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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

IVAN ALFARO,

Defendant and
Appellant.

B282223

(Los Angeles County
Super. Ct. No. BA448580)

APPEAL from judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed as modified.

Sally Patrone Brajevich, 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, Senior

Assistant Attorney General, Scott A. Taryle, Supervising
Deputy Attorney General, Rene Judkiewicz, Deputy
Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Ivan Alfaro of shooting at an occupied motor vehicle (Pen. Code, § 246 [count 1])¹ and assault with a firearm (§ 245, subd. (a)(2) [count 2]), and found true the allegations that Alfaro personally used a firearm within the meaning of section 12022.5, subdivision (a) in both counts. It found not true the allegations that the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Alfaro admitted suffering a prior prison term under section 667.5, subdivision (b).

Alfaro was sentenced to a total of nine years in state prison, comprised of the upper term of four years in count 2, plus four years for the firearm use enhancement, plus one year for the prior prison term enhancement. The trial court sentenced him to the middle term of five years in count 1, which it stayed pursuant to section 654.

Alfaro contends that the trial court abused its discretion by admitting a gun found in the residence where he was living, and that the eyewitness evidence was insufficient to support the verdicts, which the Attorney General contests.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

In our review of the record, it came to our attention that the verdict form and minute order dated February 1, 2017, reflect that the jury found true the allegation that the defendant personally used a firearm in the commission of count 1, shooting at an occupied vehicle. (§ 246.) However, the enhancement for personal firearm use does not apply to violations of section 246 because firearm use is an element of the crime of shooting at an occupied vehicle. (§ 12022.5, subd. (a); *People v. Kramer* (2002) 29 Cal.4th 720, 723, fn. 2 (*Kramer*).) We invited the parties to file briefs on the issue of whether the finding must be stricken as unauthorized. The parties agree that the enhancement should be stricken.

We order the trial court to modify the jury verdict and minute order to reflect that the jury's true finding under section 12022.5, subdivision (a) in count 1 is stricken. As modified, the judgment is affirmed.

FACTS²

Prosecution

On the evening of March 15, 2015, Edwin Morales was driving on Hammel Street in East Los Angeles with his girlfriend Venita Sharma and their infant daughter. Morales pulled to the side of the road to turn on his cell phone. The car windows were rolled down.

² We have omitted the gang evidence presented at trial, as it is not relevant to the resolution of issues on appeal.

Four men in black hoodies approached the car. One of the men was in the lead and another was right behind him. The man in front was later identified as Michael Nateras. Nateras was short—approximately 5 feet 4 inches to 5 feet 5 inches tall. The man behind Nateras was a little bit taller—approximately 5 feet 9 inches tall—and was later identified as Alfaro. The hoods covered the tops of the men’s heads, but Morales could see the first two men’s faces.

Nateras was holding a gun in his right hand by his waist. The men got within three to four feet of the car. Morales was scared, so he pulled forward into a driveway. Nateras and Alfaro kept walking along with the car. The other two men initially followed, but then hung back. The gate across the driveway was closed, so Morales tried to back up, but accidentally put the car in park. He could see Nateras and Alfaro’s faces very clearly. Both men were holding semiautomatic pistols. Nateras tried to get in the car. He asked Morales, “What do you have there?” referring to Morales’s cell phone.

Morales immediately put the car in reverse. He backed down the driveway onto Hammel Street and turned at the next corner, which was Rowan Avenue. Morales was looking in his rearview mirror and saw Nateras and Alfaro fire three to five shots at his car. He heard gunshots. The muzzles of both guns flashed as the men fired. There were a total of three flashes.

Both Morales and Sharma called the police on their cell phones. The 911 operator instructed Morales not to go

anywhere. While he was talking with the operator, he looked back again. The four men were grouped together at a black gate. One of the men reached down and picked something up. The two men who had not shot at Morales's car ran away up the street. Alfaro went into a blue house in a complex of houses located at the corner of Hammel Street and Rowan Avenue. Nateras stood outside with his foot on the black gate. Nateras and Alfaro began to approach Morales's vehicle again, so he drove away. Morales continued to drive down Rowan Avenue, and eventually ended up on Caesar Chavez Avenue. He turned into a Pizza Hut parking lot where the police met him a few minutes later. Morales followed the officers back to the scene at their direction. He pointed out where Alfaro had gone to the officers. Although he did not specifically state which house in the complex Alfaro had entered, he described the location.

