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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CESAR OTERO, Defendant and Appellant.	B230045 (Los Angeles County Super. Ct. No. TA106872)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Barbara A. Smith, 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, Shawn McGahey Webb and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Cesar Otero appeals from the judgment entered following his convictions by jury for attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187; count 1) and shooting from a motor vehicle (Pen. Code, § 12034, subd. (c); count 3) each offense with personal use of a firearm, personal and intentional discharge of a firearm, and personal and intentional discharge of a firearm causing great bodily injury (Pen. Code, §§ 12022.53, subds. (b), (c) & (d)), and for possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 2) with court findings he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)). The court sentenced appellant to prison for life with the possibility of parole (with a minimum parole eligibility term of 14 years), plus 30 years.

FACTUAL SUMMARY

1. *People's Evidence*.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence established that about 10:40 a.m. on January 5, 2009, Theresa Martinez was at home on Anzac near Santa Ana Boulevard (Santa Ana) when she heard three or four nearby gunshots. She later looked out her window and saw a car speed away. The car looked like one depicted in a photograph (People's exhibit No. 2). (All exhibits herein referenced were admitted into evidence.)

About 10:45 a.m. on January 5, 2009, Los Angeles Police Officer Brandon Griffith, responding to a call, went to the residence at 10930 Anzac. Diana Reyes, appellant's common-law wife, was present. A window at the residence had been shot out and there were six bullet casings in the street.

On January 5, 2009, Moses Herrera (the victim as to count 1) lived with his mother Gabriela Baez and his sister Jokebeth in a rear house at 10600 Croesus. The address of the front house was 10602 Croesus. Baez testified Herrera awakened her about 7:30 a.m. or 8:30 a.m. and she later drove her car, containing Herrera and Jokebeth, while going on errands. Baez's car was depicted in the above mentioned People's exhibit No. 2. Baez later drove Herrera and Jokebeth home and the car entered the driveway. Baez indicated she returned home perhaps before noon. She made sure Jokebeth, who

was autistic, entered the front house where Baez's mother lived. Baez and Herrera talked about three or four minutes, then he exited the car.

After Herrera entered a gate, Baez "looked over the back mirror" and saw a truck that slowed in the middle of the street. The truck's driver, a male, fired more than five shots from a gun he held in his left hand. The gun appeared to be a nine-millimeter handgun. Multiple bullets struck Herrera. The truck, which had no rear license plate, never stopped.

Baez gave conflicting testimony as to whether the shooter was Hispanic. The shooter was not Black or White. Baez testified the shooter was between 20 and 30 years old and "kind of heavyset [in] weight." He was clean shaven, had "real, real short" hair, and was wearing a dark or black baseball cap and a dark blue, or black, shirt. Baez's car had a "real deep tinted window" and her rear window had a "limo-type" tint.

Croesus was a one-way southbound street. When the truck, traveling southbound, was close to Croesus and 107th, Baez decided to follow it. Baez followed the truck southbound on Croesus to Santa Ana. The truck then drove on nearby streets until it drove southbound on Hickory towards Santa Ana. The truck slowed and the shooter fired additional shots at a house on Hickory.

The truck then drove on nearby streets until it was travelling northbound on Grape, a one-way street. While on Grape, the truck collided with a parked red Cadillac. The truck continued but Baez eventually lost sight of it. Baez identified at trial a photograph (People's exhibit No. 5) of a truck as depicting the truck she had seen.[1]

Baez testified that she was on the phone with 911 "from the minute . . . [she] started after [the shooter]" and that she was talking to someone the entire time. The prosecutor asked Baez, "As soon as you left Croesus?" and Baez replied, ". . . I think . . .

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[1] During the pursuit, Baez got a "pretty good look" at the truck's driver, making eye contact with him four or five times. She remembered on January 5, 2009, what the driver looked like, but his appearance had changed by the time of trial. Baez testified, "now [appellant's] hair is long. . . . He's wearing glasses, something that he wasn't wearing at that time." Baez did not identify appellant at trial.

right after I got behind him, that would be like maybe on Croesus and 107th." A tape of Baez's 911 call was played to the jury.

