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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR MERAZ,

Defendant and Appellant.

2d Crim. No. B235143
(Super. Ct. No. 2009013585)
(Ventura County)

Victor Meraz appeals from judgment after conviction by jury of first degree murder. (Pen. Code, § 187, subd. (a).)¹ The jury found two special circumstances allegations to be true: that Meraz committed murder by intentionally discharging a firearm from inside a motor vehicle with intent to kill the person outside (§ 12022.53, subd. (b)); and that he intentionally killed his victim while an active participant in a street gang, to further the gang's activities. (§ 190.2, subd. (a)(22).) The jury also found true allegations that he personally and intentionally discharged a firearm causing death and that he committed murder for the benefit of a street gang. (§§ 12022.53, subds. (c) & (d), 186.22, subd. (b).)

The trial court sentenced Meraz, who was a minor, to life in prison without possibility of parole (LWOP). (§ 190.5.) For the firearm enhancements, it imposed a

¹ All statutory references are to the Penal Code.

consecutive term of 25 years to life, and imposed and stayed a 20-year consecutive term. (§ 12022.53, subs. (c) & (d).) For the gang enhancement, it imposed a consecutive 10-year term. (§ 186.22, subd. (b)(1)(C).)

We reject Meraz' contention that the trial court did not properly instruct the jury in response to a question about self-defense, but we vacate the LWOP sentence and remand so the court may reconsider its sentencing discretion in view of the United States Supreme Court's decision in *Miller v. Alabama* (2012) 567 U.S. ____ [183 L.Ed.2d 407, 424] (*Miller*). We also conclude that the trial court imposed an incorrect security fine, should not impose a 10-year gang enhancement on remand, and should not impose a parole restitution fine if the sentence on remand does not include a period of parole.

FACTUAL AND PROCEDURAL BACKGROUND

Meraz shot and killed a rival gang member, Alberto "Payo" Avalos. Meraz and Jorge Velasco² were members of The Boyz gang. Alberto Avalos was a member of Lil Boyz, a rival gang.

Velasco drove Meraz home through Lil Boyz territory at night. Velasco told an informant that Meraz was in the back of the car, "talking shit," and that Meraz yelled, "[T]he Boyz" as they drove by a group of Lil Boyz members. A car blocked Velasco's path. Meraz pointed a gun out the rear window and shot Avalos in the chest. Velasco reversed the car and they drove away through gunfire.

Meraz later told a jail informant that he and Velasco went into Lil Boyz territory that night "on a . . . mission" because Avalos had shot a member of their gang. Meraz said, "That fool had to go, homie." He said, "he capped my homie a couple months before, homie. Fuckin', this is perfect timing, let him have it, fool." He said, "I went over there to fuckin' put a name out for myself." Meraz told the informant that he had a "big[] smile" when Avalos "hit the floor." He said he was not scared and he was not "loaded." Meraz told the informant that killing was, "like a drug." These statements were all recorded. In a separate, recorded conversation, Meraz told Velasco, "I was

² Jorge Valasco is not a party to this appeal.

going to hit the whole fuckin'--the whole crowd. Pow, pow, but [the gun] jammed on me."

Meraz testified at trial that he shot Avalos out of fear. He said he was very drunk. He realized he was in rival gang territory when Velasco stopped the car. Lil Boyz members approached and he yelled, "Jorge, go leyva." Velasco gave him a gun. He panicked because they were "sitting ducks." He saw the Lil Boyz members reaching into their pockets or waists before he shot. He said his recorded statements were lies that he told out of fear and in order to gain protection in jail.

The court gave standard instructions on voluntary manslaughter, self-defense and imperfect self-defense. Neither side requested, and the court did not give, CALCRIM No. 3472 (the right to self-defense may not be contrived).

In closing argument, the prosecutor said that imperfect self-defense was not available to Meraz because he "provoked the quarrel by calling out his gang," rolling down his window, and "talking shit to Payo." She said, "You cannot go into a situation on the offensive as an aggressor seeking out a confrontation and then contrive self-defense to explain your actions."

During deliberations, the jurors asked, "What is the legal definition of contrived self-defense as instructed by the prosecutor?" After consulting with counsel, the court asked the jurors to be more specific. They responded, "If the defendant acts in a way that he knows may incite violence, would the defendant be justified by law to commit homicide in defense against violence incited by the defendant?"

With the agreement of counsel and consistent with CALCRIM No. 3472, the trial court responded, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." The jury resumed deliberations, and then reported they were "hung up on self-defense with a vote of 10 to 2 on all counts." The court ordered them to continue deliberation. They requested read back of the testimony of Meraz and two other witnesses. They reached a verdict the following day.

The court selected a sentence of LWOP based on its finding that the crime involved a high degree of violence and danger, that Meraz was armed, that he is a danger to society and that he had numerous sustained juvenile petitions. The Court stated it was "mindful of the fact that section 190.5[,] subdivision [(b)] has been interpreted to express a presumptive sentence of life without possibility of parole for youthful offenders convicted of first-degree murder [citing] *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145." It said, "However, the Court is also obligated to consider the factors listed in Penal Code section 190.3 and California Rules of Court [rules] 4.421 and 4.423 in determining whether the appropriate sentence is 25 to life or life without the possibility of parole."

