

Court of Appeal, Second Appellate District, Division One - No. B308497

S270064

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANTHONY CRUZ, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

SEP 1 - 2021

Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

APPENDIX B

Filed 6/16/21 P. v. Cruz CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

B308497

Plaintiff and Respondent,

(Los Angeles County
Super. Ct. No. BA479035)

v.

ANTHONY CRUZ,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed as modified with directions.

Lillian Hamrick, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

APPENDIX A

Defendant Anthony Cruz appeals from the judgment following his convictions on six counts of assault with a semiautomatic firearm and one count of possession of a firearm by a felon. Defendant's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), identifying no issues and requesting that this court review the record and determine whether any arguable issue exists on appeal.

Having reviewed the record, we modify the judgment to correct an error in imposing assessments at sentencing, and direct the trial court to fix a separate error in the abstract of judgment concerning a sentence stayed under Penal Code¹ section 654. As modified, we affirm.

FACTUAL BACKGROUND

1. *The assaults*

Footage from security cameras mounted outside a convenience store showed the following:

On June 4, 2019, at approximately 3:50 p.m., a group of six men was gathered on East 6th Street just east of South Ditman Avenue. Some were on the sidewalk in front of a home, some were in the street throwing a football.

A blue car, identified at trial by a deputy sheriff as a Chevy Impala, came east on 6th Street, then turned south on Ditman. When the six men saw the car, they began walking towards it. The car stopped just south of the intersection; some of the men paused at this point, and others turned around and started walking away.

¹ Unspecified statutory citations are to the Penal Code.

The driver and a passenger in the back seat got out of the car. The driver raised a pistol and began firing in the direction of the six men, walking forward rapidly as he did so. Some of the men ducked behind a vehicle parked along the curb, others fled. The driver fired several shots; at trial, the deputy sheriff opined that a puff of dust captured on the video was a bullet striking the street perhaps 20 feet from one of the fleeing men. The driver and his passenger then ran back to the car and drove south on Ditman.

2. *Investigation and arrest*

Investigators found four 9-millimeter Luger shell casings near where the gunman had been standing, and a bullet fragment near the house in front of which some of the men had been standing at the time of the shooting. The deputy sheriff opined that the bullet fragment was from a nine-millimeter handgun, and that its location was consistent with the line of fire he observed on the surveillance video.

Two other deputy sheriffs had been informed about the shooting and been given a description of the Impala and its driver. The Impala was distinctive because it had paint peeling off the hood, no front license plate, and the front driver's side tire lacked a hubcap or rim. On June 18, 2019, they stopped a vehicle matching the description of the Impala. Defendant was in the driver's seat.

Later, a detective showed the two deputies the surveillance video of the shooting. They identified the vehicle and the driver in the video as the vehicle and driver they had stopped.

On June 26, 2019, the deputies went to defendant's home, located a few blocks from the scene of the crime, and detained him. The Impala was parked in front of the home, registered to

defendant's girlfriend. Investigators found no weapon or ammunition in the home or vehicle.

A detective watched the surveillance video again after meeting defendant and identified the gunman in the video as defendant.

PROCEDURAL BACKGROUND

An information charged defendant with six counts of assault with a semiautomatic firearm (§ 245, subd. (b)), and alleged as to each count that defendant had personally used a firearm (§ 12022.5, subds. (a), (d)). ~(CT 37-40)~ The information further charged defendant with one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)).²

Before trial, the trial court held a *Marsden*³ hearing and denied defendant's request to appoint new counsel.

A jury convicted defendant on all counts and found the firearm enhancement allegations true. The trial court found that defendant was in violation of his probation on an earlier conviction.

The prosecution recommended a sentence of 35 years 8 months. The trial court instead imposed a total sentence of 22 years 4 months, as follows: on the first assault count, the high term of nine years, with the high term of 10 years for the firearm

² The information also alleged two prior conviction enhancements under section 667.5, subdivision (b). The prosecution did not pursue those allegations at trial, presumably because by the time of trial, the Legislature had amended section 667.5, subdivision (b) to apply only to prior convictions for sexually violent offenses. (Stats. 2019, ch. 590, § 1.)

³ *People v. Marsden* (1970) 2 Cal.3d 118.

enhancement; on the second assault count, one-third the midterm for both the offense and the enhancement, for a total of 3 years 4 months, consecutive to the sentence on the first count; and on the remaining four assault counts, the low term of three years, to be served concurrently with the sentence on the first count, with the firearm enhancements struck under section 1385. The court stayed imposition of sentence on the firearm possession count pursuant to section 654.