A police custodian of records testified an incident report was generated whenever someone called 911, the operator obtained "the address," and the operator entered the information in the computer. An incident report reflected that at 12:29 p.m. on January 5, 2009, an incident occurred at Hickory and East 107th. The custodian also testified the call came in at 12:29 p.m., and the caller was a female. The report reflected that at 12:30 p.m., a heavyset Hispanic male was firing a .38-caliber gun. At 12:38 p.m., the caller asked that police meet at her residence at 10602 Croesus.

During the afternoon of January 5, 2009, police went to the victim's residence at 10600 Croesus. Police found six 9-millimeter bullet casings in the street in front of the residence and two bullets in its driveway. Police found a similar casing at the shooting scene at "10824" Hickory. Police went to Grape and saw damage on the driver's side mirror of the Cadillac. A criminalist testified the above bullets and casings were fired from the same gun.

Arturo Garcia testified that around lunchtime on January 5, 2009, he was outside his residence at 10620 Croesus. He heard gunshots, then saw a truck drive by at high speed. Garcia, who had taken a college art course and knew how to draw, described the truck to police and drew a picture (People's exhibit No. 10) of it. Garcia could not see inside the truck and could not see who was driving it. However, Garcia saw that the driver was a man as the truck went by quickly. During cross-examination, appellant's counsel represented that Garcia's picture showed the driver with "maybe spikey-like hair at the top." Garcia denied remembering whether the driver had that type of hair.

A Sprint Nextel custodian of records testified cellphone calls would be made or received via a cell tower (tower) that, in an urban area, would be no more than two miles from the cellphone. Cellphone records for a cellphone with the phone number (323) 867-8050 reflected that calls were made or received on that cellphone using a tower(s) as follows. At 9:18 a.m. on January 5, 2009, calls made used a Santa Fe Springs tower. At 9:42 a.m., a call made began by using an Artesia tower and ended by using a Cerritos

tower. At 10:38 a.m., a call received used a Torrance tower. After numerous phone calls, a call made at 11:53 a.m. used a Torrance tower and ended using a different tower. At 12:20 p.m., a call made used a tower at East 103rd in Los Angeles. At 12:38 p.m., a call received used a Long Beach tower.

On January 6, 2009, a police officer went to Superior Pools (Superior) in Santa Fe Springs and saw a truck with a blue baseball cap on the dashboard. The officer testified the truck appeared to be the one depicted in the photographs which were People's exhibit Nos. 5 and 26. The truck the officer observed had a rear license plate. A criminalist presented evidence that paint on the truck observed by the officer matched paint from the Cadillac, and the height of the red paint on the truck substantially matched the height of the driver's side mirror of the Cadillac.

Albert Delacruz testified that in January 2009, he was the operations manager of Superior and employed appellant as a driver. People's exhibit No. 26 depicted one of Superior's delivery trucks. Drivers employed by Superior were required to inspect their trucks and complete inspection reports for them before and after deliveries. On January 5, 2009, appellant completed a pre-delivery inspection report for the truck depicted in People's exhibit No. 26, but he did not complete a post-delivery report. The pre-delivery report reflected nothing unusual. Appellant's delivery log for January 5, 2009, indicated he was supposed to go to Artesia, Torrance, Lakewood, and Buena Park. The truck assigned to appellant would deliver and receive items in the South Bay area only.

Appellant's truck was equipped with a GPS system that generated documents reflecting the truck's location when the truck's engine was turned on, when it was turned off, and every 10 minutes. The GPS was accurate to within nine feet and reported the closest address. The GPS might be off by one address.

GPS documents for appellant's truck reflect the following. At 11:49 a.m. on January 5, 2009, the truck was in Torrance. At noon, the truck was on Torrance Boulevard near a freeway onramp. At 12:09 p.m., the truck was travelling on the 110 freeway in Los Angeles. At 12:20 p.m., the truck was at 10722 Mona in Los Angeles, i.e., on Mona near 107th. At 12:25 p.m., the truck's engine turned off at 10814

Croesus near 107th. Less than a minute later, at 12:25 p.m., the truck's engine turned on at 10924 Croesus near Santa Ana. The truck shortly thereafter, but still at 12:25 p.m., quickly accelerated to 26 miles per hour and proceeded toward Santa Ana. At 12:30 p.m., the truck was at 10605 Graham. At 12:40 p.m., the truck was exiting the 710 freeway in Compton.

