Filed 7/15/19 P. v. Herrera CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ARTURO HERRERA, Defendant and Appellant.	2d Crim. No. B286907 (Super. Ct. No. 1500408) (Santa Barbara County)

A jury found Arturo Herrera guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), and found true the allegation that he personally used a blunt object as a dangerous and deadly weapon (Pen. Code, § 12022, subd. (b)(1)). The trial court sentenced Herrera to 25 years to life for the murder plus one year for the weapon enhancement. The trial court also imposed assessments and fines. We affirm.

FACTS

Herrera and Enrique Herrera (Enrique) were brothers. They lived with their mother, Martha, in a two bedroom house in rural Lompoc. Herrera and his brother were close growing up.

But in July 2015 they got into a fight. After that they stayed away from each other and did not talk. They continued, however, to live with Martha in the same house.

On July 4, 2016, at about 6:00 a.m., Martha visited briefly with Enrique in the living room. Then Enrique went back to his bedroom and closed the door. Martha left for work at about 9:45 a.m. Herrera was in Martha's bedroom with the door closed and the television on at low volume. Because they lived out in the country, Martha did not lock the door to the house.

At 1:07 p.m. Herrera called 911. He reported, "My brother was attacked. He needs a[n] ambulance." When the operator asked Herrera who attacked his brother, Herrera replied, "I don't know." Sheriff's Deputy Joaquin Oliver responded. He saw Herrera standing at the street by the dirt road that led to the residence. Herrera told Oliver that his brother had been attacked. He did not know by whom. Herrera refused to go with Oliver to the residence.

Oliver proceeded up the dirt road to the residence. He radioed Deputy Ray Gamboa and asked him to wait at the intersection with Herrera. Herrera told Gamboa that his brother had been attacked and he is bleeding from his head. Herrera said he did not know who did it. Gamboa asked Herrera if he had blood on him. Herrera said no. Gamboa did not see any on him.

Oliver knocked on the door of the residence and announced his presence. Having received no response, he entered through the unlocked door. Oliver noticed the washing machine was running and the bathroom smelled of soap as if someone had taken a shower. The shower was still damp and had water spots.

Oliver opened the door to the southwest bedroom and saw Enrique lying on the bed. There were blood spatters on the walls,

ceiling, and carpet near the bed. A pink towel covered Enrique's head. Oliver lifted the towel and saw a large amount of blood and some grey matter around Enrique's head. He appeared to be dead. A paramedic subsequently confirmed the death. A cell phone and wallet were near the bed. There was money in the wallet.

The washing machine had stopped. Martha identified one of the shirts in the washing machine as belonging to Herrera.

There were no signs of forced entry into the residence and deputies encountered no other people in or around the house. Deputies were unable to find the murder weapon.

Herrera told first responders at the scene that he was in his room sleeping. He got up at about noon and watched television for 20 to 30 minutes. He noticed Enrique's bedroom door was partly open. That was unusual. He looked inside and saw Enrique on the bed. He ran outside and called 911, then ran down the road to wait for medical assistance. Herrera said he did not hear anything. He was in his room and kept the television pretty loud. Herrera's neighbors testified that they saw him calmly walking down the road at about the time he called 911.

An autopsy showed Enrique died of blunt force trauma to his head. The pathologist opined the time of death was about 10:00 a.m.

Sheriff's detectives interviewed Herrera at the sheriff's station at about 8:30 p.m. that night. He initially waived his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Herrera said he woke up at about noon and watched television for about 30 to 40 minutes. Then he walked out of his room and saw Enrique. He did not know what happened to him. He said he

and Enrique were close. Herrera invoked his *Miranda* rights. The interview ended, and he was arrested.

The next day Detective Brian Scott placed Jairo Garcia in a cell next to Herrera. Garcia was facing a life sentence, and would be given leniency for cooperating with law enforcement. Garcia's task was to get Herrera to talk about the murder. Their conversation was recorded. It lasted about an hour and 20 minutes.

Garcia began by asking Herrera where he is from. Herrera replied that he had been a Marine at Vandenberg Village. Garcia introduced himself as "Glock" and said, "Nice to meet you, dog." Herrera replied, "Sweet." Because Herrera was quiet, Garcia asked him why he was scared. Herrera denied he was scared. Garcia said, "[T]his is your first time, so I'm gonna try to help ya out, ya know?" Garcia told Herrera, "[Y]ou gotta run with somebody here to be taken care of." Garcia said, "[I]f you're runnin' white, you're gonna have to go meet up with them. Where if you're runnin' homie, you gonna be up with them."

