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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUE HUERTA,

Defendant and Appellant.

B234998

(Los Angeles County
Super. Ct. No. BA368359)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig J. Mitchell, Judge. Affirmed in part, reversed in part.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Joshue Huerta appeals from the judgment after a jury convicted him of attempted voluntary manslaughter and found true the alleged gun and gang enhancements. On appeal Huerta contends the trial court erred in declaring the victim-witness “unavailable” and admitting his preliminary hearing testimony. Huerta also contends the gang enhancement is not supported by substantial evidence. We reverse the gang enhancement and affirm the judgment in all other respects.

FACTS AND PROCEEDINGS BELOW

A. Preliminary Hearing Testimony Of The Victim, Luis Fernandez

Fernandez testified that late one night he was riding with his friend, Chuckie, in Chuckie’s truck. Chuckie was wearing a baseball cap backwards. The cap had the letter “B” on it.¹ Fernandez did not belong to a gang. When Chuckie pulled into a gas station and convenience store in South Los Angeles a black car drove slowly by and the occupants gave Fernandez and Chuckie a “mad-dog look.”² Chuckie went into the store to pay for the gas. While Fernandez waited in the truck he saw defendant Huerta and another man come from the direction that the black car had driven and enter the store.³ At first Huerta and the other man talked to Chuckie. Then a fight broke out and Fernandez went to help his friend. As he approached the store he heard a gunshot and saw Huerta standing outside the store with a gun in his hand. Huerta raised the gun and pointed it in Fernandez’s direction. Fernandez “started running in the opposite direction.” As he ran he heard a gunshot and felt his left leg go numb and start to bleed.⁴

¹ Subsequent evidence showed that Chuckie was a member of a gang called the Bud Smokers Only or BSO.

² Fernandez did not explain what he meant by the term “mad dog look” but we understand the term to mean looking at a person in a hard or threatening manner.

³ Subsequent evidence showed that Huerta and his companion were members of the Chakalosos (CKS) gang.

⁴ The undisputed evidence, however, showed that the only bullet that struck Fernandez entered through the front of his leg, not the back as it would have if he had been shot while running away from Huerta.

As discussed more fully below, the prosecution could not locate Fernandez and procure his attendance at trial. The court declared Fernandez “unavailable” as a witness and admitted his preliminary hearing testimony into evidence.

B. Gang Enhancement Testimony

Detective Eduardo Aguirre of the Los Angeles County Sheriff’s Department testified as the prosecution’s gang expert. He identified Chuckie as a member of the Bud Smokers Only (BSO) gang. He identified Huerta as a member of a rival gang, the Chakalosos (also known as CKS). The primary activities of CKS included murders, drive-by shootings, robberies, and narcotics sales. Aguirre testified that the gas station where the shooting occurred was in rival gang BSO’s territory. In Aguirre’s opinion the shooting of Fernandez benefited CKS. Huerta and his companion would have recognized Chuckie as a BSO member by the letter B on his cap. His wearing the cap backward was a sign of disrespect to any rival gang member who saw it. Huerta’s fighting a BSO member and shooting his companion in BSO territory would benefit CKS by “add[ing] another notch to the violent types of crimes they commit in their area and outside their area.”

C. Huerta’s Defense

Huerta testified that he and a member of an allied gang went to the gas station’s convenience store to buy a glass pipe for smoking “dope.” He acknowledged that the gas station was two miles from his home and in a rival gang’s territory but explained: “It’s one o’clock in the morning. There’s not that many gas stations that sell those pipes, and I go there a lot. So it’s a common thing for me to go to the gas station.”

While Huerta was standing in line at the counter waiting to buy his pipe, the man in line in front of him (later identified as Chuckie) turned his cap around. To Huerta, this gesture meant that the man was a gang member and there was going to be a confrontation. When the man turned around and faced him, Huerta believed the man was going to pull a gun or otherwise attack him. Huerta shoved the man away and the man fell to the floor. Still fearing the man was going to pull a gun, Huerta drew his own gun

and pointed it at the floor. When the man got up and ran into the store's supply room Huerta left the store. Huerta testified that when he exited the store the first thing he saw was Fernandez running toward him. Fernandez's "hand was in his sweater pocket coming out." Thinking Fernandez had a gun, Huerta fired his gun toward Fernandez. When Fernandez turned and began running away Huerta fired his gun twice more, aiming into the air.

Huerta contended that he shot at Fernandez in self-defense or at the very most in imperfect self-defense. The court instructed the jury on both theories. On the latter theory the court told the jury: "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill a person because he acted in imperfect self-defense."

D. Verdict and Sentence

The jury found Huerta not guilty of attempted murder but guilty of attempted voluntary manslaughter. It also found true the allegations that in the commission of the crime, Huerta inflicted great bodily injury on Fernandez, personally used a firearm, personally and intentionally discharged a firearm and committed the crime for the benefit of a criminal street gang.

The court sentenced Huerta to the low term of 18 months for the attempted voluntary manslaughter plus 10 years for personal weapon use, 3 years for inflicting great bodily injury and 5 years for the gang enhancement.

