Filed 6/29/04 P. v. Narro CA2/6

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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. MARCEL M. NARRO, Defendant and Appellant.	2d Crim. No. B168750 (Super. Ct. No. GA045560) (Los Angeles County)

Appellant Marcel M. Narro was tried before a jury and convicted of one count of first degree murder with gang and firearm enhancements and one count of firearm possession by a felon. (Pen. Code, §§ 187, subd. (a), 189, 186.22, subd. (b), 12022.53, subdivision (d), 12021, subd. (a)(1).)[1] He admitted a prior serious felony conviction within the meaning of the Three Strikes law and the serious felony enhancement provision (§§ 667, 1170.12) and was sentenced to prison for a term of 75 years to life plus a determinate term of 15 years. We conclude the judgment must be modified to strike a 10-year gang enhancement, but reject appellant's claim that the evidence was insufficient to support his conviction for first degree murder.

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

FACTS

Joseph Gallegos was a member of the Lopez Maravilla gang. He was boarding a bus with his girlfriend and her two small children when appellant approached him and asked, "Hey, what clique are you from?" Appellant was a member of the Metro 13 gang, which was affiliated with the Mexican Mafia and was an enemy of the unaffiliated Lopez Maravilla gang. The Mexican Mafia had issued a "green light" on Lopez Maravilla allowing its own associates to commit acts of violence against Lopez Maravilla members.

Recognizing appellant's question as a gang related challenge, Gallegos responded, "You know where I'm from." He started to board the bus, but appellant pulled him off and the two men began fighting. Gallegos' girlfriend saw that appellant had a knife. Gallegos pulled out a gun and tried to shoot appellant, but the gun did not fire. They continued to fight until appellant fled.

Gallegos remained in the area, talking to his girlfriend and her children. Appellant drove up a couple of minutes later and got out of his car carrying a gun. Gallegos, who was no longer holding a gun, tried to take shelter behind another car. Appellant chased him around the car and pulled the trigger of his gun at least once, but it did not discharge. When Gallegos saw the gun was not working, he stood up and told appellant, "Put the gun down and let me beat your ass like I did." Appellant then shot Gallegos in the chest, causing him to fall face down on the ground. Appellant struck Gallegos in the head with the butt of his gun and kicked him in the head before he ran from the scene. Gallegos died from his gunshot wound. Appellant was arrested several months later in New Mexico with false identification documents.

Appellant testified at trial and claimed that Gallegos had started the fight while appellant was putting something in the trunk of his car. Gallegos pulled out a gun during the fight, and appellant obtained it from him after a struggle. Gallegos ran to his girlfriend, got another gun from her, and used it to threaten appellant's girlfriend, who

was in the passenger seat of his car. Appellant told Gallegos to leave her alone and Gallegos pointed the gun at him. Appellant then shot Gallegos in self-defense.

DISCUSSION

Sufficiency of the Evidence

Appellant argues the evidence was insufficient to support his conviction of first degree murder and asks us to modify the judgment to the lesser included offense of voluntary manslaughter. (§ 1260.) He claims the prosecution proved "at most, a shooting in the heat of passion or sudden quarrel, with more than adequate provocation from the victim." We disagree.

When the sufficiency of the evidence to support a criminal conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether substantial evidence—evidence that is reasonable, credible and of solid value—supports the verdict. We cannot reweigh the evidence, reassess the credibility of witnesses, or substitute our own view of the evidence for that of the jury. (*People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The record in this case amply supported a first degree murder conviction. Viewed in the light most favorable to the judgment, the evidence shows that appellant started a fight with Gallegos, pulled a knife during that fight, and fled after Gallegos pulled out a gun and attempted to use it to protect himself from great bodily harm. Appellant left the scene but returned a few minutes later with a gun, which he used to kill an unarmed Gallegos. If the jurors believed this version of the facts (which was described by Gallegos' girlfriend and two unrelated eyewitnesses), they could conclude that appellant had deliberately planned to kill Gallegos when he returned with a gun and intentionally did so with express malice aforethought.

Appellant claims he acted in a heat of passion and could be convicted of no greater crime than voluntary manslaughter. A killing that would otherwise be murder may be reduced to voluntary manslaughter if it is committed in a sudden quarrel

or heat of passion, but the provocation must come from the victim and must be such that it would cause an ordinary person of average disposition to act rashly or without due deliberation or reflection. (§ 192, subd. (a); *People v. Rios* (2000) 23 Cal.4th 450, 462; *People v. Breverman* (1998) 19 Cal.4th 142, 163.) A jury could reasonably determine that appellant, as the initial aggressor of each of the two confrontations with Gallegos, was not adequately provoked and did not respond as an ordinary person of average disposition. The jury was also entitled to conclude that when appellant returned with a gun after the initial altercation, he possessed a deliberate and premeditated intent to kill Gallegos and was not acting rashly or without due deliberation.

Appellant was not precluded from arguing that the killing was something less than murder. The jury was fully instructed on the provocation/heat of passion variant of voluntary manslaughter, as well as theories of reasonable and unreasonable self-defense. We will not second guess its rejection of these theories on appeal.

