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

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK RUIZ,

Defendant and Appellant.

H036183

(Monterey County

Super. Ct. No. SS031815)

A jury convicted defendant Frederick Ruiz of the first degree murder of another inmate at Soledad State Prison. On appeal he claims that the trial court should have told the jury that unless the state could prove he was not angry when he killed the victim, he was not guilty of first degree murder. He also claims that to the extent his lawyer failed to ask the court to do this and then argue the point to the jury, he received ineffective assistance of counsel. Finally, he disputes the amount of a court-imposed fine.

Except for the fine matter, we find no errors, nor do we find any ineffective assistance of counsel. We will affirm the judgment with a modification.

PROCEDURAL BACKGROUND

A jury convicted defendant of first degree murder. (Pen. Code, §§ 187, subd. (a), 189.) The case then proceeded to trial by the court, which found true a former-murder special circumstance allegation (*id.*, § 190.2) and an allegation that defendant had

suffered two prior convictions within the meaning of the “Three Strikes” law (*id.*, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).¹

The trial court sentenced defendant to life imprisonment without the possibility of parole, to be served consecutively to the sentence he was currently serving because of the first degree murder conviction that had resulted in his placement at Soledad State Prison. As relevant to this appeal, the court also imposed a \$200 parole revocation fine pursuant to Penal Code section 1202.45, suspending it unless defendant violated parole.

FACTS

I. *Prosecution Case*

On March 25, 2000, the prison yard at the Correctional Training Facility, commonly known as Soledad state prison, was teeming with inmates. One of them, Reynaldo “Chequín” Najera, was bleeding. He staggered toward prison guard Bruno Banda and collapsed. He had suffered a fatal stab wound.²

Defendant, whose prison moniker was “Bullet,” killed Najera because defendant had pawned a gold chain to Najera but when defendant wanted to pay Najera and retrieve the chain Najera had lost it.

Near the scene of the killing, investigators found a pair of blue jeans and a sweatshirt in garbage cans, both with visible blood on them. In May 2001, investigators

¹ This was defendant’s second trial on these charges. A jury convicted him of first degree murder and the trial court found true the special circumstance and Three Strikes allegations in a prior trial. In *People v. Ruiz* (2007) H030233 (nonpub. opn.), this court reversed the judgment, finding that the court’s management of his shackling had denied him a right to a fair trial.

² Defendant inflicted three stab wounds. The fatal wound was to Najera’s neck; it cut Najera’s carotid artery and penetrated five and a half inches. The other two were a back wound that penetrated an inch and a half and a shallow wound to the right wrist. Najera also had a “tiny scrape” on the front of his chest, but the record is not clear that defendant caused this injury.

forcibly extracted a blood sample from defendant after obtaining a search warrant so they could compare defendant's deoxyribonucleic acid (DNA) profile to any useful DNA on the articles of clothing. A mixture of three individuals' DNA was on an unbloodied portion of the sweatshirt's neckband and Najera's DNA was found in blood on the sweatshirt. With his profile analyzed, defendant proved to be a major contributor to the DNA taken from the sweatshirt's neckband.

DNA evidence recovered from the jeans was inconclusive, although it identified the blood on them as Najera's, and the authorities did not find any weapon that they could identify as the murder weapon.

Inmate witness 1B testified that he and defendant were friends at the time of the stabbing. On that day, defendant told 1B that he was going to "book Chequín that day," meaning, in prison slang, stab him. Some days afterward, 1B said to defendant, "I hope you got away," and defendant agreed that he hoped he had escaped discovery.³

Inmate witness 1A testified that he saw defendant attack Najera with downward blows. Najera, in a bloody state, walked away. Defendant passed 1A. Anticipating a prison lockdown that could deprive inmates of shower access, 1A immediately went to take a shower. There he found defendant, who was repeatedly flushing a toilet, something inmates do to dispose of evidence. After 1A left the shower stall, he noticed

