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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PEPE LOPEZ,

Defendant and Appellant.

E078481

(Super.Ct.No. CR34707)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Reversed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney
General, Charles C. Ragland, Assistant Attorney General, A. Natasha Cortina and Alan
L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

Pepe Lopez appeals from the order denying his Penal Code section 1172.6 petition to vacate his murder conviction.¹ He argues the trial judge erred at the evidentiary hearing on his petition by considering inadmissible evidence about another murder he was involved in shortly before this one and by failing to consider his youth as a factor when determining whether he had acted with “reckless indifference to human life” within the meaning of section 189, subdivision (e)(3). Because we agree with Lopez’s second contention, we reverse and remand for a new hearing.

I

FACTS

On the evening of February 2, 1990, Lopez and his three friends (John Howe, Jose Andrade, and Daniel Visoso) were involved in two separate homicides within the span of an hour—a shooting outside a McDonald’s in Corona and one outside an AM/PM in Temecula. In separate trials, Lopez was found guilty of first degree felony murder for his participation in the crimes. Because the circumstances of the McDonald’s murder are relevant to the issue of whether Lopez acted with reckless indifference to human life in this case, we summarize the relevant facts of both cases.²

A. *The McDonald’s and AM/PM Murder Convictions*

At the McDonald’s murder trial, the prosecution presented evidence that Lopez and another member of his group approached the victim, Gilbert Sabatka, as he was

¹ Unlabeled statutory citations refer to the Penal Code.

² On our own motion, we take judicial notice of the trial record in the McDonald’s case No. E011097. (See Evid. Code, §§ 452, subd. (d), 459.)

placing an order at the drive-thru. After a few words were exchanged, one of them shot Sabatka multiple times in the head, killing him. The jury found Lopez guilty of the first degree murder of Sabatka; they also found true the prior murder special circumstance described in section 190.2, subdivision (a)(2), which, among other things, required them to find beyond a reasonable doubt that Lopez harbored an intent to kill Sabatka during the offense.

At the trial for the conviction at issue, the AM/PM murder, the prosecution presented evidence that about 40 minutes after the McDonald's shooting, Lopez and his friends drove to an AM/PM in Temecula with the intention of stealing beer. Lopez and Howe entered the store unarmed, grabbed the beer, and walked out. A few seconds later, a clerk confronted Lopez in the parking lot, and, in a struggle over the beer, Lopez pushed the clerk, thereby turning the petty theft into an *Estes*³ robbery. As Lopez was extricating himself from the encounter, Howe retrieved a gun from their car and shot the clerk multiple times, killing him. During the shooting, Lopez ran towards the car to avoid getting shot, but once Howe stopped firing, Lopez doubled back to grab the beer he'd dropped during the struggle. Lopez returned to the car, and the group drove off.

A few hours later, the police found Lopez, Howe, Andrade, and Visoso inside an uninhabited home in Temecula. Police also found on a nearby embankment a wrecked vehicle matching eyewitness descriptions of the car used to flee the crime in Corona.

³ *People v. Estes* (1983) 147 Cal.App.3d 23.

Next to the car, they found a sawed-off .22-caliber rifle whose bullets and shell casings matched those from both the McDonald's and AM/PM shootings.

In interviews with the police, Lopez said he and his friends had come down from Los Angeles to drive around the area. He said Andrade had been driving and Visoso was passed out drunk in the backseat. He admitted participating in the beer run but said it hadn't been his idea; he went along with it because Howe "told him to." He admitted he'd pushed back when the clerk confronted him in the parking lot, but claimed to be surprised, however, when Howe went for the gun. He said he ran away from the clerk because he was afraid Howe's shots might hit him, but he also admitted running back to retrieve the beer.

At trial, the jury convicted Lopez of the first degree murder of the clerk under a felony-murder theory. The jury also convicted Lopez of one count of robbery and found as to both the robbery and murder that a principle was armed during the offenses.

(§12022, subd. (a).)

B. *Lopez's Resentencing Petitions*

In 2018, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), which, as relevant here, narrowed the definition of felony murder and created a procedure for vacating murder convictions predating the amendment that could not be sustained under the new law. (Stats. 2018, ch. 1015, § 4.) Following this procedure, on February 6, 2019, Lopez filed two separate petitions to vacate his murder convictions.