The trial court terminated probation in the earlier matter. The court awarded credits, and imposed restitution and parole revocation fines of \$400 each, a \$30 court facilities assessment, and a \$40 court security assessment.

Defendant timely appealed.

DISCUSSION

Defendant's appointed counsel filed a *Wende* brief raising no issues on appeal and requesting that we independently review the record to determine if the lower court committed any error. We advised defendant of the opportunity to file a supplemental brief, and he did so, raising a number of contentions.

A. Defendant's Contentions

Defendant complains that his counsel did not file motions defendant requested, including a *Pitchess*⁴ motion, which defendant contends would have produced useful impeachment information about the investigating detective and the East Los Angeles branch of the Los Angeles County Sheriff's Department. To the extent defendant is contending counsel was constitutionally ineffective, we cannot address that claim on

⁴ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

direct appeal in the absence of evidence that counsel had no rational or tactical purpose in declining to file those motions. (*People v. Sepulveda* (2020) 47 Cal.App.5th 291, 301.) To the extent defendant is contending the trial court erred by not granting his *Marsden* request, we note that the record does not reflect that defendant raised counsel's failure to file a *Pitchess* motion as a reason to replace him, nor do we perceive any other errors in the trial court's denial of the request.

Defendant contends his counsel failed to object to seating Juror Number 4 despite the trial court indicating that juror had "English issues." Shortly thereafter, however, the trial court stated, "I'm not quite convinced that Juror Number 4 would be unable to serve." The parties apparently agreed, because although they stipulated to excuse two other potential jurors with "English issues," they declined to stipulate to excuse Juror Number 4. Accordingly, defendant's objection to Juror Number 4 is forfeited. Further, the record does not indicate defendant suffered any prejudice from the seating of that juror.

During trial, one of the six alleged victims was identified by name but did not appear at trial. Defendant contends he was denied the opportunity to cross-examine this nonappearing victim. Defendant also objects that the prosecutor pointed at that named victim on the surveillance video during closing argument without sufficiently establishing that the person in the video was that person. Defendant did not raise these objections below, and they are forfeited. On the merits, the victim's identity was a minor point and none of his statements to law enforcement was admitted at trial, so defendant suffered no prejudice either by the prosecution's identification of the victim or the inability to cross-examine.

Defendant claims hearsay evidence was admitted at trial but does not identify any specific evidence. Having reviewed the record, we have not located any evidence that should have been excluded as hearsay.

Defendant contends the prosecutor inappropriately marked up the surveillance video during closing argument, circling or labelling parts of the image. Defendant also objects that a copy of the video was presented rather than the original. Defendant claims the jury therefore did not see the actual video. These arguments are forfeited for lack of objection below. They also fail on the merits. Based on our review of the video exhibits, they appear unaltered, so we presume the jury did see the actual video at some point in the trial, and would have understood that any circles or labels presented during closing argument were added later. We are aware of no authority that a copy of a video is inadmissible in place of the original.

Defendant argues there was insufficient foundation laid for the deputy to opine regarding the ballistics of the bullet fragment or that the puff of dust on the surveillance video was a bullet striking the street. He further argues the evidence was inconsistent as to the location of the bullet fragment, and that the testimony as to its location came from a witness without first-hand knowledge. Assuming arguendo it was error to admit this evidence, that error was harmless. The surveillance video unmistakably showed the Impala driver firing a pistol multiple times at the group of men, rendering the need for ballistic analysis or recovery of physical evidence such as a bullet fragment unnecessary. Beyond a reasonable doubt, the jury would have reached the same verdict based on the video, even absent testimony regarding ballistics or bullet fragments. For

the same reason, we reject defendant's argument that the evidence was insufficient because no witnesses testified who actually witnessed the shooting.

Defendant contends there was insufficient evidence he fired at all six men, noting the single bullet fragment recovered and the fact that when the puff of dust appeared on the video, the men had already scattered and were at least 15 feet from the puff. These arguments are inapposite to the offense of assault with a firearm. A gunman who fires into a group of people may be convicted of as many counts of assault with a firearm as there are people in the group, even if the gunman fires only a single shot. (See *People v. Perez* (2010) 50 Cal.4th 222, 225.)