³ 1B acknowledged that, when the authorities questioned him in August of 2000, initially he said he knew nothing about the circumstances of Najera's death. Finally, however, he decided to explain them during that interrogation because he was angry that defendant had attacked him that same month. In addition, there was evidence that 1B was hoping to leverage his knowledge of the incident to mitigate the disciplinary consequences of a prison rules violation. Ultimately, however, he received no benefit following his statement inculcating defendant.

that a T-shirt and socks he had set aside in the shower room were missing. No one but he and defendant were in the shower room at the time.⁴

II. *Defense Case*

Associate Warden Jeffrey Soares testified, as chiefly relevant here, that on the day Najera was stabbed he recovered a denim jacket from another inmate that had blood on it. Because Soares was told that Najera had run into the jacket-wearing inmate in his flight following his stabbing, the jacket was not subjected to forensic analysis. A correctional officer testified that he photographed the jeans, which had been found in a trash can.

DISCUSSION

I. *Claim of Erroneous Failure to Instruct on Unreasonable Heat of Passion*

Defendant claims that the trial court violated state law and his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and equivalent guaranties in the California Constitution by failing to instruct the jury, even in the absence of his counsel's request, that the jurors could not convict him of first degree murder unless the state proved beyond a reasonable doubt that, in essence, defendant was in a calm frame of mind. If he was suddenly angry, albeit unreasonably so, and the state failed to prove otherwise, then he might be guilty of second degree murder, but not first degree murder. He relies on *People v. Valentine* (1946) 28 Cal.2d 121, which stated that in proper circumstances a jury must be "advised that the existence of provocation which is not 'adequate' to reduce the class of the offense [from murder to manslaughter] may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon,

⁴ 1A acknowledged that, before his similar testimony at defendant's prior trial, the prosecutor, at his behest, wrote a favorable letter to the parole board and another seeking his transfer from the Soledad state prison. Before the current trial, 1A asked the prosecutor to write another favorable letter to the parole board and a letter requesting a different type of housing for him. The District Attorney's office did this but nothing resulted from it.

and carried it out after, deliberation and premeditation.” (*Id.* at p. 132; see *People v. Rogers* (2006) 39 Cal.4th 826, 877-878.)

“The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. [Citations.] ‘That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.’ [Citations.] ‘To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.’” (*People v. Burney* (2009) 47 Cal.4th 203, 250.)

The problem with defendant’s theory is that the initial premise fails. “The jury need not be instructed on a theory for which no evidence has been presented.” (*People v. Roberts* (1992) 2 Cal.4th 271, 313.) There is no evidence that defendant was suddenly angry at the victim. Indeed, there is no evidence that he was angry at all. He points to none and our own examination of the record reveals none. From all that appears, he could have been methodically, relatively dispassionately, and calculatedly executing prison justice over the loss of the chain, perhaps for financial reasons or reasons of status.

Along these lines, 1B testified on redirect examination:

“Q. . . . Did Mr. Ruiz [defendant] say anything to you about why he was going to book Chequín?

“A. Yes.

“Q. What did he say?

“A. About the gold chain.

“Q. He said he was going to book Chequín because of the gold chain?

“A. Gold chain, yes.”

Defendant made these statements as he and 1B “were talking about scoring dope in the yard that morning,” 1B testified on direct examination. The prosecutor asked, “And did he then warn you of anything?” and 1B answered “Yes” before adding some other words to which the trial court sustained an objection.

The foregoing testimony does not suggest a florid display of anger, but rather premeditation and deliberation.

Defendant proposes, as stated, that the trial court should have instructed the jury that unless the state could prove beyond a reasonable doubt that defendant did not suddenly become angry in the instant before he stabbed Najera, he could only be convicted of second-degree murder at most. We are aware of no authority for such a proposition. Almost all murders involve a degree of anger on the part of the perpetrator, and if the state were forced to prove that perpetrators were not suddenly angry at the moment they killed—an evidentiary challenge of the first order and one that in many cases could not be met—first degree murder convictions would be rare. The law is not so generous to accused murderers. What the state must prove beyond a reasonable doubt for first degree murder is that defendant killed with malice aforethought and that he acted, as relevant here, with premeditation and deliberation. (See Pen. Code, §§ 187, subd. (a), 189.) This the state did. If defendant could negate an element of that proof with evidence that his mental state was so overwrought as to cancel the element of premeditation and deliberation—we are not stating that the law unequivocally contains such an entitlement, but only recapitulating a premise of defendant’s argument—the burden was on him to do so. “ ‘[I]f there is no proof, other than an unexplainable rejection of the prosecution’s evidence, that the offense was less than that charged, such instructions [on lesser included offenses] shall not be given.’ [Citation.] Because there was no reason why the jury would have rejected the prosecution’s evidence and *defendant presented no evidence* that he [committed only the lesser included offense], there was . . . no factual predicate for instructing the jury on . . . a lesser included

