal.4th at p. 149.)[3] "'[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' [Citation.]" (*Beltran*, *supra*, 56 Cal.4th at p. 955.) Thus, we examine all the evidence and "consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the

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3 Defendant contends that we must apply the test for federal constitutional error to determine whether any error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) However, in noncapital cases, as the duty to instruct sua sponte on all lesser included offenses supported by the evidence derives exclusively from California law, any error in failing do so does not implicate the federal constitution. (*Beltran*, *supra*, 56 Cal.4th at p. 955.) Relying on *People v. Thomas* (2013) 218 Cal.App.4th 630 (*Thomas*), defendant suggests that by remanding the harmless error issue in that case, the California Supreme Court has signaled that so long as an appellant claims on appeal that the error violated the federal constitution, a failure to instruct sua sponte on heat of passion is reviewed under *Chapman*. Neither the Supreme Court nor *Thomas* so held. *Thomas* did not involve the failure to instruct sua sponte on heat of passion, and the court made clear that in such a circumstance, the *Watson* test continues to be the applicable one. (*Thomas*, *supra*, at pp. 643-644.)

defendant complains affected the result." (*Breverman, supra,* at p. 177; see also *Beltran, supra,* at p. 955; Cal. Const., art. VI, § 13.)

Overwhelming evidence showed that defendant was the aggressor from the start. When defendant first entered the restaurant, he passed the group's table and gave them a "mean stare." Later, defendant started a quarrel with Marlon when he saw Marlon talking or arguing with defendant's female acquaintance. Defendant approached Marlon looking as though he wanted to fight, and cursed Marlon by saying "Fuck you," and other offensive words. Despite his friends urging him not to "get in," defendant continued to swear while his two male companions surrounded Marlon in a threatening manner, prompting Milton to come to the defense of his brother. After Milton struck defendant, defendant struck him back with the assistance of his friends. When the fight ended, defendant threatened, "You're going to pay for it." Then, after defendant was taken outside, he wanted to wait for Milton's group and Alvarado had to order him to leave.

Malice is not negated when "'sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return.'" (*Beltran*, *supra*, 56 Cal.4th at p. 951.) As little as 30 to 40 minutes may be a sufficient cooling-off period, particularly when defendant has no explanation for the delay. (*People v. Dixon* (1961) 192 Cal.App.2d 88, 90.) Here, defendant was upset but not injured by Milton's blow and he had 30 minutes or more to cool off: Milton's group came out of the restaurant about 10 minutes after defendant left the parking lot in his SUV; Marlon testified that the group left about 1:20 a.m.; the group spent five minutes driving to De Leon's house and an unknown number of minutes bringing out the children and securing them in the car; at 2:03 a.m., defendant's SUV was videotaped in the area of De Leon's house; the group had been chatting in the driveway for about five minutes when defendant arrived; and the police were on the scene by 2:29 a.m.

Not only did defendant have sufficient time to reflect, his calm, deliberate behavior and evidence of planning were "manifestly inconsistent with having acted under the heat of passion." (*People v. Wharton* (1991) 53 Cal.3d 522, 572.) Defendant's female acquaintances followed the group in a red car in an apparent effort to learn their

destination; defendant later arrived at the house with an accomplice; it was dark, and both men wore black clothing and black knit caps; each man held a gun, walked up the driveway within a few feet of their victims, and began firing immediately at the entire group, disabling Garcia and Flores before hunting down Milton and Marlon.

In sum, the strong evidence of defendant's "preexisting reflection and weighing of considerations" supported the jury's finding that the shootings were willful, deliberate, and premeditated "rather than mere unconsidered or rash impulse. [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) The evidence supporting a contrary finding was negligible, and thus "so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, *supra*, 19 Cal.4th at p. 177.)

II. Custody credit

Defendant contends that the trial court miscalculated the number of days he spent in custody prior to sentencing, and that he is entitled to two additional days. Respondent agrees. Credit must be given for every day in custody, including the day of arrest and the day of sentencing. (*People v. Downey* (2000) 82 Cal.App.4th 899, 920.) Defendant was arrested on December 20, 2011, and sentenced March 8, 2013. As there were 29 days in February 2012, the number of days to be credited is 445, not the 443 awarded by the trial court.

DISPOSITION

The judgment is modified to award two additional days of presentence custody credit, for a total of 445 days in place of 443 days. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modified presentence custody credit and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST