Filed 10/30/06 P. v. Torres CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAVIER TORRES, Defendant and Appellant.	B180930 (Los Angeles County Super. Ct. No. VA080220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Javier Torres appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty of the willful, deliberate and premeditated attempted murder of two peace officers, Sheriff's Deputies Stephanie Patterson and Manny Avina (Pen. Code, §§ 187, subd. (a), 664,[1] counts 1 and 2), during which defendant personally used and intentionally discharged a firearm (§ 12022.53, subds. (b) & (c)), proximately causing great bodily injury to Deputy Patterson (*id*., subd. (d)). The jury also found defendant guilty of assault with a semiautomatic weapon on the two peace officers, Deputies Patterson and Avina (§ 245, subd. (d)(2), counts 3 and 4), during which defendant personally used and intentionally discharged a firearm (§ 12022.53, subds. (b) & (c)), proximately causing great bodily injury to Deputy Patterson (*id*., subd. (d)). The jury further found defendant guilty of possession of an assault weapon (§ 12280, subd. (b), count 5); possession of a firearm by a felon (§ 12021, subd. (a)(1), count 6); carrying a loaded firearm while an active gang member (§ 12031, subds. (a)(1) & (a)(2)(C), count 7); and possession of a weapon by a person in custody (§ 4502, subd. (a), count 8).

Following his conviction, defendant admitted that he previously had been convicted of a serious felony (§§ 667, subds. (a) & (b) - (i), 1170.12).

On counts 1 and 2, the trial court sentenced defendant to life imprisonment with the possibility of parole plus 25 years to life (§ 12022.53, subd. (d)). It added consecutive determinate terms of six years for possession of an assault weapon on count 5 and two years for custodial possession of a weapon on count 8. It stayed sentences on counts 3, 4, 6 and 7 under section 654. Finally, it added a five-year enhancement under subdivision (a) of section 667.

On appeal, defendant challenges the trial court's failure to instruct on attempted voluntary manslaughter as a lesser included offense (counts 1 and 2) and on the definition

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

of a criminal street gang (count 7). He challenges the sufficiency of the evidence that he was a member of a criminal street gang (count 7). He further claims error in the trial court's denial of his motion for disclosure of juror information and imposition of the upper term sentence on count 5. We find no grounds for reversal and affirm the judgment.

FACTS

On the morning of December 22, 2003, members of the Los Angeles County Sheriff's Department's Fugitive Task Force went to a duplex on Palm Street in Bellflower. They were looking for defendant, who was wanted on a warrant for parole violation, and his girlfriend, Sarah T., who had been reported by her father as a runaway.

The task force members, Sergeant Delmese and Deputies Timothy Duerr, Liza Vera, Patterson and Avina, were in plain clothes, wearing bulletproof vests with a Sheriff's star on the front and the word "Sheriffs" written across the back. They were accompanied by three or four uniformed deputies.

Sergeant Delmese, Deputy Avina, and three or four uniformed patrol officers approached the front door while Deputies Patterson and Vera went to the back of the duplex. Deputy Avina knocked on the front door several times with his flashlight. Receiving no response, he and Deputy Duerr went to a side door. Deputy Avina knocked and announced, "Sheriff's Department" in a loud voice. Again, he received no response. Eventually, the uniformed officers were allowed to return to their regular duties and the task force members maintained surveillance on the house.

Deputy Patterson saw the vertical blinds on a back window move and radioed to the task force members that she saw movement in the back. She saw the blinds move a second time and heard the sound of a pole, which had been wedged in the window, being removed. She again radioed the others. Deputy Avina got a shotgun from his car and gave it to Sergeant Delmese, who was by the front door. Deputy Avina then went to join Deputy Patterson at the back.

Defendant opened the back window. Deputies Avina and Patterson, who were less than 10 feet away, stepped out with guns drawn and yelled, "Sheriff's Department. Let me see your hands. Get your hands up. Don't come out of the window. Go show yourself to the deputies at the front door." Defendant disappeared back inside, and Deputies Avina and Patterson stepped away, out of view from the window. When Deputy Patterson stepped out again, she saw defendant at the window with a nine millimeter Beretta in his hand. Deputy Patterson fired one shot at defendant, because she believed he would shoot anybody who got in his way as he tried to escape.

Defendant shot back from inside the house. As Deputy Patterson began running from the gunfire, a bullet struck her. It entered her left side, broke her pelvic bone, then ricocheted inside her body, hitting her colon, small intestines and ovaries and severing a vein in her left leg. She fell to the ground.

Deputy Avina was shot in his right shoulder and struck in the face by stucco flying off the wall as bullets hit it. He returned fire while backing up and out of the line of fire. Hearing a noise at the window, he looked around the corner of the house and saw defendant, gun in hand, coming out of the window and landing on the ground. He shot at defendant, striking him on the left foot. Defendant began running. Deputy Avina radioed the other task force members and told them the direction in which defendant was running.

Sheriff's deputies eventually found defendant hiding in a storage shed. Defendant was bleeding from a wound to his left foot. Deputies also found a gray hooded sweatshirt, a bulletproof vest and pieces of a Beretta handgun in the shed.

Dale Higashi (Higashi), a senior criminalist with the sheriff's department, responded to the Palm Street duplex. He found 16 cartridges inside the duplex and one outside. All were fired from the nine millimeter Beretta which was found in the storage shed. Two bullets retrieved from the deputies at the hospital were fired by the same gun. There were numerous bullet holes in the walls and window. Higashi also found a Calico Model 951 semiautomatic assault rifle under a mattress inside the duplex.

Deputy Richard Lopez spoke to Anthony Perez (Perez), who was sharing the Palm Street duplex with defendant. Perez said that defendant was a member of the T-Flats gang from Compton, and his gang moniker was "Danger." Perez had observed T-Flats tattoos on defendant's chest.

Deputy Lopez also spoke to defendant. Defendant said he had been living at the Palm Street duplex with Perez and several others for about a month. He explained that when the deputies arrived, he was asleep. He awoke and looked at a video monitor that was hooked up to a camera by the front door. He saw someone he did not know at the front door and thought the person was trying to break into the house. He panicked and could not remember anything until he was in the hospital. Defendant denied shooting anyone or even having a gun in the house. He also denied that he was a gang member and said that he no longer was known as "Danger."

On April 25, 2004, Deputy Heriberto Fernandez, who was on duty at the Men's Central Jail, heard yelling near defendant's cell. He saw defendant in his cell pick up a metal object, wrap it, and then pass it to the inmate in the cell next to his. Deputy Fernandez and additional deputies removed defendant and the inmate in the next cell. They retrieved a seven and one-half-inch shank, a jail-made stabbing device, wrapped in a towel.

Defense

Defendant became a member of the Compton Varrio Tortilla Flats "T-Flats" gang when he was about 13 years old. He quit the gang a few months before December 2003, after witnessing the murder of his friend Arturo by members of the rival Compton Varrio Segundo gang. He moved to Bellflower because it was not in T-Flats or Compton Varrio Segundo gang territory.

On the morning of December 22, 2003, he woke up after someone banged on the front door. He looked at the video monitor but could not tell that it was a Sheriff's deputy at the front door. He then heard someone at the front window. Thinking that someone was trying to break in, he ran into the bedroom and locked the door.

Defendant was afraid; he believed that the Compton Varrio Segundo gang had put out a "green light," or attack order, on him because he had witnessed Arturo's murder. He believed there was a second "green light" on him because his brother was suspected of killing a Compton Varrio Segundo member. For these reasons, he had purchased a bulletproof vest, which he wore most of the time.

Defendant removed the metal bar from the bedroom window, intending to go out the window and confront the person at the front window. As he started to open the window, but before he removed the window screen or stuck any part of his body out the window, someone shot into the house.

Defendant thought someone was trying to kill him and panicked. He grabbed his nine millimeter Beretta from the dresser and fired into the wall, hoping to scare the intruder away. He then pushed the window screen out and jumped out the window. He did not see anyone outside, did not shoot anyone, and no one shot at him. He lost his balance and accidentally shot himself in the foot. Seeing that his gun was empty, he ran away and hid in a storage shed.

Defendant did not learn that the people outside the house were sheriff's deputies until after he was taken to jail. He never heard them announce themselves and did not see clothing identifying them as deputies. Had he known they were deputies, he would have felt no need to protect himself and would not have fired his gun.

Defendant admitted possession of the assault weapon found in the bedroom. He claimed he needed the shank in jail for protection due to the "green lights" against him.

DISCUSSION

Failure To Instruct on Attempted Voluntary Manslaughter

The trial court and counsel agreed that the jury would be instructed on attempted voluntary manslaughter as a lesser included offense of attempted murder on counts 1 and 2. The trial court gave a number of instructions regarding attempted voluntary manslaughter as a lesser offense.

It instructed the jury as to the necessity of a joint operation of act and specific intent as to the crimes "charged in Counts 1 and 2, and the crime of voluntary manslaughter, a lesser crime thereto." (CALJIC Nos. 3.31, 3.31.5.) It instructed the jury that actual but unreasonable belief in the need to defend oneself against imminent peril is a defense to attempted murder but not to "the crime of attempted voluntary manslaughter, a lesser included crime to the crime of attempted murder." (CALJIC No. 5.17.)

The trial court instructed the jury as to what constitutes an attempt. (CALJIC No. 6.00.) It defined attempted murder (CALJIC No. 8.66), as well as "willful, deliberate, and premeditated" as it applies to attempted murder (CALJIC No. 8.67). It told the jury that if it was not satisfied that defendant was guilty of the crime charged, it could convict him of a lesser crime, and "[t]he crime of attempted voluntary manslaughter is lesser to that of attempted murder." (CALJIC No. 17.10.) It did not instruct the jury as to the elements of attempted voluntary manslaughter (CALJIC No. 8.41).

In general, the trial court has the duty to instruct the jury sua sponte as to the principles of law relevant to the issues raised by the evidence. (*People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Saddler* (1979) 24 Cal.3d 671, 681.) This duty extends to instructions on lesser included offenses when the evidence raises a question as to whether all elements of the charged offense have been established, but instructions on lesser included offenses are not required if there is no evidence that the offense is less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Instructions on lesser included offenses must be given

whenever there is "'"evidence from which a jury composed of reasonable [persons] could have concluded"' that the particular facts underlying the instruction did exist." (*People v. Wickersham* (1982) 32 Cal.3d 307, 324, disapproved on other grounds in *Barton*, *supra*, at p. 201; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685.) In the absence of such evidence, no instruction on the lesser included offense need be given. (*Wickersham*, *supra*, at pp. 324-325; *Flannel*, *supra*, at p. 684.)

Even evidence which is "less than convincing" or subject to justifiable suspicion may constitute substantial evidence requiring instruction on a lesser included offense. (*People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1467.) This includes testimony by the defendant. (*Turner*, *supra*, at p. 690; *Glenn*, *supra*, at p. 1467.)

As to the specific crimes at issue here, "[m]urder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) Phrased differently, malice may be implied "'when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. . . .'" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104.)

Voluntary manslaughter is the "unlawful killing of a human being without malice . . . [¶] . . . upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) An unlawful killing also may be voluntary manslaughter where malice has been negated by an honest but unreasonable belief the defendant's life was in imminent danger from the victim. (*People v. Flannel*, *supra*, 25 Cal.3d at p. 675; *People v. Aris* (1989) 215 Cal.App.3d 1178, 1186, disapproved in part on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.) "'Accordingly, when a defendant is charged with murder the trial court's duty is to instruct sua sponte, or on its own initiative, on unreasonable self-

defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense.' ([*People v.*] *Barton, supra,* 12 Cal.4th [at pp.] 200-201 . . . .)" (*People v. Breverman, supra,* 19 Cal.4th at p. 159, italics omitted.)