His petition to vacate the McDonald’s murder conviction is the subject of *People v. Lopez* (2023) 88 Cal.App.5th 566. In that opinion, we affirmed the trial court’s summary denial of Lopez’s petition based on our conclusion that the record of conviction established Lopez’s guilt under the new felony-murder rule as a matter of law. We held that the murder conviction, coupled with the true finding on the prior murder special circumstance, demonstrated the jury necessarily found Lopez was a “participant in the perpetration or attempted perpetration of a [qualifying] felony . . . in which a death occurs” and acted “with the intent to kill” within the meaning of section 189, subdivision (e)(2). (*Lopez*, at pp. 570, 574, but see *id.* at pp. 580-591 (dis. opn. of Raphael, J.) [concluding § 189, subd. (e)(2) requires proof the defendant aided and abetted the murder not just the underlying felony and therefore disagreeing that the record of conviction established Lopez’s ineligibility as a matter of law].)

Unlike the McDonald’s murder petition, Lopez’s petition to vacate the AM/PM murder—the subject of this appeal—survived prima facie review. Lopez alleged he’d been convicted of first degree murder under a felony-murder theory and could not be convicted of murder under the new law because he was not a major participant in the underlying robbery and did not act with reckless indifference to human life during its commission. Because nothing in the record of conviction established Lopez’s ineligibility as a matter of law, the trial court issued an order to show cause and set the matter for an evidentiary hearing.

In advance of the hearing, the People submitted a brief arguing the record of conviction in the McDonald's case demonstrated that Lopez had acted with reckless indifference to human life during the AM/PM robbery. As evidence of the details of that murder, the People included the factual summary from our prior unpublished opinion affirming Lopez's conviction on direct appeal, *People v. Lopez* (Feb. 8, 1994, E011097).

The hearing took place before Riverside County Superior Court Judge John D. Molloy on February 4, 2022. At the outset, defense counsel stipulated to the People's representation of the facts of the McDonald's case. After hearing argument based on the evidence in both cases, the judge found beyond a reasonable doubt that Lopez had been a major participant in the AM/PM robbery because he had stolen the beer alongside Howe and had wrestled with the clerk in the parking lot. The judge also found beyond a reasonable doubt that Lopez had acted with reckless indifference to human life because the circumstances of the McDonald's murder showed he "absolutely knew that his confederates or he, himself, were willing to use that firearm . . . in a homicidal fashion." The judge denied Lopez's petition on the merits, and Lopez filed a timely appeal.

II

DISCUSSION

Lopez argues the judge erred by relying on the factual summary from our prior appellate opinion as evidence of the circumstances of the McDonald's murder. He also argues the judge applied the wrong legal standard by failing to consider his youthful age

when determining whether he acted with reckless indifference to human life within the meaning of section 189, subdivision (e)(3). We agree with his second contention.

Under Senate Bill 1437, a defendant can no longer be guilty of felony murder for merely participating in a qualifying felony in which a death occurs. Now, the prosecution must prove the defendant was, at the very least, a “major participant” in the underlying qualifying felony and acted with “reckless indifference to human life.” (§ 189, subd. (e)(3).)

In this context, a person acts with reckless indifference to human life when they “knowingly engag[e] in criminal activities known to carry a *grave risk* of death.” (*People v. Clark* (2016) 63 Cal.4th 522, 616 (*Clark*), italics added.) The concept has both a subjective and objective element. As to its subjective element, “[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed” and consciously disregard “the significant risk of death his or her actions create.” (*People v. Banks* (2015) 61 Cal.4th 788, 801 (*Banks*).) As to its objective element, “[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” (*Clark*, at p. 617.)

Our Supreme Court has repeatedly held that participating in an armed robbery, on its own, is insufficient to show a reckless indifference to human life. (E.g., *In re Scoggins* (2020) 9 Cal.5th 667, 678.) “Awareness of no more than the foreseeable risk of death

inherent in any [violent felony] is insufficient to establish reckless indifference to human life; only knowingly creating a grave risk of death satisfies the statutory requirement. Notably, the fact a participant [or planner of] an armed robbery could anticipate lethal force might be used is not sufficient to establish reckless indifference to human life.” (*People v. Jones* (2022) 86 Cal.App.5th 1076, 1088 (*Jones*), quoting *In re Scoggins*, at p. 677 [cleaned up].)

Instead, a court must “consider the *totality* of the circumstances” when determining whether a defendant acted with reckless indifference to human life. (*Banks, supra*, 61 Cal.4th. at p. 802, italics added.) Factors relevant to that determination include: (1) the defendant’s awareness that a lethal weapon would be used, whether the defendant personally used a lethal weapon, and the number of lethal weapons used; (2) their “[p]roximity to the murder and the events leading up to it”; (3) the length of time they or their confederates restrained the victim; (4) their knowledge of a confederate’s likelihood of killing; and (5) whether they made an effort to minimize the risk of violence. (*Clark, supra*, 63 Cal.4th at pp. 618-622.)