Gang Enhancement

Appellant's sentence on the first degree murder conviction includes a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). We agree with appellant that the enhancement cannot be applied to this count and must be stricken.

Section 186.22, subdivision (b) establishes three forms of increased punishment when a crime has been committed for the benefit of a criminal street gang. For most offenses carrying a determinate term, subdivision (b)(1) provides that a defendant's sentence must be increased by a term of years--10 years when the crime is a violent felony. (*Id*., subd. (b)(1)(C).) For certain specified offenses not at issue in this case (e.g., home invasion robbery, carjacking, shooting at an inhabited dwelling house), subdivision (b)(4) provides that the determinate term ordinarily applicable is replaced by "an indeterminate term of life imprisonment with the minimum term of the indeterminate sentence calculated as the greater of" three possible options. Finally, when the defendant is convicted of a "felony punishable in the state prison for life,"

subdivision (b)(5) requires that the defendant serve a minimum of 15 calendar years in prison.

The enhancement for a term of years specified in section 186.22, subdivision (b)(1) specifically applies "[*e*]*xcept as provided in paragraphs (4) and (5)*." Several Courts of Appeal, including this division, have held that the subdivision (b)(1) enhancement thus may not be added to the sentence on a "felony punishable in the state prison for life" within the meaning of subdivision (b)(5), i.e., to a felony carrying a term of life, 15 years to life, or 25 years to life. (*People v. Harper* (2003) 109 Cal.App.4th 520, 527; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.)[2] In such cases, the defendant is instead subject to the 15 calendar year minimum term of section 186.22, subdivision (b)(5). Application of this rule requires us to strike the 10-year gang enhancement that was added to appellant's 25-year-to-life sentence for murder.

The People argue that section 186.22, subdivision (b)(5) applies only to felonies carrying "straight" life sentences, for which no minimum term is specified. (See § 3046.) They reason that subdivision (b)(5) refers to any "felony punishable by imprisonment in the state prison for life," whereas subdivision (b)(4) elevates the punishment for certain determinate term felonies to "an indeterminate term of life imprisonment with a minimum term . . . ." The People argue that if subdivision (b)(5) had been intended to apply to life sentences carrying a minimum term, it would have been worded similarly to subdivision (b)(4) and would have specifically referred to life sentences with a minimum term.

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[2] A contrary result was reached by the majority in *People v. Herrera* (2001) 88 Cal.App.4th 1353, which we decline to follow. Issues concerning the applicability of the subdivision (b)(1) enhancement to indeterminate sentences are currently pending in the Supreme Court. (*People v. Lopez*, review granted Nov. 12, 2003, S119294.)

We are not persuaded. Subdivision (b)(4) was added to section 186.22 in 2000, with the passage of Proposition 21. It specifically refers to "an indeterminate term of life imprisonment with a minimum term" for an obvious reason: it sets an increased penalty for certain crimes that is itself a life term with a minimum term. Subdivision (b)(5)'s broader reference to felonies "punishable by imprisonment in the state prison for life" applies to all crimes carrying a life sentence, whether or not the sentence includes a specified minimum term.

In *People v. Montes* (2003) 31 Cal.4th 350, our Supreme Court considered whether section 186.22, subdivision (b)(5) applied to a felony which itself carried a determinate sentence, but was enhanced by a term of 25 years to life under section 12022.53, subdivision (d). The court concluded that subdivision (b)(5) applied only when the underlying felony carried a life sentence, but it did not suggest that section 12022.53, subdivision (d)'s specification of a 25-year minimum term in any way affected the triggering of section 186.22, subdivision (b)(5). (See *id*. at pp. 354-362.)

Notably, *Montes* cites portions of the legislative history suggesting that when the text of current section 186.22, subdivision (b)(5) was originally drafted [initially as subdivision (b)(3); later renumbered as subdivision (b)(4)], the Legislature recognized that it would apply to a 25-year-to-life first degree murder sentence, even though it would have no effect on the earliest possible parole date for such a sentence. (*People v. Montes*, 31 Cal.4th at pp. 357-358, and fn. 10, citing Cal. Youth and Adult Correctional Agency, Enrolled Bill Rep. On Assem. Bill No. 2013 (1987-1988 Reg. Sess.) prepared for Governor Deukmejian (Sept. 1, 1988) p. 2 & Attachment A.) The substance of subdivision (b)(5) has remained unchanged throughout the various incarnations of section 186.22. (See *People v. Lewis* (1993) 21 Cal.App.4th 243, 249 [reenacted portions of statute given same construction they received before the amendment].)

We are satisfied that section 186.22, subdivision (b)(5) applies to all cases in which the underlying felony carries a life sentence, whether or not that sentence

carries a minimum term. Subdivision (b)(5) governs appellant's sentence to the exclusion of subdivision (b)(1).

DISPOSITION

The 10-year enhancement under section 186.22, subdivision (b)(1) is stricken. The abstract of judgment shall be amended to reflect the striking of the enhancement. A copy of the amended abstract shall be forwarded to the Department of Corrections. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Clifford L. Klein, Judge

Superior Court County of Los Angeles

Corinne S. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

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