Garcia asked Herrera why he was in jail. Herrera said it is serious and he did not want to talk about it. Garcia asked if Herrera had a co-defendant. Herrera said, "I can't say." After further questioning, Herrera admitted that no one got arrested with him, and that he did not have a co-defendant. Garcia said he asked because if Herrera did it by himself, he would not have to worry. Herrera asked, "[L]et's say I did it by myself already, so what's going to happen? [¶. . .¶] [W]ell I am just saying, like for instance, if someone did do something by themselves, like what would they say." Garcia asked if Herrera was inquiring about his arraignment. Herrera said he was trying to get information.

Garcia asked again what Herrera was in jail for. Garcia said it would not be a secret. Other inmates would ask for his "paperwork." Garcia said jail inmates did not want to be sleeping around child molesters or baby killers.

Garcia said, "I can tell you don't know how to go about your case, so I can help you I can teach you the ropes so that you can understand." The following colloquy ensued:

"[Garcia]: [T]hat's why I was asking you like earlier I was asking you, I know you felt like, you didn't feel confident to tell me, that's why I was asking if you had a co-defendant, like if you did something with somebody, well now that I know that you're here for what you told me.

"Herrera: [Y]eah

"[Garcia]: [L]ike, did you do it with somebody like do you have to worry about something else?

"Herrera: [N]o

"[Garcia]: [S]o you did it by yourself?

"Herrera: [Y]eah"

Garcia said he shot someone, but the police did not find a weapon. He asked Herrera if they found a weapon on him. Herrera said no. Garcia asked multiple times what kind of weapon Herrera used. Herrera did not answer.

Herrera told Garcia, "[T]hank you for giving me a heads up. [You are] actually the first person to look out for me."

A search of Herrera's cell phone showed he had an account with YNC.com. The website has a collection of death videos and pornography. Herrera accessed the "Murder" category of videos repeatedly.

The titles Herrera accessed include: "Shocking, Man Brutally Stabbed and Killed His Own Brother in Broad

Daylight"—the video shows one man repeatedly stabbing another until he apparently dies; "Man Hit in the Head with a Hammer"—the video shows a man hit in the head with a short-handled sledgehammer; "Man Shoots His Brother and Aunt Then Commits Suicide"—the video shows a man shooting two people, then using the gun on himself.

The content of most of the videos was described for the jury by a police witness. The jury saw two videos that Herrera accessed in the early morning hours of July 4, 2016: "Brutal, Killers Unload Their Guns on Victim in Front of His Home, Uncensored"—the video shows a man repeatedly shot in the back of the head as he lay on the sidewalk; "Shocking, Man Beaten with a Huge Stone"—the video shows a man being beaten by a group of men. They throw a large stone on his head as he tries to get up, and again as he lays on the ground.

DEFENSE

A forensic serologist testified that the towel that had been on Enrique's head contained DNA from Herrera and Enrique, but also trace amounts of DNA that did not belong to them.

The owner of a forensic DNA laboratory testified that a bloodstained towel found in the washing machine had not been through the wash cycle. If it had, the bloodstain on the towel would have been washed off. He opined that the bloodstain may have come from cross-contamination in the lab.

A psychologist examined Herrera and found no significant mental health problems.

Herrera called four character witnesses.

Cyrus Chan met Herrera in college. He described Herrera as "really nice, really laid back." Chan had never seen Herrera become violent. Chan had not heard that Herrera punched

another jail inmate from behind or that he attacked a sleeping inmate. Chan had read that Herrera watched violent movies, but he did not believe Herrera was violent. Chan said, "People watch violent movies."

Samuel Gonzalez-Jimenez met Herrera before they enlisted in the Marines. He described Herrera as "[n]ormal, calm, collected."

Launi Johnson rented a room in her house to Herrera for six months approximately six or seven years ago. She described him as a quiet and nice gentleman.

Ken Lagid was in the Marines with Herrera. Lagid described Herrera as calm and quiet. He avoided fights. Lagid had not heard that Herrera punched an inmate or woke a sleeping inmate and initiated a fight. Lagid said that all Marines watch violent videos. He does. It is a normal thing for Marines who have been in combat.

DISCUSSION

I.

Herrera contends that the trial court erred in admitting his statements to Garcia.

Herrera argues that his statements were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. He points out that he had previously invoked his *Miranda* rights, and that Garcia was acting as an agent of the police.

In *Illinois v. Perkins* (1990) 496 U.S. 292, the Supreme Court held that an undercover law enforcement officer posing as a fellow inmate is not required to give *Miranda* warnings when the suspect is unaware that he is speaking to a law enforcement officer. When a suspect considers himself in the company of cellmates and not officers, the police-dominated coercive

atmosphere that underlies the need for *Miranda* warnings is lacking. (*Perkins*, at p. 296.)