According to defendant, his testimony provided substantial evidence supporting a finding that he attempted to kill Deputies Patterson and Avina in the unreasonable but good faith belief that he had to do so in self-defense: Defendant testified as to his fear of being killed by the Compton Varrio Segundo gang. On the day in question, he saw someone whom he could not identify at the front door; then he heard someone trying to break in the front window. As he opened the back window, someone fired a shot into the house. Thinking that someone was trying to kill him, he panicked. He grabbed his nine millimeter Beretta from the dresser and fired into the wall, hoping to scare the intruder away. He then pushed the window screen out and jumped out the window. At that point, he did not see anyone outside, did not shoot anyone, and no one shot at him. He lost his balance, accidentally shot himself in the foot, and then ran away.

The physical evidence was consistent with defendant's testimony. Bullet casings were found inside the duplex, and there were numerous bullet holes in the wall and window. Additionally, the deputies were in plain clothes, wearing bulletproof vests with a Sheriff's star on the front and the word "Sheriffs" written across the back; seen briefly from the front, they might not have been readily identifiable as Sheriff's deputies.

We agree that there was substantial evidence from which a reasonable jury could have found that defendant shot the deputies in an unreasonable but good faith belief in the need for self-defense. That the evidence was, in the People's words, "his own self-serving and uncorroborated" testimony does not negate this conclusion. (*People v. Turner, supra,* 50 Cal.3d at p. 690; *People v. Glenn*, *supra,* 229 Cal.App.3d at p. 1467.)

The question thus becomes whether it is reasonably probable that defendant would have obtained a more favorable result had the jury been instructed on the definition of attempted voluntary manslaughter. (*People v. Breverman, supra*, 19 Cal.4th at p. 178;

People v. Watson (1956) 46 Cal.2d 818, 836.) We do not believe it is reasonably probable.

The jury was instructed that it could convict defendant of the lesser crime of attempted voluntary manslaughter if it was not satisfied that defendant was guilty of the crime charged, so it knew it had the option of convicting defendant of a lesser crime, even though it did not have a specific definition of the lesser crime. The jury also was instructed that defendant was not guilty of attempted murder if he attempted to kill in the actual but unreasonable belief in the necessity for self-defense. Having been so instructed, the jury convicted defendant of attempted murder. It additionally found true the allegations that defendant knew or reasonably should have known that the victims were peace officers engaged in their duties and, more importantly, that the attempted murders were willful, deliberate and premeditated. In other words, the jury necessarily rejected defendant's testimony which suggested that he shot the deputies believing that it was necessary for self-defense. There is no reasonable probability of a more favorable result had the jury received an instruction specifically defining attempted voluntary manslaughter. Accordingly, reversal of defendant's attempted murder convictions on counts 1 and 2 is not required based on instructional error.

Instruction on Carrying a Loaded Firearm While an Active Gang Member

The jury convicted defendant on count 7 of carrying a loaded firearm while an active gang member in violation of section 12031, subdivisions (a)(1) and (a)(2)(C).[2] In order to convict defendant, the jury was instructed that it must find (1) that defendant carried a loaded firearm on his person, (2) with knowledge of its presence, (3) at a time when he was an active participant in a criminal street gang, (4) whose members engaged in or had engaged in a pattern of criminal gang activity, (5) which he knew about, and

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[2] Subdivision (a)(1) of section 12031 prohibits carrying a loaded firearm in public. Subdivision (a)(2)(C) provides that the crime is punishable as a felony "[w]here the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22."

(6) which he either directly and actively committed or aided and abetted. (CALJIC No. 12.54.1.)[3]

Defendant makes two claims of error relating to his conviction on count 7. First, he claims that the evidence is insufficient to establish that he was an active member of a criminal street gang, as that term is defined by statute. Second, he claims the trial court erred in failing to instruct the jury as to the statutory definition of a criminal street gang.

At trial, the defense stipulated that defendant "is an active member of the Compton Varrio T-Flats gang and that that is in fact a gang, and he's an active." His counsel also conceded in argument that defendant was guilty of possession of a firearm while an active gang member. Counsel urged the jury to find defendant guilty of the crimes of which he was guilty but not guilty of the crimes of which he was not guilty. The concessions of guilt appear to have been part of a strategy to obtain convictions on the less serious charges but acquittals on the attempted murder charges.