offense.” (*People v. Abilez* (2007) 41 Cal.4th 472, 514, italics added; see also *People v. Friend* (2009) 47 Cal.4th 1, 50-52.) Defendant did not meet his burden.

Defendant identifies one category of evidence that he suggests justifies his contention on appeal that “[t]he loss of his gold chain, and Najera’s act of betrayal, was sufficient . . . to create a subjectively experienced heat of passion.” He asserts that “the manner of killing, the infliction of multiple stab wounds, is consistent with someone acting in a heat of passion.” The evidence, however, is of one fatal stab wound and two others that were shallow and not particularly damaging. It does not point to a frenzy by defendant, but the infliction of just enough damage to kill Najera. “To warrant [an instruction on a lesser included offense], there must be substantial evidence of the lesser included offense, that is ‘evidence from which a rational trier of fact could find beyond a reasonable doubt’ that the defendant committed the lesser offense. [Citation.]

Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]” (*People v. Redd* (2010) 48 Cal.4th 691, 732-733, bracketed material in original.) The evidence to which defendant points does not meet the foregoing standard.

II. *Claim of Ineffective Assistance of Counsel*

Next, defendant claims that he received ineffective assistance of counsel under the federal and state constitutions because counsel failed to seek the instruction to which defendant claims an entitlement in his first argument and then failed to argue that on the basis of such an instruction defendant could not be guilty of first degree murder.

Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “The ultimate purpose of this right is to protect the defendant’s fundamental right to a trial that is both fair in its conduct and reliable in its result.” (*Ibid.*) A claim of ineffective

assistance of counsel in violation of the Sixth Amendment entails deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.) The *Strickland* standards also apply to defendant's claim under article I, section 15 of the California Constitution. (E.g., *People v. Waidla* (2000) 22 Cal.4th 690, 718.)

"Representation does not become deficient for failing to make meritless objections." (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.) As we have explained in discussing defendant's first claim, any initiative by counsel to seek the instruction defendant has in mind would have lacked a legal basis and would have been without merit. Accordingly, there was no ineffective assistance of counsel.

III. *Claim of Cumulative Defects in the Trial*

Defendant claims that the foregoing aspects of the case, taken together, made his trial fundamentally unfair under the due process clause of the Fourteenth Amendment to the United States Constitution and the equivalent guaranty in the California Constitution. (See *People v. Rogers, supra*, 39 Cal.4th at p. 911.)

Because we have found no errors and no ineffective assistance of counsel, we must reject the claim. "Defendant was entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Defendant's trial was fair.

IV. *Parole Revocation Fine*

Defendant claims that because he was sentenced solely to a term of life imprisonment without the possibility of parole, the trial court erred in imposing a \$200 parole revocation fine under Penal Code section 1202.45. He is correct, as the People concede.

Section 1202.45 provides in pertinent part: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess

an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine . . . shall be suspended unless the person’s parole is revoked.”

Thus, “ ‘[w]hen there is no parole eligibility, the [parole revocation] fine is clearly not applicable.’ ” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1184, bracketed material added here.) As stated, the People agree. We do not here address the applicability of this fine in a case in which both a sentence of life without the possibility of parole and a separate sentence with parole eligibility is imposed. Defendant received only a sentence of life imprisonment without possibility of parole in this cause.

DISPOSITION

The judgment is modified to strike the parole revocation fine imposed under Penal Code section 1202.45. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Duffy, J.

WE CONCUR:

Rushing, P. J.

Premo, J.