Herrera seeks to distinguish *Perkins* on the ground that the suspect never invoked his *Miranda* rights, whereas Herrera did. But *Perkins* held that *Miranda* is not implicated when the suspect is unaware that he is speaking to a law enforcement officer. It is irrelevant that Herrera had previously invoked his *Miranda* rights. (See *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1541 ["[T]he fact that the conversation occurred after an invocation of rights is without legal significance"]; *People v. Orozco* (2019) 32 Cal.App.5th 802, 815 ["California courts have uniformly come to the conclusion that *Perkins* controls when a suspect invokes his *Miranda* right to counsel but later speaks with someone he does not know is an agent of the police"].)

Herrera argues that independent of the *Miranda* violation, his statements were coerced and were introduced in violation of due process.

Coercion or overreaching by the police or its agents that is the proximate cause of an involuntary statement violates due process. (*People v. Mickey* (1991) 54 Cal.3d 612, 647.) The test of voluntariness is whether, considering all of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne. (*Haynes v. Washington* (1963) 373 U.S. 503, 513-514.)

Herrera argues that Garcia intimidated him by portraying himself as a hardened criminal. But Garcia was simply portraying himself as an inmate with experience in the penal and court system. He did not intimidate Herrera. Instead, Garcia gained Herrera's confidence by portraying himself as an

experienced inmate offering advice to someone who had never before been incarcerated.

In fact, Herrera asked Garcia's advice about what to say in court. It is clear that Herrera's will was not overborne. He refused to tell Garcia what he was charged with or what kind of weapon he used. Far from being intimidated, Herrera told Garcia, "[T]hank you for giving me a heads up. [You are] actually the first person to look out for me."

II.

Herrera contends that the trial court erred by admitting evidence of murder videos he accessed on his cell phone prior to the murder.

Herrera argues that the videos should have been excluded as improper character evidence under Evidence Code section 1101, subdivision (a). Failing that, Herrera argues that the evidence should have been excluded under Evidence Code section 352, as more unduly prejudicial than probative.

The trial court granted the People's motion to admit the evidence under Evidence Code section 1101, subdivision (b) to show premeditation, deliberation, intent, motive, absence of mistake, or accident and knowledge. The court limited the evidence to videos accessed in the last two months and allowed only two of the videos to be shown to the jury. As so limited, the trial court found the evidence admissible under Evidence Code section 352, as more probative than prejudicial.

Evidence Code section 1101 provides in part: "(a) [E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a

specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) ."

We review the trial court's decision to admit evidence under Evidence Code section 1101, subdivision (b) for an abuse of discretion. (*People v. Leon* (2015) 61 Cal.4th 569, 597.)

A reasonable juror could conclude that a person who repeatedly views murder videos has an obsession with murder and intended to act on the obsession. Thus, the evidence of such videos is relevant to prove premeditation, deliberation, intent, motive, and absence of accident. (See *People v. Memro* (1995) 11 Cal.4th 786, 865 [child pornography in possession of defendant showed he had a sexual attraction to young boys and intended to act on that attraction].) The evidence of the videos was admissible under Evidence Code section 1101, subdivision (b).

Nor did the trial court abuse its discretion under Evidence Code section 352. The videos were highly probative of Herrera's intent and the trial court found that the videos, while unpleasant, were not particularly gruesome. We cannot say as a matter of law that their probative value was substantially outweighed by the danger of undue prejudice. (See *People v. Memro*, *supra*, 11 Cal.4th at p. 865.)

It follows that the admission of the evidence did not infect the trial with unfairness so as to violate due process.

III.

Herrera contends that the trial court erred by allowing the prosecutor to cross-examine his character witnesses with specific instances of misconduct.

The prosecutor asked Herrera's character witnesses whether they were aware he had been in fights in jail or watched violent videos. Herrera acknowledges that by putting his character at issue, the prosecutor is allowed to introduce evidence to rebut the character evidence. (Evid. Code, § 1102, subd. (b).) Herrera argues, however, that the prosecutor is limited to evidence of the defendant's reputation, not specific acts of misconduct.

Evidence Code section 1102 provides: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

Although Evidence Code section 1102, subdivision (b) does not expressly authorize evidence of specific acts of misconduct, it does not prohibit such evidence either. Our Supreme Court has held that the prosecutor is entitled to cross-examine a defendant's character witness by asking whether he or she has heard of acts or conduct inconsistent with the testimony so long as the prosecutor has a good faith belief that such acts or conduct occurred. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1170; see also *People v. Hinton* (2006) 37 Cal.4th 839, 902 [prosecutor entitled to cross-examine on specific instances of violent behavior].)