The police entered a multi-family residence with converted garages at the corner of Hammel Street and Rowan Avenue. They had had previous contacts with Nateras, who was a known gang member. Nateras lived in one of the converted garages, and Alfaro lived in another converted garage with Nateras's sister, who was his girlfriend, and their baby.

Police obtained a warrant and searched the residences. Los Angeles County Detective Goro Yoshida found a gun in a sock in the ceiling of the restroom in the converted garage where Alfaro lived. Detective Yoshida testified that the gun was loaded and could be discharged. It was a .25 caliber

semiautomatic which discharged spent casings when fired. To Detective Yoshida's knowledge, the gun did not appear to have been fired recently, but he was not a ballistics expert. Detective Yoshida did not request that the gun be tested to determine whether it was operable. The detective did not know if there was a way to determine whether a gun was operable without test firing it.

Morales identified Nateras and Alfaro as the shooters in field show-ups approximately an hour and a half after the incident. Prior to the identification, police admonished him that the fact that a person was in custody did not mean the person committed the crime. Morales did not see where the police apprehended the men. He kept an open mind when identifying them. Sharma was not with him during the field show-up. Morales stated that it appeared Alfaro changed clothing after the incident, because he was wearing different clothing. At trial, Morales testified he was positive that he correctly identified Alfaro and Nateras. He also identified the area where he last saw Alfaro.

Sharma testified that when the two men approached the car she was looking at them and that they each had a gun. As the car was driving away from them, Sharma heard the gunshots. After the police arrived, Sharma identified both Alfaro and Nateras at field show-ups.³ She identified both men as the shooters at trial. She testified that she was

³ Sharma did not specifically state that Alfaro was one of the shooters at the field show-up, and the officer who questioned her did not ask at that time.

epileptic and had previously had her right temporal lobe removed. The removal of her temporal lobe has affected her short-term memory. She may remember something at one time and then not be able to recall it at another time.

A criminalist testified that gunshot residue (GSR) may spread over an area of three feet when a gun is fired. A person who tests positive for GSR may not have fired a gun; particles may be transferred from one surface to another. GSR tests revealed that Alfaro had a particle containing two of the three required elements for GSR on his hands. The test was consistent with GSR, but not positive.

Morales's car was not hit by any of the bullets. No casings were found at the scene. The gun was tested for fingerprints, and Alfaro's fingerprints were not on it.

Defense

Identification expert Mitchell Eisen testified about the limitations and inaccuracies of eyewitness identifications. Many factors can negatively impact memory. Stress, trauma, weapon focus, a short time to view someone, and the presence of multiple subjects all affect the ability to accurately recall an event. Memories may become distorted when witnesses share their recollections of events. Every time we recall an event, the memory is rewritten and changed. We fill in the gaps with information that feels correct. Memories also fade over time. Witnesses become

more confident when given feedback they have picked the correct person, and that confidence increases over time.

False identifications are much more prevalent when an identification is made in a field show-up as opposed to a photographic lineup. Field show-ups are more suggestive because the witness is only shown a single suspect. The witness may infer the police are showing him the perpetrator. In many false identification cases, witnesses were 100 percent certain they were correct.

DISCUSSION

Admission of the Gun

Alfaro first contends that the trial court abused its discretion under Evidence Code section 352 by admitting evidence of the gun discovered in a hole in the ceiling of the bathroom where he was living at the time of the shooting. He argues that the evidence was highly prejudicial and likely confused the issues. The contention lacks merit.

Law

Evidence Code section 352 provides that “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing

issues, or of misleading the jury.” “The trial court has broad latitude in determining the relevance of evidence.” (*People v. Scott* (2011) 52 Cal.4th 452, 490.) “An appellate court applies the abuse of discretion standard to review any ruling by a trial court on the admissibility of the evidence, including a ruling on an Evidence Code section 352 objection.” (*People v. Cox* (2003) 30 Cal.4th 916, 955 (*Cox*), disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) ““[T]he ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.” [Citation.]’ [Citation.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 620.)