DISCUSSION

I. THE COURT DID NOT ERR IN FINDING FERNANDEZ UNAVAILABLE AS A WITNESS AT TRIAL

Under Evidence Code section 1291, subdivision (a): "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness" A witness is "unavailable" under Evidence Code section 240, subdivision (a)(4) and (5), if the witness is: "Absent from the hearing and the court is unable to compel his or her attendance by its process" or "Absent from the hearing and

the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

Here, the trial court found that the prosecution had exercised "due diligence" in attempting to locate Fernandez, declared him unavailable and admitted his preliminary hearing testimony into evidence. We review de novo the court's determination of unavailability. (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1432.)

A. The Prosecution Attempted To Locate Fernandez

Before trial, the court held a hearing concerning the admissibility of Fernandez's preliminary hearing testimony. The prosecution produced evidence of its efforts to locate Fernandez in the six months prior to the hearing. Huerta concedes that the prosecution fulfilled its duty in conducting a local search for Fernandez but maintains it failed to make a good faith effort to search for Fernandez in Mexico where his family claimed he was living.

The search for Fernandez was principally conducted by Detective Aguirre. In April 2011, two months before the start of the trial, Aguirre learned from Fernandez's stepfather, Victor Hernandez, that Fernandez could possibly be in Nayarit or Veracruz, Mexico. Hernandez, however, "would not provide a name or an address [or telephone number] of who [Fernandez] was staying with." Aguirre testified that without that information his contacts in Mexico could not help him locate Fernandez. At one point, close to the date of trial, Hernandez told Aguirre that Fernandez was in Tijuana and would be illegally crossing the border into California in the next few days. Hernandez said he did not know how to contact Fernandez in Tijuana and Aguirre obtained no further information about the possible border crossing.

The step father told Aguirre that Fernandez called him "on numerous occasions" including a call on or about June 7, 2011, advising his family that he was in Tijuana and would be crossing the border in a few days. Despite the information that Fernandez frequently called his stepfather Aguirre did not attempt to obtain records of calls from

Mexico to Hernandez's telephone. Aguirre admitted on cross-examination that it might "have been a good idea."

B. Due Diligence Did Not Require The Prosecution To Attempt To Tap Hernandez's Telephone Or Obtain His Telephone Records

Huerta argues that due diligence in attempting to locate Fernandez required the prosecution to apply for a warrant to tap Hernandez's telephone in order to trace calls from Fernandez and to subpoena Hernandez's telephone records to look for telephone numbers of calls from Mexico. He cites the United States Supreme Court's admonition that "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, italics in original.) We do not view *Roberts* as requiring the prosecution in this case to try to obtain a wire tap or telephone records. The *Roberts* court merely observed that where there exists a remote possibility of producing the witness, good faith *may* require the prosecution to explore that possibility depending on the totality of the circumstances. (Ibid.) We also note that the *Roberts* court went on to repeat the familiar maxim that "[t]he law does not require the doing of a futile act." (Ibid.)

As the trial court correctly observed it was not reasonably probable that a magistrate would have issued a wire tap order under the circumstances of this case. Furthermore, it is highly unlikely that a search of Hernandez's telephone records would have turned up information that could have been used to locate Fernandez in Mexico. Fernandez went to Mexico to avoid testifying at Huerta's trial. His step father no doubt would have told him that the police were looking for him. Under those circumstances it is not likely that he would have left a trail that those seeking his testimony could follow such as placing telephone calls from the telephone at the place where he was staying. Further, according to his step father, he was moving from place to place in Mexico so any telephone number retrieved would have been a cold lead once the machinery to follow the lead had been engaged.

C. Huerta Forfeited His Argument Based On The Treaty Of Cooperation Between The United States And Mexico And In Any Event The Prosecution Made A Reasonable Effort Under The Treaty To Enlist The Assistance Of Mexican Officials

Huerta contends that the prosecution did not act in good faith because it failed to invoke the assistance of the Mexican authorities in locating Fernandez under the Treaty of Cooperation Between The United States Of America And The United Mexican States For Mutual Legal Assistance (the Treaty).

This contention is forfeited because, as he admits in his brief on appeal, his trial counsel did not invoke the Treaty in the hearing on Fernandez's availability. Huerta maintains that we have discretion to ignore the forfeiture of an important constitutional issue such as the right to confrontation under the Sixth Amendment (see *People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn.1) but should we hold that the issue is forfeited then his counsel rendered ineffective assistance. We reject both contentions. Even important constitutional rights can be waived if the new argument invokes facts or legal standards different from those that the trial court was asked to apply. (*People v. Tully* (2012) 54 Cal.4th 952, 979-980.) The Treaty was never discussed at the hearing on Fernandez's unavailability. Furthermore, as discussed below, we need not decide whether defense counsel's performance was deficient because the prosecutor's declaration shows that she did all she reasonably could have done to obtain the assistance of Mexican authorities in locating Fernandez. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697 [a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies].)

Even if we were to address Huerta's arguments under the Treaty, we would find them wanting.