Herrera argues that the prosecutor did not prove the incidents of assaults on jail inmates. But the prosecutor need not prove the acts; the prosecutor needs only a good faith belief that

the acts occurred. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1170.) Here, the prosecutor demonstrated a good faith belief that the acts occurred by making an offer of proof in limine. Herrera did not contest the facts stated by the prosecutor.

Nor did the trial court abuse its discretion under Evidence Code section 352. The prosecutor was entitled to impeach Herrera's character witnesses with the questions about his conduct. The brief reference to the misconduct was not unduly prejudicial.

IV.

Herrera contends that he is entitled to a hearing on his ability to pay the assessments and fines imposed by the trial court at sentencing.

Herrera relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157. In *Dueñas*, the court held that imposing assessments pursuant to Government Code section 70373 (court facilities funding) and Penal Code section 1465.8 (court operations) without a hearing on the defendant's ability to pay violates due process. (*Dueñas*, at p. 1168.) Neither of those statutes expressly prohibits the trial court from considering the defendant's ability to pay. Under Penal Code section 1202.4, subdivision (c), the trial court is expressly prohibited from considering the defendant's ability to pay in imposing a restitution fine unless the fine imposed is above the $300 minimum. *Dueñas* held that the trial court must stay execution of the restitution fine unless or until the People demonstrate that the defendant has the ability to pay. (*Dueñas*, at p. 1172.)

Here, the trial court imposed a $30 fee pursuant to Government Code section 70373, a $40 fee pursuant to Penal Code section 1465.8, and a restitution fine of $10,000 pursuant to

Penal Code section 1202.4. The trial court also imposed and stayed a $10,000 parole revocation fine.

Herrera, however, did not object in the trial court. The defendant's failure to challenge fees imposed at sentencing precludes doing so on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864.) In *People v. Castellano* (2019) 33 Cal.App.5th 485, Division Seven of this court, the division that decided *Dueñas*, excused the defendant's failure to raise the issue in the trial court. The court reasoned that the defendant's challenge is based on a newly announced constitutional principle that could not have been reasonably anticipated at the time of trial. (*Castellano,* at p. 489.) *People v. Frandsen* (2019) 33 Cal.App.5th 1126 (*Frandsen*), decided by Division Eight, reached a different conclusion.

Frandsen pointed out that Dueñas herself saw the need for raising the issue in the trial court, and the *Dueñas* opinion is based on cases dating back to *Griffin v. Illinois* (1956) 351 U.S. 12; indeed, back to the Magna Carta. (*Frandsen*, *supra*, 33 Cal.App.5th at pp. 1154-1155.)

It is understandable that trial counsel representing criminal defendants in cases prior to *Dueñas* were more concerned with issues of guilt and sentencing than in court fees and restitution, particularly with defendants like Herrera receiving life sentences.

Nevertheless, as *Frandsen* points out, even though this issue may have been slowly simmering on the backburner, it was there to be raised. The issue concerning fees is waived.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

I concur:

YEGAN, J.

TANGEMAN, J., Concurring and Dissenting:

I join with my colleagues as regards Parts I through III of the majority opinion. But I disagree with their conclusion, in Part IV, that Herrera forfeited his claim that he is entitled to a hearing on his ability to pay the fees imposed pursuant to Government Code section 70373 and Penal Code section 1465.8 because he did not object to those fees in the trial court.

At the time Herrera was sentenced, the cited statutes virtually precluded any objections to the imposition of the fees they mandated; thus, a due process objection would have been either futile or wholly unsupported by substantive law. I disagree that simply because "Dueñas herself saw the need for raising the issue in the trial court, and the *Dueñas* opinion is based on cases dating back . . . to the Magna Carta" (Maj. opn. *ante*, at p. 13, citing *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155), the result in *Dueñas* was somehow foreseeable.

As eloquently stated in *People v. Black* (2007) 41 Cal.4th 799, 812: "The circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated" the change in law. In *Black*, our Supreme Court held that there was no forfeiture where a defendant failed to object in the trial court that he was entitled to a jury trial on sentencing issues based on an argument later accepted by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296. This was so, held the court, even though the *Blakely* opinion relied on "longstanding precedent" (*id.* at p. 305).

Based on law in existence when Herrera was sentenced, *Dueñas* was surely as unforeseeable as was the holding in *Blakely*. Accordingly, I agree with and would follow those courts

that have declined to find forfeiture on similar facts. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489; *People v. Johnson* (2019) 35 Cal.App.5th 134.)

NOT TO BE PUBLISHED.

TANGEMAN, J.

Gustavo E. Lavayen, Judge

Superior Court County of Santa Barbara

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, Blythe J. Leszkay and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.