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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE RODRIGUEZ,

Defendant and Appellant.

F066128

(Super. Ct. No. BF132269A)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. David R. Lampe, Judge.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, LeAnne Le Mon and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On May 13, 2010, appellant shot Michael Ramirez and Balleza Santos III, wounding Ramirez and killing Santos. Appellant was charged with one count of first degree murder (count 1; Pen. Code,¹ § 187, subd. (a)); one count of attempted murder (count 2; §§ 187, subd. (a), 664); and one count of participation in a criminal street gang (count 3; § 186.22, subd. (a)). Count 1 contained an enhancement alleging that the murder was carried out to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)), while counts 1 and 2 contained enhancements alleging premeditation or the discharge of a firearm from a motor vehicle, the discharge of a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

Following a jury trial, appellant was found guilty of first degree murder and attempted murder, and the enhancements concerning section 189 and the discharge of a firearm were found to be true. Appellant was sentenced to an aggregate term of 82 years to life in prison, along with various fees and fines.

On appeal, appellant argues that (1) there was insufficient evidence to establish that appellant fired a gun from a motor vehicle, (2) the trial court erred by failing to properly instruct the jury on the distinction between first and second degree murder, (3) appellant's trial counsel was ineffective for failing to object to the trial court's instructions to the jury on the distinction between first and second degree murder, (4) the trial court erred by applying the incorrect law of restitution when calculating appellant's restitution fines, and (5) the trial court erred when calculating appellant's custody credits. Argument (5) is persuasive, and the case will be remanded in part for the proper calculation of appellant's custody credits. Appellant's convictions and fines are affirmed.

¹ Unless otherwise specified, all statutory references are to the Penal Code.

FACTS

On May 13, 2010, appellant and two other men, Michael Torres and Joseph Sanchez, drove to a store in McFarland. All three men had gang affiliations. When they arrived at the store, appellant remained in the car while Torres went inside to buy beer. When Torres came out of the store, he witnessed Michael Ramirez, a member of a different gang, fighting with appellant in appellant's car. Ramirez then exited the car and confronted Torres, who got into appellant's car.

After Torres got into the vehicle, appellant put the car in reverse and began to leave. Ramirez kicked appellant's car, and appellant stopped, retrieved a firearm from under the seat, opened the door, and stepped one foot out of the car before firing several shots over the car at Ramirez. Ramirez was wounded in the shooting while Balleza Santos III, a bystander, was killed by a gunshot wound to the head.

After the shooting, appellant drove away from the scene. He was later apprehended at his home in Washington.

At trial, appellant testified that he had been involved with a gang from the ages of 12 to 19, but that he had been out of the gang for three years when the shooting occurred. He also testified that he shot Ramirez because he thought Ramirez had a weapon and would shoot him if he drove away. Appellant denied intending to shoot anyone other than Ramirez.

At the conclusion of trial, appellant was found guilty of first degree murder and attempted murder. This appeal followed.

DISCUSSION

I. There Was Sufficient Evidence To Support Appellant's Conviction For First Degree Murder.

A. Facts.

In the jury instructions, the jury was presented with two theories of first degree murder. First, the jury was instructed that murder committed with premeditation and

deliberation was first degree murder. Second, the jury was instructed that murder committed by means of discharging a firearm from a motor vehicle, intentionally at another person outside the vehicle with the intent to inflict death, was first degree murder.

During deliberations, the jury submitted the following request: “We need clarification or a define [*sic*] shots from motor vehicle.” In response, the trial court informed the jury that “words and phrases not specifically defined in my instruction are to be applied using their ordinary, everyday meanings.” The jury later asked for a definition of second degree murder, which was then defined by the trial court as “murder which is not of the first degree[.]” The jury subsequently found appellant guilty of first degree murder.

B. Standard of Review.

We view the record in the light most favorable to the conviction and presume the existence of every fact in support of the conviction the trier of fact could reasonably infer from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) “Reversal is not warranted unless it appears ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ [Citation.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.)

C. Analysis.

When a jury is presented with both a supported and unsupported ground for conviction, reversal is only required if there is an “affirmative indication in the record that the verdict actually did rest on the inadequate ground.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Here, appellant does not challenge the sufficiency of the evidence supporting his conviction under a theory of deliberation and premeditation. Instead, appellant argues that the record affirmatively shows that the jury’s verdict rested on the theory that appellant fired from a motor vehicle, and that theory was not supported by the evidence.

