Filed 1/23/17 P. v. Nieves 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

RICARDO NIEVES,

Defendant and Appellant.

2d Crim. No. B268349
(Super. Ct. No. BA418654-02)
(Los Angeles County)

"There is no legal impediment to placing an informant next to [an] inmate. '[I]n the often competitive enterprise of ferreting out crime' [citation], the police are permitted to use a subterfuge to obtain an inculpatory statement as long as the subterfuge is not likely 'to produce an untrue statement' [citation]." (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1399, fn. 3.) Here the police staged a ruse lineup and told appellant that he had been identified as the murderer. Then two undercover police officers posed as inmates, befriended him, and gave him advice on how to defend himself. They asked him

questions and appellant incriminated himself. As we shall explain, these procedures do not run afoul of the due process clause.

Ricardo Nieves appeals his conviction, by jury, of the first degree murder of Efrain Cervantes. (Penal Code, §§187, 189.)[1] The jury also found the murder was gang related and that appellant personally used and intentionally discharged a firearm causing death. (§§186.22, subd. (b)(1)(C), 12022.53, subd. (b)-(d).) The trial court sentenced appellant to an indeterminate term of 50 years to life in state prison. It also imposed and stayed a 10-year enhancement term based on the gang-related nature of the offense. (§ 186.22, subd. (b)(1)(C).)

Appellant asks this court to review a sealed search warrant affidavit and other documents to determine whether the trial court properly placed them under seal. He also contends: 1. his right to due process was violated when he was subjected to a ruse lineup and then placed in a holding cell with undercover officers who obtained incriminating statements from him, 2. the gang enhancement is not supported by substantial evidence, 3. the trial court erred by not instructing the jury on self-defense, imperfect self-defense, provocation, and the flight of a third party from the crime scene. He contends these errors, considered cumulatively, require reversal. Finally, the parties agree the trial court erred when it imposed a 10-year enhancement pursuant to §186.22, subdivision (b)(1)(C). We modify the judgment to provide that the enhancement does not apply, and as so modified, affirm.

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

Facts

At about 8:45 p.m. on June 20, 2013, Efrain Cervantes parked his car at the corner of Grape and 87th Streets in Los Angeles, near his home and the home of his uncle. As he walked to his uncle's house, a red SUV drove up. When it passed within 15 or 20 feet of Cervantes, someone sitting on the driver's side reached out of a window and shot at him six or seven times, striking him once in the back. One of Efrain's brothers, Alejandro, came out of the uncle's house with a revolver and shot at the SUV as it sped off. Efrain died from his wound. His mother, Christina Cervantes, watched the shooting. She saw there were four people inside the SUV, but could not determine their gender or race.

Homicide investigators from the Los Angeles County Sheriff's Department determined that the red SUV involved in the shooting was registered to co-defendant Alejandro Valenzuela. They also believed that appellant was involved in the shooting. Six months after the homicide, they obtained a search warrant for appellant's home. When deputies arrived to execute the warrant, they found Valenzuela's red Ford parked nearby. Valenzuela was inside appellant's house.

Gunshot residue was found inside the SUV, in the front passenger area. A hole consistent with a bullet strike had been patched on the right front fender. There was also a bullet hole in the headrest of the middle rear passenger seat.

Appellant was in custody on an unrelated charge when the search warrant was executed. Investigators decided to use a ruse, i.e., a staged lineup, to elicit statements from him. Appellant participated in a lineup with undercover officers and was told that someone in the audience had identified him in the

shooting. He was then placed in a holding cell with two undercover sheriff's deputies posing as inmates.

In conversation with the deputies, appellant said that he was a member of Ivy Street, a gang, and was known as "Flaco." Appellant told the deputies that he and Valenzuela were out together when a "homeboy" called to tell him that his "little brother" had been shot and killed. Valenzuela drove appellant to pick up a loaded Tec-9 handgun and, from there, to the location of the supposed killer. When they arrived, appellant jumped out of the SUV and fired the Tec-9 at Efrain Cervantes. After appellant got back in the SUV, he said, someone started shooting at them. A window was shattered and a piece of glass hit appellant in the face. According to appellant, "Then they hit the chamber from the gun I was shooting. It's crazy, fool." He did not mention shooting in self-defense or having a confrontation or argument with the victim before the shooting.

Due Process

Appellant contends the deceptive methods used to obtain his incriminating statements violated due process because law enforcement deliberately delayed filing murder charges against him to avoid his Sixth Amendment right to counsel.[2] He also contends that the undercover officers violated his Fifth Amendment privilege against self incrimination. He is incorrect.