Evidence was presented that appellant sometimes lived with Reyes at 10930 Anzac, and sometimes lived with his parents in the residence across the street at 10933 Anzac. On January 15, 2009, police searched the residence at 10933 Anzac. Fernando Quintano (Fernando) and Judy Quintano (Judy), appellant's brother and sister, respectively, were present at the time, and Judy apparently lived there. Police recovered two cellphones from that residence, and a detective believed they belonged to Fernando and Judy, respectively. In each cellphone there was an entry for the name Cesar and a phone number associated with that entry. The phone number was (323) 867-8050. Police searched the residence at 10930 Anzac and it appeared someone had hastily left that residence.

Los Angeles Police Officer Carlos Lozano, a gang expert, testified Herrera was an active member of the Watts Colonia Weigand gang (Weigand), and appellant was an active member of the Suicidal Watts gang (Suicidal). The two gangs were rivals and each affiliated with another gang(s). Weigand and Suicidal were two of the primary gangs in the area encompassed by 103rd on the north, Weigand and Mona on the east, 110th on the south, and Graham and Willowbrook on the west. Suicidal's territory was the one-block area encompassed by Santa Ana on the north, Anzac on the east, 110th on the south, and Wilmington on the west. In December 2008, Sammie Zambrano, a Weigand member, was shot and killed in Suicidal territory, leading to ongoing retaliatory shootings between the gangs. Appellant had the reputation of being an intimidating enforcer in his gang.

Lozano also testified gang members would not provide information to police but would personally retaliate against enemies. A gang member showed disrespect to a rival gang by entering the latter's territory. A gang member showed ultimate disrespect for a

rival gang member by committing violence on the rival gang member in the latter's neighborhood, and retaliation would be swift and violent. Gang members committed public violence to enhance their reputation and intimidate the neighborhood. In response to a hypothetical question based on evidence, Lozano opined to the effect the shooting of Herrera was done for the benefit of, at the direction of, or in association with, Suicidal.

2. *Defense Evidence*.

In defense, Herrera testified the only event he remembered on the morning of January 5, 2009, was that he was shot. However, he also testified he looked back before he was shot, saw the gunman, and appellant was not the shooter. Herrera testified the shooter's hair looked like a fade. Herrera denied previously testifying the shooter had long, slicked-back hair. Herrera then acknowledged he previously had testified the shooter had slicked-back hair. Herrera denied remembering if the shooter had facial hair. Herrera then acknowledged he previously had testified the shooter had a goatee. Herrera denied knowing appellant. Herrera acknowledged, however, that he had met appellant in jail prior to the previous trial. When police saw Herrera had been shot, they laughed at him and said, "They finally got you . . . ."

3. *Rebuttal Evidence*.

In rebuttal, Los Angeles Police Officer Thomas Eiman testified that on June 25, 2009, he interviewed Herrera at a police station. Herrera had been arrested for possession of marijuana. Eiman was investigating Zambrano's murder and Herrera did not want to discuss the case. Herrera indicated he did not know anything about the killing of Zambrano and, even if Herrera had known something, he would not have told the information to police.

Herrera indicated he was upset his mother had been nearby when he was shot on January 5, 2009. Herrera told Eiman, "We're doing what we have to do, and we'll catch whoever we have to catch. And later on if you gotta . . . lock us up for whatever, we'll [*sic*] lock us up for whatever, but right now I don't know nothing, . . ." Herrera denied knowing who shot him and suggested Herrera was walking into the house when he was shot.

ISSUES

Appellant claims (1) there is insufficient evidence supporting his convictions and (2) the trial court erroneously denied his motion for a new trial.

DISCUSSION

1. *There Was Sufficient Evidence Supporting Appellant's Convictions*.

Appellant claims there is insufficient evidence supporting his convictions because there is insufficient identification evidence that he was the person who committed the crimes. We reject the claim.