DISCUSSION

Claim of Instructional Error

Meraz contends the court should have responded to the jury's question by instructing them that a person's knowledge that their conduct might incite violence does not render self-defense unavailable. (*People v. Conkling* (1896) 111 Cal. 616.) He forfeited the contention.

Meraz' counsel agreed that the court should give CALCRIM No. 3472 in response to the juror's question. "I'm afraid I must acquiesce, your Honor. It appears from this note that they are asking for something specific. [CALCRIM No.] 3472 seems to cover that." Meraz did not request any modification. (*People v. Dykes* (2009) 46 Cal.4th 731, 802 [a party who believes the court's response to a jury's question should be modified or clarified must make a contemporaneous request to that effect].)

Moreover, the instruction did not imply that mere knowledge that conduct might incite violence precludes a finding of self-defense. The court instructed the jury that provocation with "intent to create an excuse to use force" (CALCRIM No. 3472) would preclude a finding of self-defense. This was a correct statement of law. (*People v. Hinshaw* (1924) 194 Cal.1, 26; *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381.)

Sentencing Under Section 190.5

Meraz contends that section 190.5 does not establish a presumption in favor of a LWOP sentence for youthful special circumstance murderers. A change in the law has proven Meraz to be correct. (*Miller, supra*, 567 U.S. ___ [183 L.Ed.2d at p. 424.]) The trial court did not expressly rely on an LWOP presumption when it exercised its sentencing discretion, but we will remand in an abundance of caution so that it may, if it so chooses, reconsider its sentencing options in view of *Miller*.

Section 190.5, subdivision (b), provides that, when a 16- or 17-year-old is convicted of a special circumstances murder, the sentence "shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." At the time of sentencing, this language had been interpreted to provide "a presumptive penalty of LWOP for a 16- or 17-year-old special circumstances murderer," but to permit the court to grant leniency in its discretion, based on any mitigating factors. (*People v. Guinn, supra*, 28 Cal.App.4th at p. 1145 (Guinn).)

After the trial court sentenced Meraz, the United States Supreme Court decided in *Miller* that the Eighth Amendment forbids any sentencing scheme that mandates LWOP for juvenile offenders. (*Miller, supra*, 567 U.S. ___ [183 L.Ed.2d at p. 424.]) Section 190.5 does not mandate LWOP. But after *Miller* it cannot be read to presume that LWOP is the correct sentence for every youthful special circumstance murderer. "[G]iven all we have said . . . , this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (*Ibid.*)³

The trial court cited *Guinn, supra*, 28 Cal.App.4th at p. 1145, and acknowledged that "section 190.5 subdivision (b) has been interpreted to express a presumptive sentence of life without the possibility of parole for youthful offenders

³ The California Supreme Court recently granted review in two cases to consider whether a sentence of life without parole imposed on a juvenile offender under section 190.5, subdivision (b) violates the Eighth Amendment under *Miller*. (*People v. Moffett*, review granted Jan. 3, 2013, S206771; *People v. Gutierrez*, review granted Jan. 3, 2013, 206365.)

convicted of first degree murder." The trial court then considered the factors listed in section 190.3 and rules 4.421 and 4.423 of the California Rules of Court "in determining whether the appropriate sentence is 25 [years] to life or life without the possibility of parole."

There are numerous factors the court may consider under section 190.3 in determining whether to impose the death penalty or life without parole. The people point out this includes, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding . . ." (§ 190.3, subds. (a)) and "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (*Id.*, subd. (b).) Age is also a factor. (*Id.*, subd. (i).) The trial court found numerous aggravating factors which could justify the trial court's sentence under *Miller*.

The trial court, however, rendered its sentencing decision against the backdrop of the *Guinn* case which placed the burden on Meraz to overcome the sentence of life without parole and receive a lesser sentence. However aggravating the circumstances are here, out of an abundance of caution we believe it to be the better practice to remand the matter to the trial court so that it will have the opportunity to reconsider its sentence in light of *Miller*. Indeed, the sentence may be the same, or the trial court may feel less constrained now that *Guinn* has been undermined by *Miller*.

Court Security Fee

The court's \$120 security fee order as reflected on the abstract of judgment should be modified to \$40, reflecting a single offense, as respondent concedes. (§ 1465.8, subd. (a)(1).)

Parole Restitution Fee

The court should not impose and stay a \$10,000 section 1202.45 restitution fine on remand if Merraz' sentence does not include a period of parole, as respondent concedes. (§ 1202.45.)

Gang Enhancement

The 10-year gang enhancement imposed under section 186.22, subdivision (b)(1)(C) may not be imposed on remand. A 15-year minimum parole eligibility period should instead be imposed. (§ 186.22, subd. (b)(5).). The enhancement does not apply to crimes that carry a life sentence. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239-1240.) The 15-year minimum parole eligibility period applies to life terms. (§ 186.22, subd. (b)(5).) Having concluded that the 10-year enhancement under section 186.22, subdivision (b)(1)(C) was unauthorized, we do not reach the question whether it should have been stayed pursuant to section 654.

DISPOSITION

The sentence is vacated and the case is remanded for resentencing consistent with the views expressed in *Miller* and in this opinion. The judgment is otherwise affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Kevin G. Denoce, Judge
Superior Court County of Ventura

Dan Mrotek, 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, Senior Assistant Attorney General, Mary Sanchez, Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.