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[2] Appellant did not object to nor obtain a ruling on this theory in the trial court. He is precluded from doing so for the first time on appeal. The claimed violation of the rule of *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246] is forfeited. (E.g., *People v. Ramos* (1997) 15 Cal.4th 1133, 1171; *People v. Rowland* (1992) 4 Cal.4th 238, 259.)

Illinois v. Perkins (1990) 496 U.S. 292 (*Perkins*) holds that "an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response." (*Id.*, at p. 300.) Using an undercover officer to elicit incriminating statements from a suspect does not violate the suspect's privilege against self-incrimination, the *Perkins* majority held, because the "essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone [whom] he believes to be a fellow inmate." (*Id.*, at p. 296.)

In his concurring opinion, Justice Brennan agreed with the Fifth Amendment holding, but argued that deceptive and manipulative interrogation tactics might violate a suspect's due process rights and might be "'offensive to a civilized system of justice . . . .'" (*Perkins*, *supra*, at p. 301.) The question, according to Justice Brennan, was "'whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.'" (*Id.*, at p. 302, quoting *Miller v. Fenton* (1985) 474 U.S. 104, 116, italics added.) Justice Brennan's formulation of a suspect's due process rights in this context has not become the majority view.

In evaluating whether interrogation techniques violate due process, the courts should consider the totality of the circumstances to determine whether a suspect's will was overborne. A due process violation occurs only where law enforcement subterfuge was likely to have produced false statements or a coerced confession. (*Colorado v. Connelly* (1986)

479 U.S. 157, 167; *People v. Hogan* (1982) 31 Cal.3d 815, 841, overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

Pursuant to this standard, the interrogation tactics used by law enforcement in this matter did not violate appellant's due process rights. Appellant was placed in a holding cell with persons he believed to be fellow inmates. He then boasted at length with those people about the murder he committed. The undercover deputies did not threaten or intimidate appellant. They sympathized with him and gave him suggestions for rebutting the evidence against him. There is no evidence appellant was physically or psychologically compelled to talk with his *cellmates* about the murder. Consequently, there was no due process violation.

Right to Counsel

Law enforcement did not violate appellant's Sixth Amendment right to counsel. The right to counsel "is 'offense specific'; it arises and may be asserted only as to those offenses for which criminal proceedings have formally begun." (*People v. DePriest* (2007) 42 Cal.4th 1, 33.) Appellant did not have a right to counsel when he was placed in the holding cell because he had not been charged with the murder.

Search Warrant

Appellant asks us to independently review the trial court's denial of his motion to discover information contained in a sealed search warrant. (*People v. Hobbs* (1994) 7 Cal.4th 948, 977 (*Hobbs*).) Specifically, appellant requests that we review the materials to determine whether they contain any information that might support his due process argument.

We have reviewed the sealed search warrant affidavit and the transcript of the in camera hearing conducted by the trial court. Like the trial court, we conclude the affidavit was properly sealed to protect the identity of a confidential informant or informants. There is nothing in these materials that would support appellant's claimed due process violation. The trial court did not err when it ordered the affidavit remain under seal. (*Hobbs*, *supra*, at pp. 973-975.)[3]

Gang Enhancement Evidence

Detective Guillen of the Los Angeles County Sheriff's Department testified as an expert witness on criminal street gangs. Among other things, Guillen testified that appellant is an active member of Ivy Street and that his co-defendant Valenzuela is an active member of 18th Street. Guillen testified that both Ivy Street and 18th Street are criminal street gangs within the meaning of section 186.22. The jury agreed, finding appellant committed the murder for the benefit of a criminal street gang. Appellant contends there was insufficient evidence that Ivy Street meets the statutory definition of a criminal street gang.

Section 186.22 provides enhanced punishment where a felony is "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§186.22, subd. (b)(1).) The term "'criminal street gang,'" means "any ongoing organization, association, or group of

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[3] The affidavit in support of the search warrant is quotidian. It narrates an explanation of the commission of the murder and appellant's involvement therein. It also shows that evidence relating to the murder could be found at appellant's house.

three or more persons, whether formal or informal, having as one of its primary activities the commission of [certain felonies enumerated in subdivision (e) of the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§186.22, subd. (f).)

Guillen opined that Ivy Street meets the statutory criteria for a criminal street gang. The group has about 50 documented members, including appellant, who identify themselves with the color green and the letters "I" and "V." Ivy Street "claims" a defined geographical territory; the shooting occurred within that area. Guillen testified that the "primary activities" of Ivy Street were vandalism, robberies, weapons possessions, selling narcotics, shootings and murder. A member of Ivy Street was convicted in 2011 of possession of a firearm by a felon. (§12021, subd. (a)(1).) Another member was convicted in 2012 of possession of a controlled substance. (§ 11351.)