There is no dispute someone attempted to murder Herrera and committed the other offenses; the issue is identity. There was substantial evidence as follows. About 10:40 a.m. on January 5, 2009, someone fired multiple shots and shot out the window of the residence at 10930 Anzac. Appellant, an active Suicidal member, lived at the residence, which was in Suicidal territory. A car that looked like Baez's car sped from the shooting scene. Herrera, Baez's son who was an active Wiegand member, lived at 10600 Croesus. Less than two hours after the first shooting, the male driver of a truck shot Herrera outside 10602 Croesus, not far from 10930 Anzac, and a short distance from Baez's car which was in the driveway. Shortly thereafter, the gun used to shoot Herrera was used to shoot at a house on Hickory. Suicidal and Wiegand were rival gangs, there had been ongoing retaliatory shootings between them, and appellant was an enforcer in his gang.

There is no real dispute that the truck seen in the general neighborhood of appellant and Herrera on January 5, 2009, was the delivery truck assigned to appellant, that he was driving it that day, and he drove it near the scene of the Herrera shooting.[2] Garcia provided a detailed drawing of the truck. Baez identified at trial People's exhibit No. 5 as a photograph depicting the truck she had seen. A police officer testified the

[2] In his opening brief, appellant, referring to the attack on Herrera, concedes "[a]ppellant was certainly placed near the scene of the shooting." Appellant also concedes "appellant's company truck" was at the Hickory address. Appellant refers to "appellant's lunchtime trip to Watts" and concedes police searched "[a]ppellant's truck."

truck depicted in People's exhibit Nos. 5 and 26 appeared to be the truck he saw on January 6, 2009, at Superior, the pool company where appellant worked.

Delacruz, who employed appellant as a driver at Superior, testified People's exhibit No. 26 depicted one of Superior's trucks, drivers were supposed to complete pre-delivery and post-delivery inspection reports for their trucks, and, on January 5, 2009, appellant completed a pre-delivery report, but not a post-delivery report, for the truck depicted in People's exhibit No. 26. The jury reasonably could have concluded appellant was driving the truck at all times on January 5, 2009, and that he failed to complete a post-delivery inspection report in order to avoid reporting the damage he had caused to the truck when he was driving it on Grape. The jury further could have concluded appellant evidenced consciousness of guilt by removing the rear license plate of the truck before he committed the present offenses, and affixing it there after he committed them.

Further, based on the evidence, including the testimony of Baez, the evidence from the GPS system, and the evidence of cellphone calls made and received by appellant, the jury reasonably could have concluded as follows. After learning by phone about the shooting at 10930 Anzac, appellant drove his delivery truck on the 110 freeway and eventually drove to the general neighborhood of appellant and Herrera. At 12:20 p.m., appellant arrived at Mona and 107th and was also in range of the tower at 103rd. Sometime after 12:20 p.m., but before 12:25 p.m., appellant, driving the truck, shot Herrera, committing the offenses alleged in counts 1 and 3. Before, during, and after that five-minute period, he committed the offense alleged in count 2.

After shooting Herrera, appellant continued southbound on Croesus, arriving at 10814 Croesus and 10924 Croesus at 12:25 p.m. He then went to Hickory at 12:29 p.m. and shot at a house there. He later left the scene. There was sufficient evidence, including identification evidence, to convince a rational trier of fact, beyond a reasonable doubt, that appellant committed the present offenses. (*Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

2. *The Trial Court Properly Denied Appellant's Motion for a New Trial.*

On May 4, 2010, the jury was sworn and, on May 13, 2010, the jury reached their verdicts after two hours and 25 minutes of deliberations.[3] On January 5, 2011, appellant filed a motion for a new trial. At the hearing on that date, appellant argued the motion was based on, inter alia, newly discovered evidence, i.e., the testimony of Herbert Godoy.

Godoy testified at the hearing as follows. Godoy had suffered a 2010 conviction for cocaine possession and a 2001 robbery conviction. Godoy was appellant's friend and had known appellant since Godoy was 13 years old. In January 2009, Godoy was staying at 10812 Croesus. Appellant, every other week, came to Godoy's house and helped clean Godoy's pool. Appellant would sometimes just show up, knowing when the pool needed servicing. Godoy did not recall January 5, 2009, or where Godoy was, or what he was doing, on that date. Godoy moved from Croesus in March 2009. He filed with the post office a change of address card effective in March 2009. On January 4, 2011, an investigator first contacted Godoy about this case and subpoenaed him.

