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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS VILLALVAZO et al.,

Defendants and Appellants.

B232293

(Los Angeles County
Super. Ct. No. BA364542)

APPEALS from judgments of the Superior Court of Los Angeles County,
Leslie A. Swain, Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant
and Appellant Luis Villalvazo.

Tracey A. Rogers, under appointment by the Court of Appeal, for Defendant and
Appellant Victor Mancía.

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

Luis Villalvazo and Victor Mancía were tried together before a jury. The jury found Villalvazo and Mancía guilty of two counts of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a)),¹ shooting a firearm from a motor vehicle (§ 12034, subd. (c)), and shooting at an inhabited dwelling (§ 246), with findings that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C) and (4). In addition, as to counts 1, 3, and 4, the jury found the following allegations true as to Villalvazo: (1) he personally used a firearm; (2) he personally and intentionally discharged a firearm, proximately causing great bodily injury; and (3) a principal personally used and intentionally discharged a firearm, proximately causing great bodily injury. (§ 12022.53, subs. (b), (d) & (e)(1).) As to count 2, the jury found the same allegations true, with the exception of the infliction of great bodily injury pursuant to section 12022.53, subdivisions (d) and (e)(1). Inexplicably, the jury determined that all of the personal discharge allegations (§ 12022.53, subd. (c)) were not true. As to counts 1, 3, and 4, the jury concluded as to Mancía that a principal used and personally discharged a weapon, proximately causing great bodily injury. As to count 2, the jury found the great bodily injury allegation (§ 12022.53, subs. (d) & (e)(1)) not true and the remaining two allegations (§12022.53, subs. (b), (c) & (e)(1)) true.

Both filed timely notices of appeal. Villalvazo filed an opening brief contending that the trial court erred in denying his motion for a new trial. Mancía's court-appointed counsel filed an opening brief requesting this court to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. She also filed a declaration stating that she had sent Mancía a letter advising him of the nature of the brief, a copy of the brief, and the record. On November 14, 2011, we advised Mancía he had 30 days within which to submit any issues that he wished us to consider. To date, we have received no response.

We affirm the judgments.

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

FACTUAL AND PROCEDURAL BACKGROUND

On November 10, 2009, Fausto Martinez was sitting outside his residence on South Union Drive in Los Angeles with his neighbors Eder Santana and a person named Jerman. A small gray car drove slowly towards them. Martinez was able to see only a hand inside the car holding a weapon. He then heard four or five gunshots and was wounded in the foot. Santana was also injured by a bullet grazing his foot. The vehicle kept going down Union and turned right on 6th Street.

Los Angeles Police Detective Thomasin Clack and her partner Detective Balderrama were driving in the vicinity and heard three shots fired. Clack looked in the direction of the shots. She observed a male hopping on one foot and saw a compact car travelling southbound on Union Drive. The car was moving slowly in Clack's direction and made a right turn. Clack and her partner began to follow the car and broadcast their location via the radio, believing the vehicle was involved in the shooting. The suspect vehicle slowed and the passenger and driver opened their doors slightly. Clack saw two people inside. The officers continued to follow the car. It stopped and Clack saw Villalvazo getting out of the passenger side of the vehicle. She observed the handle of a gun protruding from Villalvazo's waistband. He started to draw the weapon; however, he got back into the car and it headed eastbound on Ocean View.

Los Angeles Police Officer Jose Avila was patrolling when he heard the radio broadcast concerning the suspect vehicle and immediately spotted it on Grand View. As Officer Avila approached the car, he saw the passenger throw what appeared to be a weapon out of the passenger window. Officer Avila stopped the car and detained the occupants. He identified Villalvazo as the passenger and Mancina as the driver. A loaded semi-automatic .45 caliber weapon was later found on the sidewalk.

Officer Jack Chavez arrived at the scene, observed the handgun on the ground, and photographed it. He did not order that the gun be dusted for fingerprints.

A police department criminalist, Carol Acosta, examined the firearm recovered by police, as well as three discharged .45 caliber casings, one fired bullet, and one bullet core found at the scene of the shooting. She determined that the casings and the bullet had been fired from the firearm in evidence. During cross-examination at trial, she reviewed her report and noted there was fingerprint powder on the firearm and magazine, indicating that the weapon had been dusted for fingerprints.²

Miguel Herrera, a construction worker who was working in the area, testified that the Friday before the shooting occurred, he saw Villalvazo spray painting a word containing the letter “R” on a wall. On the day of the shooting, he saw a car going down Union Drive with a passenger in the front seat. The passenger crouched down, lifted his right hand up, reached across his body, and pointed it towards the driver’s side of the car. Herrera heard three or four shots and saw the vehicle turning onto 6th Street. Herrera identified Villalvazo as the driver of the car.