Where a defendant pursues a trial strategy of conceding guilt on lesser offenses in order to obtain acquittal on more serious charges, the failure to instruct the jury on uncontested elements of the lesser offenses is not reversible error. (*People v. Flood* (1998) 18 Cal.4th 470, 504, fn. 22; *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.) Inasmuch as defendant conceded guilt of carrying a loaded firearm while an active gang member, his claims of error with respect thereto are without merit.

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[3] Section 186.22 defines a "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), 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." (Subd. (f).) A "pattern of criminal gang activity" is defined as the commission of two or more of the enumerated offenses within a three-year period. (*Id.*, subd. (e).)

Motion for Disclosure of Juror Information

After the jury rendered its verdicts, defendant filed a motion pursuant to Code of Civil Procedure sections 206 and 237 to disclose juror identifying information. The motion was supported by the declaration of defendant's attorney, who stated that he received a telephone call from defendant's sister, who wanted to continue the sentencing hearing. She said she had some concerns regarding a potential issue of juror misconduct. She told the attorney that during jury deliberations, one of the jurors spoke to defendant's brother. He told the brother that he "'didn't really want to be on this jury. . . [.] I told them that I had a job, that I had to work, but they chose me anyone [*sic*].' The juror then made a statement to the effect 'I'm just going to go in there and do what everybody else wants to do'." Defendant believed this later statement evidenced an intent by the juror not to participate fully in deliberations and therefore possible misconduct.

The trial court denied the motion. It explained that the juror's statement was not enough to show misconduct "because of Evidence Code [section] 1150 which excludes evidence of the jurors['] . . subjective reasoning processes to impeach the verdict." The court added that "based on this casual comment by a juror that I'm just going to go in there and do what everybody else wants to do, that doesn't strike me as enough to go through what you want to do, which is to disclose the identifying information" and "pester[] the jurors."

Code of Civil Procedure sections 206 and 237 permit a defendant to obtain sealed juror information upon a showing that such information is necessary for a new trial motion or other lawful purpose. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087.) A motion for disclosure of juror information must be "supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the [motion] and supporting declaration establish a prima facie showing of good cause . . . ." (Code Civ. Proc., § 237, subd. (b).) We review the trial court's denial of the disclosure motion for abuse of discretion. (Cf. *People v. Jones* (1998) 17 Cal.4th 279, 317.)

In the present case, "[t]o the extent [defendant's] offer of proof revealed the thought processes of the juror with whom [defendant's brother] spoke, it does not establish a ground for juror misconduct because a verdict may not be impeached by inquiry into the jurors' mental or subjective reasoning process." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 553; see also *People v. Jones*, *supra*, 17 Cal.4th at p. 317.) The offer of proof did not extend to admissible evidence of "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) The trial court therefore did not abuse its discretion in denying defendant's motion. (*Jones*, *supra*, at p. 317; *Rhodes*, *supra*, at p. 554.)

Imposition of the Upper Term on Count 5

Defendant challenges the imposition of the upper term sentence on count 5, possession of an assault weapon, based on an aggravating factor not found by the jury. Defendant's challenge is based on the holding of *Blakely v. Washington* (2004) 542 U.S 296, 303-304, that the maximum sentence a judge may impose is that permitted by the facts established by the jury verdict or admitted by the defendant. Defendant acknowledges that the California Supreme Court has held that *Blakely* does not preclude exercise of judicial discretion to impose the upper term sentence based on aggravating factors found by the court. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) We are bound by the California Supreme Court's decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and must reject defendant's contention.[4]

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[4] On February 21, 2006, the United States Supreme Court granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501 [nonpub. opn.]) *sub nom. Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47] to consider whether this state's determinate sentencing law unconstitutionally permits trial courts to impose upper term sentences based on facts not found true by the jury.

The judgment is affirmed.

NOT TO BE PUBLISHED

JACKSON, J.*

We concur:

MALLANO, Acting P. J.

VOGEL, J.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.