According to appellant's argument, the jury's questions concerning the definition of "from motor vehicle" and the nature of second degree murder are affirmative proof that the jury relied solely upon the motor vehicle basis when convicting appellant. This conclusion, however, gives undue weight to the jury's questions during deliberations. It is not possible to conclude from the jury's questions that they had rejected a theory of deliberation and premeditation. Indeed, the jury may have simply been looking for clarification on the simpler theory so as to avoid having to discuss the issues of deliberation and premeditation. After receiving clarification, the jury may have opted to reject the motor vehicle theory and continued onto the theory of deliberation and premeditation, before ultimately deciding to convict. Accordingly, appellant has not made an affirmative showing that the jury's guilty verdict was not based on a theory of deliberation and premeditation, and is not entitled to reversal.

Further, we are not persuaded that the motor vehicle theory of the crime was unsupported by the evidence. A review of the surveillance footage shows appellant firing a weapon over the hood of a running car with the door open and only one foot outside of the car. Moreover, the victim was outside of the car, and appellant admitted to firing the gun intentionally at Ramirez. Viewing this evidence in the light most favorable to the conviction, we find there was substantial evidence to support appellant's conviction for first degree murder.

II. The Trial Court Properly Instructed the Jury On the Distinction Between First And Second Degree Murder.

A. Facts.

Prior to jury deliberations, the trial court instructed the jury as to the definition of murder and the elements of both prosecution theories of first degree murder. The jury was also instructed that, if it determined appellant committed murder, they must determine whether it was murder of the first or second degree.

During deliberations, the jury submitted the following question: “We did not find any instructions or definition of 2nd degree murder. Do we consider 2nd degree murder as a lesser crime?” The trial court then instructed the jury that “murder which is not of the first degree is murder of the second degree.” The jury subsequently found appellant guilty of first degree murder.

B. Standard of Review.

“[A] claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. [Citation.]” (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

C. Analysis.

“A trial court must instruct the jury ‘on the law applicable to each particular case.’ [Citations.]” (*People v. Martin, supra*, 78 Cal.App.4th at p. 1111.)

Here, the jury was instructed on the definition of murder and first degree murder, and was instructed that second degree murder is any murder that is not murder in the first degree. On appeal, appellant does not dispute the accuracy of the instructions concerning murder or first degree murder, but asserts that the instructions concerning second degree murder were deficient for failing to state that second degree murder applies when the evidence is insufficient to prove deliberation and premeditation.

While appellant’s definition complies with CALJIC No. 8.30, it is inapplicable to this case. As noted above, one of the theories of first degree murder that appellant was charged with did not require deliberation and premeditation. Instead, that theory only required the discharge of a firearm from a motor vehicle with intent to kill. Accordingly, defining second degree murder as murder in the absence of deliberation and premeditation would be contradictory and needlessly confusing for the jury. Further, section 189 explicitly defines first degree murder and states that “[a]ll other kinds of murders are of the second degree.”

Therefore, because the trial court's instructions to the jury accurately addressed the distinction between first and second degree murder, appellant is not entitled to relief on this issue.

III. Appellant's Trial Counsel Was Not Ineffective For Failing to Object to the Jury Instructions Regarding Second Degree Murder.

A. Standard of Review.

We exercise deferential scrutiny when reviewing claims of ineffective assistance of counsel, and consider the reasonableness of conduct based on circumstances as they stood at the time of counsel's actions or omissions. (*People v. Harris* (1993) 19 Cal.App.4th 709, 714-715.)

B. Analysis.

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. [Citation.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

Here, appellant asserts that his trial counsel was ineffective for failing to object to the trial court's jury instructions regarding second degree murder. As noted above, however, those instructions were an accurate and sufficient statement of the law, and any objection by appellant's trial counsel would have been fruitless. Therefore, because "[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile" (*People v. Price* (1991) 1 Cal.4th 324, 387), we find that appellant was not denied the effective assistance of counsel at trial.

IV. The Trial Court's Application of the Restitution Statute Was Not a Violation of The Ex Post Facto Clause.

A. Standard of Review.

We review questions of law de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

B. Analysis.

“[T]he imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions. [Citations.]” (*People v. Souza* (2012) 54 Cal.4th 90, 143.) Accordingly, a defendant is entitled to remand if a trial court imposes a restitution order by applying the law of restitution that applied at the time of sentencing, rather than the law applicable at the time the crime was committed. (*Ibid.*)

Here, the probation officer's report recommended appellant be ordered to pay a restitution fine in the amount of \$240 pursuant to section 1202.4, subdivision (b)² and an identical restitution fine pursuant to section 1202.45. At sentencing on November 5, 2012, the court issued those orders. Appellant did not object.