Notably, a defendant’s age is also relevant to the determination because it bears on whether they have “the experience, perspective, and judgment” to adequately appreciate the risk of death posed by their criminal activities. (*In re Moore* (2021) 68 Cal.App.5th 434, 454 (*Moore*) [holding that a court must consider a defendant’s youth when “determining whether the defendant acted with reckless indifference to human life”].) The “hallmark features’ of youth” are “immaturity, impetuosity, and failure to appreciate

risks and consequences.” (*Ibid.*, citing *Miller v. Alabama* (2012) 567 U.S. 460, 477.) As observed by the author of the amendment to section 3051, the provision requiring youth offender parole hearings for those who committed their crimes when they were 25 or younger: “Scientific evidence on adolescence and young adult development and neuroscience shows that certain areas of the brain, particularly those affecting judgement and decision-making, do not develop until the early-to-mid-20s. Research has shown that the prefrontal cortex doesn’t have nearly the functional capacity at age 18 as it does at 25.” (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017-2018 Reg. Sess.) as amended Mar. 30, 2017, pp. 2-3.)

Jones is instructive. In that case, the appellate court concluded that it was unclear from the record of the evidentiary hearing whether the trial judge considered Jones’s age—he had just turned 20 at the time of the offense—in finding he acted with reckless indifference to human life. (*Jones, supra*, 86 Cal.App.5th at p. 1091.) Rather than assume the judge had done so, the court reversed the order denying the petition and remanded with directions for the judge to reconsider whether the People had proved that element beyond a reasonable doubt “based on the *totality* of the circumstances,”—which included Jones’s age. (*Ibid.*; see also *id.* at p. 1093 [concluding remand was necessary because “it is best for the trial court to have a meaningful opportunity to consider Jones’s youth”].)

Here, the question of whether Lopez acted with reckless indifference centers on his subjective awareness of the risk the gun would be used a second time that evening during what was seemingly intended to be a minor offense—an unarmed, petty theft. It’s

clear that in deciding this question the judge considered the details of the McDonald's murder to be highly relevant. However, as was the case in *Jones*, nothing in the record indicates the judge also considered whether Lopez's age or immaturity impacted his ability to calculate the risk that one of his associates would use the gun at the AM/PM. This oversight matters because while the details of the McDonald's murder are certainly relevant to determining whether Lopez knew his actions carried a grave risk of death, so is the fact Lopez had turned 18 just a few months earlier and his accomplice, Howe, was 17.

We therefore remand for the judge to consider the totality of the circumstances surrounding the AM/PM murder, which includes Lopez's age and level of maturity. (*Moore, supra*, 68 Cal.App.5th at p. 454; *Jones, supra*, 86 Cal.App.5th at p. 1091.) Given our holding, Lopez's evidentiary argument is moot.

III

DISPOSITION

We reverse the order denying Lopez's petition and direct the trial court to hold a new evidentiary hearing in accordance with the views expressed in this opinion.

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SLOUGH

J.

We concur:

RAMIREZ

P. J.

RAPHAEL

J.

[*The People v. Pepe Lopez*, E078481]

RAMIREZ, P. J., Concurring and Dissenting

I agree that the matter must be remanded to the superior court to reconsider the finding of reckless indifference as to the defendant's youthful characteristics. Not only do the authorities addressing the *Banks/Clark* (ref. *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522) criteria require it, but defendant has a right to preserve evidence of youth-related mitigating factors in anticipation of a youth offender parole hearing. (Pen. Code, § 3051, pursuant to *People v. Franklin* (2016) 63 Cal.4th 261, and its progeny.)

However, I part company with the majority's holding that the superior court should reconsider the entire "reckless indifference" finding with respect to defendant's participation and conduct when the codefendant shot the clerk. Defendant was one of the two actual robbers, in a shoplifting-cum-robbery within the meaning of *People v. Estes* (1983) 147 Cal.App.3d 23. The trial court expressly found defendant was one of the two robbers in determining defendant was a major participant. Thus, he did not "aid[], abet[], counsel[], command[], induce[], solicit[], request[], or assist[] *in the commission of a felony* enumerated in paragraph (17)" of Penal Code section 190.2, subdivision (d), as required under Penal Code section 189, subdivision (e). (Italics added.)

The ameliorative provisions of the amendments to Penal Code section 189 did not express an intention of eliminating all felony murder liability. Instead, it was intended "to amend the felony murder rule and the natural and probable consequences doctrine, as

it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f); *People v. Lewis* (2021) 11 Cal.5th 952, 959.)

Lopez was not convicted under the natural and probable consequences doctrine. Therefore, I would limit the remand to consideration of defendant’s youthful characteristics in connection with the reckless indifference to human life factor.

RAMIREZ
P. J.