Huerta first argues that the Mexican Consulate gave Ta misleading advice when its representative stated that even if Fernandez could be located in Mexico he "could not be compelled to appear in court or cooperate." Although this statement was correct as it pertained to appearance in a United States court, the Consulate did not advise Ta that

under Article 7 of the Treaty the Mexican authorities could compel Fernandez to appear in a Mexican court and testify by teleconference in Huerta's trial in Los Angeles. (*People v. Sandoval, supra*, 87 Cal.App.4th at pp. 1442-1443.) The Consulate's incomplete advice did not affect the search for Fernandez because the record shows that Ta and Detective Aguirre continued to seek Fernandez in Mexico even after receiving the inaccurate advice from the Consulate.

Huerta next argues that the prosecution should have invoked the terms of the Treaty imposing a duty on Mexican authorities to attempt to locate Fernandez. Huerta is apparently referring to Article 13, section 1 of the Treaty which provides: "The requested Party [i.e. Mexico] shall take all necessary measures to locate or identify persons who are believed to be in that State and who are needed in connection with an investigation, prosecution, or proceeding within the scope of this Treaty." The record shows, however, that the prosecutor contacted the Mexican Consulate in Los Angeles and requested Mexico's assistance in locating Fernandez. The Consulate "informed [Ta] that they needed more information to assist, i.e. the town/city in Veracruz where [Fernandez] supposedly resides." It appears the Treaty permitted the Consulate to request that information before attempting to locate Fernandez.⁵ In any case, whether the Treaty so permitted, the Consulate imposed those requirements.

Finally, Huerta argues that the prosecutor should have made her request for assistance through the United States Department of Justice, not directly to the Mexican Consulate, because the Department of Justice is the "Coordinating Authority" for the United States under Article 2, section 1 of the Treaty. Nothing in the Treaty specifies to whom and by whom requests for assistance may be made.

⁵ The treaty provides that a request for assistance shall include "[t]o the extent necessary and possible [the] . . . whereabouts of a person to be located . . . and location of persons from whom evidence is sought[.]" (Art. 4, § 3(a) & (c).)

D. Due Diligence Did Not Require Ordering Fernandez To Appear At Each Court Proceeding Subsequent To The Preliminary Hearing

Huerta contends that the prosecutor knew when Fernandez testified at the preliminary hearing that he “was scared to testify” and “did not want to testify” and should have asked the court to order Fernandez to appear at Huerta’s arraignment and each proceeding thereafter in order to keep tabs on his whereabouts. If Fernandez failed to appear at any court session, Huerta reasons, a bench warrant for his arrest could have been issued. How this would have prevented Fernandez from disappearing into Mexico, Huerta does not explain.

II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE GANG ENHANCEMENT

The California Street Terrorism Enforcement and Prevention Act provides enhanced punishment upon proof that a charged felony was “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (Pen. Code, § 186.22, subd. (b)(1).) Huerta contends that the expert testimony and other evidence in this case did not support the gang finding. We agree.

We review the claim of insufficiency of the evidence “by examining the entire record in the light most favorable to the judgment below. [Citation.] We review to determine if substantial evidence exists for a reasonable trier of fact to find the counts against the [defendant] true beyond a reasonable doubt.” (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) “Substantial evidence must be reasonable, credible, and of solid value. [Citation.] We also presume the existence of every fact the [jury] could reasonably deduce from the evidence” (*Ibid.*)

The gang enhancement requires the People to prove that the underlying crime was committed “for the benefit of, at the direction of, or in association with any criminal street gang[.]” (Pen. Code, § 186.22, subd. (b)(1).)

Detective Aguirre testified that Huerta's fighting with a BSO member (Chuckie) and shooting his companion (Fernandez) in BSO territory would benefit Huerta's CKS gang by "add[ing] another notch to the violent types of crimes they commit in their area and outside their area." In other words, Huerta's actions would have benefited CKS by enhancing its reputation for violence and intimidation. The problem with Aguirre's reputation theory is that it could be said about nearly every crime a gang member commits that the crime enhanced the gang's reputation. The appellate courts, however, have consistently rejected this premise. (E.g., *In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199 (defendant's possession of unlawful dirk or dagger for his self-protection did not benefit his gang); *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [gang members can commit crimes "on a frolic and detour unrelated to the gang"].)

Substantial evidence does not support a finding that Huerta committed voluntary manslaughter for the benefit of a criminal street gang. Fernandez, who was waiting outside the store in Chuckie's truck, did not know the cause of the argument between Huerta and Chuckie inside the store and could not say that the altercation between the two men was gang related. The record is absent any evidence that the shooting was precipitated by any other criminal conduct on Huerta's part or in retaliation for a rival gang incident. The victim was not a gang member. Huerta did not flash a gang sign or shout a gang slogan before or after the shooting. There was no evidence that he was wearing gang attire. There was no evidence that the shooting was planned or approved by other gang members.

For these reasons we conclude that the evidence does not support a finding Huerta shot Fernandez for the benefit of a criminal street gang.

DISPOSITION

The gang enhancement is reversed. In all other respects the judgment is affirmed.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.