Appellant now asks the restitution fine orders be reduced to \$200 because, he surmises, the amount imposed, \$240, demonstrates both that the trial court chose to impose the lowest fine authorized by statute, and that it applied the 2012 version of

² Section 1202.4, subdivision (b)(1) states: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000).”

In 2010, section 1202.4, subdivision (b)(1) stated the fine “shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000).”

section 1202.4. Appellant argues the court's order violated the ex post facto clauses of the federal and state constitutions and resulted in an unauthorized sentence which "is reviewable on appeal without objection below."

"The Constitution forbids the passage of *ex post facto* laws, a category that includes '[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.' [Citation.]" (*Peugh v. United States* (2013) 569 U.S. ____, ___ - ___ [133 S.Ct. 2072, 2077-2078] (*Peugh*); accord, *Collins v. Youngblood* (1990) 497 U.S. 37, 41-42.) "It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions. [Citations.]" (*People v. Souza* (2012) 54 Cal.4th 90, 143; accord, *People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

Appellant points out the United States Supreme Court has held that an increase in the applicable sentencing range under the federal sentencing guidelines implicates ex post facto concerns. (*Peugh, supra*, 569 U.S. at p. ___ [133 S.Ct. at p. 2088].) Appellant concludes the change in the minimum fine set out in section 1202.4, subdivision (b)(1), therefore, is also subject to ex post facto considerations.

There is a significant difference between a change in the sentencing guidelines which, although discretionary, are the mandatory starting point for imposition of a federal sentence and "remain a meaningful benchmark through the process of appellate review" (*Peugh, supra*, 569 U.S. at p. ___ [133 S.Ct. at p. 2083]), and the minimum fine listed in section 1202.4, subdivision (b)(1). It is not pertinent whether defendant is correct: By failing to object to the amount of the restitution fines at sentencing, he has forfeited his claim for appeal. (See *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189.)

A trial court has broad discretion to determine the amount of a restitution fine within statutory parameters. (§ 1202.4, subd. (b)(1); *People v. Kramis* (2012) 209 Cal.App.4th 346, 350; cf. *People v. Griffin* (1987) 193 Cal.App.3d 739, 741 [addressing former Gov. Code, § 13967].) "The burden is on the party attacking the sentence to

clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. [Citations.]” (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

“[C]laims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices” are forfeited when, as here, they are raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353; accord, *People v. Smith* (2001) 24 Cal.4th 849, 852.) This is so even when they involve the asserted violation of constitutional rights. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.)

The California Supreme Court has created a “narrow” exception in the forfeiture rule for unauthorized sentences. (*People v. Smith, supra*, 24 Cal.4th at p. 852.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed *under any circumstance in the particular case*. Appellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing. [Citation.]” (*People v. Scott, supra*, 9 Cal.4th at p. 354, italics added.) By contrast “claims deemed [forfeited] on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Ibid.*)

Tellingly, appellant does not contend the trial court abused its discretion in setting the amount of the fines absent an ex post facto violation.

Because the restitution fines could have properly been imposed in the amount of \$240 even under the version of section 1202.4 in effect when appellant committed the offense, the sentence was not unauthorized. (Cf. *People v. Walz* (2008) 160 Cal.App.4th 1364, 1368-1370; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1533-1534.)

Appellant was on notice, from the probation officer’s report, that restitution fines in the amount of \$240 were recommended, and he had the opportunity to object to the

amount. (Cf. *People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1550.) The trial court was not required to explain its reasons for imposing fines in that amount. (Cf. *In re Julian R.* (2009) 47 Cal.4th 487, 498-499.) Under the circumstances, appellant forfeited any challenge to the amount of the fines by failing to object to them at sentencing. (See, e.g., *People v. White* (1997) 55 Cal.App.4th 914, 916-917; *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1396-1397; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.)

V. The Trial Court Miscalculated Appellant’s Custody Credits at Sentencing.

At sentencing, appellant received 33 days of custody credit, despite the fact that the probation report states that appellant had 900 days of custody credit. On appeal, appellant contends that he should have received 900 days of custody credit at sentencing, and respondent agrees. Accordingly, we remand for the trial court to amend the abstract of judgment to reflect the correct number of custody credits.

DISPOSITION

The case is remanded for the trial court to modify the abstract of judgment to recalculate appellant’s custody credits as set forth above. As so modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and transmit a copy of it to the parties and the appropriate authorities.

LEVY, Acting P.J.

WE CONCUR:

DETJEN, J.

PEÑA, J.