We apply the familiar substantial evidence standard to determine whether this evidence was sufficient to establish that Ivy Street is a criminal street gang within the meaning of section 186.22. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371 (*Augborne*); see also *People v. Miranda* (2016) 2 Cal.App.5th 829, 833-834.) This requires us to review the entire record in the light most favorable to the judgment to determine whether it discloses "evidence which is reasonable, credible, and of solid value" such that a reasonable trier of fact could find the disputed fact true beyond a reasonable doubt. (*Ibid.*; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.)

As our Supreme Court noted in *People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*), evidence of past or present criminal acts listed in section 186.22 is admissible to establish that those crimes are among the primary activities of an alleged criminal street gang. "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation omitted.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*Id.*, at p. 323.) To prove that a group meets the statutory definition of a criminal street gang, there must be evidence "that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony . . . ." (*Id.*, at p. 324.)

Here, Guillen provided evidence that two of the enumerated felonies had been committed by members of Ivy Street on behalf of the gang. In addition, Guillen testified that he had personal knowledge of numerous felonies committed by members of these gangs during the nearly 25 years that he had been employed as a deputy sheriff in Los Angeles County. While working in the county jails, Guillen interviewed more than 1,000 gang members. Between 1998 and 2009, Guillen worked as a field patrol deputy and became familiar with Ivy Street because "[t]hey claimed the territory in which we patrolled. So I became aware of them by contacts, by seeing 'Ivy Street' written on the walls." Guillen's testimony, coupled with the facts of this case, was substantial evidence that Ivy Street's primary activities include the commission of crimes enumerated in section 186.22, subdivision (e). Accordingly, substantial evidence supports the

jury's implied findings that Ivy Street is a criminal street gang and that appellant committed the murder for its benefit. (*Sengpadychith*, *supra*, at pp. 322-324; *Augborne*, *supra*, at p. 373.)

Nothing in the recent case of *People v. Sanchez* (2016) 63 Cal.4th 665 requires reversal. Any error on this theory is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant freely boasted of his membership in the gang and the motive for the murder, i.e., revenge for the killing of a fellow gang member.

Claimed Instructional Error

The physical evidence showed that two different people fired guns in the encounter that killed Efrain Cervantes. Appellant's theory of the case, as argued to the jury, was that he and Valenzuela were driving around, trying to buy marijuana, when they learned that the person who shot appellant's "little brother" was out in the same neighborhood. Then, appellant and Valenzuela came across Efrain Cervantes. Cervantes' brother Alejandro shot first at Valenzuela's SUV; appellant quickly fired back, killing Cervantes. Appellant contends the trial court erred when it refused to instruct the jury on self-defense and imperfect self-defense. He further contends the trial court erred when it failed to instruct the jury, sua sponte, on provocation that might have reduced the degree of his offense from first to second degree murder, or from murder to voluntary manslaughter. There was no error.

A defendant is entitled to jury instructions on self-defense and imperfect self-defense where there is substantial evidence from which a reasonable trier of fact could conclude that the defendant "actually and reasonably believe[d] in the need to

defend. [Citation.] If the belief subjectively exist[ed] but [was] objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, fn. omitted.) Both perfect and imperfect self-defense require that the defendant actually believe himself or herself to be facing imminent harm; to constitute perfect self-defense, that belief must also have been reasonable. (*Ibid.*)

Instructions on these defense theories are required only where they are supported by substantial evidence. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145, disapproved on another point, *People v. Barton* (1995) 12 Cal.4th 186, 201.) "'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.'" (*People v. Clark* (2011) 52 Cal.4th 856, 943, quoting *In re Michael D.* (2002) 100 Cal.App.4th 115, 126, citation omitted.) Speculation, however, "'is an insufficient basis upon which to require the trial court to give an instruction . . . .' (*People v. Wilson* (1992) 3 Cal.4th 926, 942.)" (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.)

Here, there is no substantial evidence, direct or circumstantial, supporting the theory that appellant honestly, subjectively believed he was in imminent danger when he shot Efrain Cervantes. There is no physical evidence that Efrain's brother shot first. Nor was there any evidence that appellant was even aware of Alejandro Cervantes presence before he shot Efrain, or that he actually was in imminent danger when he fired the gun. The only evidence of appellant's subjective state of mind was his conversation with the undercover deputies after the ruse lineup. In that conversation, appellant admitted that he shot

first. He made no claim that he feared imminent harm before pulling the trigger. In the absence of evidence that appellant subjectively believed he faced imminent harm before he shot Cervantes, the trial court had no factual basis for jury instructions on self-defense or imperfect self-defense. Its refusal to give those instructions was not error.