Generally, “[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant’s possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056.) In other words, “[e]vidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant. [Citations.]” (*People v. Henderson* (1976) 58 Cal.App.3d 349,

360.) A weapon that has not been ruled out as being the weapon used in the crime is admissible, however. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052 (*Carpenter*) [“Although the witnesses did not establish the gun necessarily was the murder weapon, it might have been. . . . The evidence was thus relevant and admissible as circumstantial evidence that he committed the charged offenses.”].) Evidence that the defendant possessed a weapon may also be admitted if the weapon used in the crime is unknown, or if the proposed evidence is relevant to some issue other than the defendant’s propensity to possess weapons. (See *Cox, supra*, 30 Cal.4th at pp. 956–957.)

Proceedings

At trial, Detective Yoshida testified that he discovered the gun in a hole cut into the ceiling of the bathroom in the converted garage where Alfaro was living, and when it was recovered it held six “live rounds” and was capable of firing. The caliber of the bullets matched the gun.

After this testimony, defense counsel requested a sidebar and informed the trial court that as he recalled the gun had been determined not to have been used in the incident in the previous trial of Nateras. Counsel requested that the gun evidence be excluded as irrelevant pursuant to Evidence Code section 352.⁴

⁴ Although not mentioned by the prosecution in its opening statement, defense counsel had already stated in

The prosecutor argued for admission of the gun evidence. To his knowledge no ballistics testing had been performed on the gun, Detective Yoshida testified it was capable of being fired, and the gun was a semiautomatic firearm, which was consistent with the description Morales gave of the weapons used in the shooting.

The trial court stated that if the gun had been tested and shown not to have been fired recently enough to be the weapon used in the crime, the evidence would be excluded under Evidence Code section 352. On the other hand, if the only indication that the gun was inoperable was that it appeared old, the court would admit the evidence and defense counsel could make the argument to the jury. The trial court asked the prosecutor to investigate whether the gun had been excluded as incapable of being the weapon used in the crime in the previous trial. After investigating the issue over the lunch break, the prosecutor informed the court that there was no evidence to indicate that the gun could be ruled out as the weapon used in the crime. The trial court admitted the gun evidence.

On cross-examination of Detective Yoshida, defense counsel elicited that Detective Yoshida submitted the gun for testing, but not for a determination of whether it had been fired recently.

opening that “[t]he evidence will also show that a gun was found on the property, in an attic.” Counsel further stated that it was not the weapon used in the incident.

On re-direct and re-cross examination, Detective Yoshida testified that he was not aware of any test to determine how recently a weapon has been fired. The detective testified that he did ascertain the gun was capable of firing.

Analysis

The trial court did not abuse its discretion. The court made appropriate inquiries to determine whether the gun evidence was relevant—i.e. whether it could have been the same weapon used in the shootings—and stated that if the evidence showed the gun could not have been used in the crimes it would be excluded. The gun was a semiautomatic, which was consistent with Morales’s testimony that the shooters used semiautomatic firearms. There was no evidence that the gun had been excluded from an earlier trial or had been found inoperable, and there was no test performed to determine how recently it had been fired. Detective Yoshida testified that although he was not an expert, in his experience with firearms as a police officer, the gun appeared capable of firing. It was also loaded with a live round of the correct caliber bullets.

That a weapon which could have been used in the shooting was discovered inside the shooter’s home in a complex of residences that he was seen entering directly following the shooting is highly relevant and does not confuse the issues. Evidence is not unduly prejudicial solely

because it implicates a defendant. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.” The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.” [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The trial court was within its discretion in admitting the gun evidence. (See *Carpenter, supra*, 21 Cal.4th at p. 1052.)

Sufficiency of Eyewitness Testimony Identifying Alfaro

Alfaro contends that the identification evidence in this case “was so flawed it was not substantial” such that reversal is required. Specifically, he points to the fact that (1) he was wearing different clothing than the second shooter, (2) his fingerprints were not on the gun, (3) Morales could not tell that Alfaro was older than Nateras initially, (4) Morales misremembered the color of the house he purportedly entered, and (5) the removal of Sharma’s right temporal lobe made her an unreliable witness. Alfaro’s arguments are an attempt to re-argue evidence and witness credibility before this court. On appeal, we neither reweigh evidence nor evaluate witness credibility. (*People v. Snow* (2003) 30 Cal.4th 43, 66 (*Snow*).) We conclude that

substantial evidence supports the witness identifications and the verdict.