Further, "an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*People v. Chance* (2008) 44 Cal.4th 1164, 1168.) Again, the video unmistakably showed the Impala driver firing in the general direction of the six men. The fact that those six men took action to protect themselves does not absolve defendant of the crime of assault.

Defendant argues that the prosecutor narrated or led a witness to narrate what was happening in the video rather than allowing the jury to determine for themselves what was happening. Having reviewed the record, we have not identified any inappropriate descriptions or narrations concerning the video. Further, as discussed, the video is clear and speaks for itself, and any embellishment from a witness would be harmless.

Defendant argues the prosecutor "demean[ed]" his argument. He cites a portion of the record in which the

prosecutor during closing rebuttal responded to a defense argument that law enforcement was in league with the prosecution, calling the argument “nonsense.” Defense counsel objected, and the trial court stated, “Let’s not demean the argument,” but permitted the prosecution “to proceed due to the way the defense argument was formulated.” We see no error in the trial court’s ruling. Assuming arguendo the prosecution acted improperly, it was a brief moment in a long argument and would not have made a difference given the strong evidence against defendant.

Defendant contends the trial court had no basis to impose the upper term on the first assault count given that no one was hurt. “[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant,” subject to exceptions not relevant here. (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.) The trial court found several aggravating factors, including that firing on a group of unsuspecting individuals indicated “a high degree of callousness,” and that defendant’s criminal history indicated “an escalating level of seriousness.” The trial court thus fully explained and justified the imposition of the upper term.

B. Errors in Sentencing and the Abstract of Judgment

We have identified two errors in sentencing and the abstract of judgment.

The first issue concerns imposition of assessments. After pronouncing sentence on all counts, the trial court imposed restitution and parole revocation fines, then stated, “There’s a criminal conviction facilities assessment fee of \$30 and a court security fee of \$40.” It is unclear if the trial court intended to impose these fees only once, or on each of defendant’s seven

counts. The sentencing minute order imposes the two fees on each of the six assault counts, but not the seventh count for possession of a firearm. The abstract of judgment reflects the two fees being imposed only twice, for a total of \$60 and \$80.

Section 1465.8, subdivision (a)(1), provides that “an assessment of forty dollars (\$40) shall be imposed on *every conviction* for a criminal offense” (Italics added.) Government Code section 70373, subdivision (a)(1) similarly provides that “an assessment shall be imposed on *every conviction* for a criminal offense” In the case of a felony or misdemeanor, the amount of the assessment is \$30. (*Ibid.*, italics added.) These assessments apply even to convictions stayed under section 654. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484.) Because defendant was convicted of seven offenses, the trial court should have imposed the assessments seven times, for a total of \$280 under section 1465.8 and \$210 under Government Code section 70373.⁵

The second issue concerns the application of section 654. When orally pronouncing judgment, the trial court stayed imposition of sentence on the seventh count for possession of a firearm under section 654. This would appear to be error—the correct procedure is to impose sentence, but then stay execution of that sentence. (*People v. Alford* (2010) 180 Cal.App.4th 1463,

⁵ Defendant did not object to the imposition of fines and fees or request a hearing on his ability to pay them, thus forfeiting any challenge under *People v. Dueñas* (2019) 30 Cal.App.5th 1157. Further, we have rejected application of *Dueñas* except in the most extreme circumstances, which are not present here. (See *People v. Caceres* (2019) 39 Cal.App.5th 917, 923 [declining to apply *Dueñas* beyond its “extreme facts”].)

1466.) The minute order for the sentencing hearing, however, indicates that the trial court imposed a sentence of 16 months on that count, stayed under section 654. We presume this reflects the intention of the trial court and direct the trial court to amend the abstract of judgment to indicate a 16-month sentence on count 7, stayed under section 654.

We have reviewed the record and find no other arguable issues. Appointed counsel has fully complied with counsel's responsibilities and no arguable issue exists. (*People v. Kelly* (2006) 40 Cal.4th 106, 126; *Wende, supra*, 25 Cal.3d at pp. 441–442.)

DISPOSITION

The judgment is modified to impose assessments under Penal Code section 1465.8 and Government Code section 70373 on each of defendant's seven convictions. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification, and also to reflect the imposition of a 16-month sentence on count 7, stayed pursuant to Penal Code section 654. The trial court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, Acting P. J.

We concur:

CHANAY, J.

FEDERMAN, J.*

* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.