During cross-examination, Godoy testified as follows. Godoy was 32 years old and grew up in Nickerson Gardens in Watts. Godoy became friends with appellant in Camp Holton, a juvenile detention center. Godoy lived on Croesus for about a year. It was probably before January 2009 that Godoy last saw appellant at Godoy's Croesus residence. Godoy could not remember the Croesus address without reading it to refresh his memory.

Godoy moved out of his Croesus residence in something like "January, February, March." It was possible Godoy moved before January 2009. It was also possible Godoy was not home on January 5, 2009. When the prosecutor asked if Godoy had any

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[3] The jury convicted appellant following a retrial after the trial court declared a mistrial because the jury in his first trial deadlocked on all counts. On May 3, 2010, prior to the retrial, the court granted the People's motion to dismiss a previous count 2 that alleged that on or about January 5, 2009, appellant committed the crime of shooting at an inhabited dwelling at 10824 Hickory. The counts were then renumbered.

knowledge that on January 5, 2009, appellant was at Godoy's Croesus residence, Godoy replied no and that he did not recall.

Godoy learned appellant was in jail when Godoy looked for him after appellant's parents told Godoy that appellant had been arrested. Godoy looked for appellant a little over a year before Godoy's testimony.

During argument on the motion, appellant argued Godoy's testimony was newly discovered evidence that on January 5, 2009, appellant was in the area of the Herrera shooting because appellant went to Godoy's Croesus residence as a friend and to service his pool.

The trial court indicated the identification evidence introduced against appellant at trial was circumstantial but extremely strong. The court suggested Godoy's testimony would be irrelevant and the court indicated that, even if Godoy's testimony would be admissible, there was no reasonable possibility that if he had testified at trial, the jury would have reached a more favorable result for appellant. The trial court denied appellant's motion for a new trial.

Appellant claims the trial court erred by denying the motion. We disagree. In ruling on a motion for a new trial based on newly-discovered evidence, the trial court considers, inter alia, whether (1) the evidence is newly-discovered, (2) the evidence is such as to render a different result probable on a retrial, and (3) the party could not with reasonable diligence have discovered and produced the evidence at the trial. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) A trial court may consider the credibility as well as the materiality of the evidence when determining whether introduction of the evidence at a retrial would render a different result reasonably probable. (*Id.* at p. 329.) A motion for a new trial based on newly-discovered evidence is looked upon with disfavor. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 485-486.) We assume we review de novo the trial court's order denying the motion for a new trial. (Cf. *People v. Ault* (2004) 33 Cal.4th 1250, 1262, fn. 7; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224, fn. 7.)

As to whether Godoy's testimony was newly-discovered evidence, Godoy testified at the January 2011 hearing that he moved from Croesus in March 2009 after having

lived there a year, and appellant, his friend, habitually came every other week to clean his pool and sometimes just showed up as needed. If so, appellant would have known this and could have called Godoy as a witness at appellant's 2010 trial to testify to evidence of appellant's habit of service to permit an inference appellant was at Godoy's residence on January 5, 2009. Godoy's testimony was not newly-discovered evidence.

As to whether Godoy's testimony would have rendered a different result probable, his testimony was the sole testimony presented at the hearing. Godoy had been convicted of robbery, a crime of moral turpitude probative of dishonesty. Godoy was a lifelong friend of appellant, a fact pertinent to bias.

Godoy testified it was possible Godoy moved before January 2009, but also indicated he may have moved in January 2009. Godoy testified it was probably before January 2009, that he last saw appellant at Godoy's residence, and it was possible Godoy was not home on January 5, 2009. Godoy denied, and did not recall, that appellant was at Godoy's house on January 5, 2009. Godoy had lived on Croesus for a year but could not remember his address. Appellant concedes Godoy's "memories were rather vague." Godoy did not testify he told appellant's parents that Godoy could provide testimony that might exculpate appellant. There is no dispute someone committed the present offenses. There was strong evidence, even absent testimony from Godoy, that appellant committed them. Godoy's testimony would not have rendered a different result probable on a retrial.

Finally, appellant presumably knew prior to trial about the alleged newly-discovered evidence of anticipated testimony from Godoy relating evidence of appellant's habit of service at Godoy's residence. However, an investigator first contacted Godoy the day before the hearing. The record fails to demonstrate appellant could not with reasonable diligence have discovered and produced the alleged newly-discovered evidence at trial. The trial court did not err by denying appellant's motion for a new trial.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.