“In reviewing a challenge to the sufficiency of the evidence under the due process clause of the Fourteenth Amendment to the United States Constitution and/or the due process clause of article I, section 15 of the California Constitution, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.” (*People v. Cole* (2004) 33 Cal.4th 1158, 1212.) ““[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” [Citation.]” (*Snow, supra*, 30 Cal.4th at p. 66.)

We reject Alfaro’s argument that the evidence was insufficient to establish his identity. “Identification of the defendant by a single eyewitness may be sufficient to prove the defendant’s identity as the perpetrator of a crime.” (*People v. Boyer* (2006) 38 Cal.4th 412, 480 (*Boyer*).) In this case both Morales and Sharma identified Alfaro as one of the shooters on more than one occasion. They were taken separately to make field identifications of the shooters only an hour and a half after the shooting took place. The officer advised each of them that the fact that a person was in custody did not mean that person committed the crime.

Morales testified that he kept an open mind. He identified Alfaro as one of the shooters at the field show-up. Sharma also identified Alfaro as one of the men involved in the shooting. Both were certain of their field identifications. Morales and Sharma also identified Alfaro at trial.

With respect to Sharma's reliability as a witness, she testified that the removal of her right temporal lobe affected the consistency of her short-term memory. Her testimony established that she was able to remember events at times and not able to remember events at other times. No evidence suggested that her memory was inaccurate, only that she could not consistently access her memories. The jurors were properly instructed that they were "the sole judges of the believability of a witness" under CALJIC No. 2.20, and that they were to consider "[t]he ability of the witness to remember or to communicate any matter about which the witness has testified." They were equipped to evaluate Sharma's testimony. We will not second guess their determination on appeal.

However, even without Sharma's testimony, the eyewitness evidence was sufficient to support the verdict. (See *Boyer, supra*, 38 Cal.4th at p. 480 [testimony of one witness sufficient to prove identity].) We disagree with Alfaro's characterization of Morales's statement that the suspects ran into a blue house as misremembering a key incident. After testifying that Alfaro ran past the black gate into a blue house, Morales was shown a photograph of the area where Alfaro was arrested that did not depict the blue

house. Morales explained that the blue house was behind another house in the photograph. He consistently testified that the men were gathered by a black gate in front of a complex of houses on Hammel Street and Rowan Avenue, and that Alfaro entered one of the houses. It is not clear from the record that Morales's memory of the house color was inaccurate, but even if it had been, the inaccuracy was of no moment. The jurors were free to reject Morales's testimony that the house was blue but also accept the remainder of his testimony, and were properly instructed on this point under CALJIC No. 2.21.1. (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1130.)

It is not significant that Morales may have initially been unable to see the shooters' faces as well as he could a few minutes later when the men came closer to his vehicle. Morales had multiple opportunities to view Alfaro's face and testified that at some points he was able to see him more clearly than at others. All four men remained within his view throughout the incident, and he repeatedly testified that the same two men who committed the shooting stayed in the front of the group.

Alfaro's cursory arguments that his fingerprints were not on the gun and that he was wearing different clothing than Morales initially described are improper attempts to re-argue the evidence which we may not entertain on appeal. We conclude that substantial evidence of identity supports Alfaro's conviction.

***Jury's True Finding on Firearm Use Allegation in
Count 1***

We agree with the parties that the jury's true finding on the section 12022.5, subdivision (a) enhancement allegation for personal firearm use in connection with the section 246 conviction for shooting at an occupied vehicle must be stricken as inapplicable.

Section 12022.5, subdivision (a) specifically states that it is inapplicable when use of a firearm is an element of the offense. Thus, the section 12022.5, subdivision (a) enhancement does not apply to violations of section 246. (*Kramer, supra*, 29 Cal.4th at p. 723, fn. 2.)

Although the trial court never imposed sentence on the enhancement in count 1, the jury's finding was erroneous and must be stricken from the verdict and minute order.

DISPOSITION

The jury's true finding under section 12022.5, subdivision (a)(1) in count 1 is stricken. The trial court is ordered to modify the jury verdict and minute order, dated February 1, 2017, accordingly. As modified, the judgment is affirmed.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.