Nor did the trial court err when it did not instruct the jury on a provocation theory of voluntary manslaughter or second degree murder. An intentional and unlawful killing that occurs "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)) lacks the malice aforethought required for murder and may instead constitute voluntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154.) "'[H]eat of passion'" exists only where the "killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'"" (*Id.*, at p. 163.) Provocation that is not adequate to reduce an offense to voluntary manslaughter may nevertheless be sufficient to raise a reasonable doubt as to whether the defendant acted with premeditation and deliberation. A murder that is not premeditated is of the second degree. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 (*Carasi*).)

Here, the trial court had no duty to instruct on provocation because there was no substantial evidence from which the jury could find that the shooting was immediately preceded by any sort of confrontation or provocation. Cervantes' mother testified that she saw the SUV drive up and then someone inside it shot at Efrain. Appellant told the undercover deputies that he jumped out of the SUV, shot Efrain and then

immediately got back inside the vehicle. Shots were fired at the SUV only after appellant was back inside the car. Because this testimony does not describe a confrontation between appellant and Cervantes, or any other conduct by the victim that would have provoked a violent, emotional response from appellant, it does not provide substantial evidence supporting a jury instruction on provocation. (*People v. Ward* (2005) 36 Cal.4th 186, 214-215; *Carasi*, *supra*, at p. 1306.)

Appellant further contends the trial court erred when it did not instruct the jury, sua sponte, that Alejandro Cervantes' flight from the scene was evidence of Cervantes' consciousness of guilt. Alternatively, he contends he received ineffective assistance of counsel at trial because defense counsel did not request an instruction on third-party flight. We are not persuaded.

First, the trial court has no sua sponte duty to give an instruction on third-party flight. (*People v. Henderson* (2003) 110 Cal.App.4th 737, 743.) As the court explained in *Henderson*, "evidence of flight by a third party after being accused of a crime or after acquiring knowledge of the crime, could be relevant to the jury's determination of whether the third party's conduct raises a reasonable doubt as to the identity of the perpetrator." (*Id.*, at p. 741.) An instruction on third-party flight is "in the nature of a pinpoint instruction" because it would "assist a jury in determining what weight, if any, to give to the alleged flight of a person about whom the court has permitted evidence of third party culpability." (*Id.*, at pp. 741, 743.) The trial court has no duty to give a pinpoint instruction sua sponte. (*People v. Anderson* (2011) 51 Cal.4th 989, 996-997.)

Second, the trial court would properly have denied a defense request for the instruction because it would not have been supported by substantial evidence. Appellant did not present evidence that Alejandro was the actual perpetrator of Efrain Cervantes' murder, or that any flight by Alejandro was relevant to determining the murderer's identity. Further, there was no evidence Alejandro "fled" the murder scene. He was not at the house when the investigating detective arrived several hours after the shooting, but there was no evidence regarding when or how he left the scene.

For the same reasons, appellant fails to demonstrate that his trial counsel was ineffective. "To establish ineffective assistance . . . [of] counsel . . . [appellant] must demonstrate both deficient performance under an objective standard of professional reasonableness and prejudice under a similarly objective standard of reasonable probability of an adverse effect on the outcome." (*People v. Waidla* (2000) 22 Cal.4th 690, 718.) The failure to request a jury instruction that is not supported by substantial evidence cannot prejudice the defendant because there is no reasonable probability the instruction would have been given by the trial court if requested or, if given, would have affected the outcome of the trial. (*Id.*, at p. 736.)

Cumulative Error

Appellant's final contention is that the cumulative effect of the errors he has identified resulted in the denial of a fair trial. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488; *People v. Hill* (1998) 17 Cal.4th 800, 844-848.) We reject this contention because, for the reasons already stated, we find no prejudicial error to cumulate. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

Gang Enhancement Penalty

The trial court sentenced appellant to a term of 25 years to life for the first degree murder (§ 187, subd. (a)), and an additional term of 25 years to life for his personal use of a firearm in committing that murder. (§ 12022.53, subd. (d).) It also imposed and stayed a 10-year enhancement term because the murder was gang related. (§ 186.22, subd. (b), (c).) The parties agree this was error.

"Section 186.22, subdivision (b)(5) (section 186.22 (b)(5)) applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004 (*Lopez*).) *Lopez* held that a gang-related first degree murder is a violent felony "and therefore is not subject to a 10-year enhancement under section 186.22(b)(1)(C)." (*Ibid.*) Section 186.22, subdivision (b)(5), which mandates a minimum 15-year parole eligibility term, applies instead.

Conclusion

We modify the judgment to provide that the 10-year enhancement term imposed under section 186.22, subdivision (b)(1)(C) does not apply. Instead, the minimum 15-year parole eligibility term applies. The clerk of the Superior Court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Dennis J. Landin, Judge

Superior Court County of Los Angeles

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

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