Los Angeles Police Officer Antonio Hernandez testified as a gang expert. He knew Villalvazo, who was an admitted member of the DIA gang. DIA and the Rockwood gang used to be allies, but since October 2009 had become rivals. Officer Hernandez had seen graffiti with DIA’s and Rockwood’s names crossed out, which was a sign of disrespect. Martinez’s house was in territory claimed by Rockwood and there was Rockwood graffiti in the area. When asked a hypothetical about a car with DIA members travelling in the area, and shooting three individuals sitting in front of a residence, Hernandez opined that the crime was committed for the benefit of the DIA gang.

Los Angeles Police Officer Michael Chang testified that Mancina had admitted on two occasions that he was a DIA gang member and had a tattoo of the letters DIA on his abdomen.

Neither defendant testified. The defense recalled Officer Hernandez as a witness, who testified that Eder Santana was often in the company of Rockwood gang members.

² A gunshot residue test performed on both defendants was negative.

DISCUSSION

I. New Trial Motion

After Acosta, the ballistics expert, testified that fingerprints may have been lifted from the gun, the prosecutor informed the court that he had not been notified of that fact. He immediately contacted the police lab and discovered that a fingerprint had been lifted. Thereafter, the prosecutor was informed that the print and one taken from the finger of Mancia were a match. He then notified defense counsel. Villalvazo's attorney informed the court that the prosecutor had told him early in the proceedings that there was no fingerprint evidence. Counsel stated he had proceeded on that assumption and his defense would have been different had he known about the print. He moved for a mistrial. Mancia's attorney indicated that if the fingerprint evidence were admitted, she would ask for a continuance. If the continuance request was denied, she would move for a mistrial. The court stated that if the prosecutor agreed to go forward without the evidence, there would be no basis to grant a motion for a mistrial. After a brief recess, the prosecutor informed the court that his preference was to proceed with the trial and exclude the evidence of the fingerprint match. Villalvazo's attorney stated that he was prepared to proceed with the trial under those conditions, but was not waiving his right to appeal the ruling.

After the jury had returned its guilty verdict, Villalvazo moved for a new trial based on the exclusion of the fingerprint evidence. After extensive argument by the parties, the court ruled that the fingerprint evidence was not necessarily exculpatory evidence for Villalvazo and could not overrule the "overwhelming evidence of Mr. Villalvazo's guilt in this case." The new trial motion was denied.

Section 1181, subdivision (8) provides that the trial court may grant a defendant's new trial motion "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." The trial court considers whether (1) the evidence is newly discovered, (2) the evidence is

cumulative, (3) it is probable that the evidence would render a different result upon retrial, (4) the moving party could have discovered and produced the evidence at trial, and (5) the facts are shown by the best admissible evidence. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) When making this determination, the trial court may consider the credibility as well as the materiality of the new evidence. (*Id.* at p. 329.) We will reverse the trial court's ruling only if a manifest and unmistakable abuse of discretion clearly appears. (*People v. Staten* (2000) 24 Cal.4th 434, 466.) Each case must be evaluated taking into account its specific facts in determining whether the trial court has properly exercised its discretion. (*People v. Dyer* (1988) 45 Cal.3d 26, 52.)

The Attorney General argues the evidence was not newly discovered because the defense could have requested that the gun be fingerprinted prior to trial. We are not persuaded. We concur with the trial court that the defense was entitled to rely on the prosecution's representation that no fingerprint evidence existed.

Villalvazo relies heavily on *People v. Soojian* (2010) 190 Cal.App.4th 491, a case in which the Court of Appeal found the trial court utilized the incorrect standard in denying the defendant's new trial motion. At trial, the evidence pointing to the defendant was not overwhelming and there was other evidence suggesting the defendant's cousin was the perpetrator. (*Id.* at pp. 497, 500-503.) In his new trial motion, the defendant included a number of declarations that cast doubt on the accuracy of the jury's guilty verdict. (*Id.* at pp. 505-510.) The appellate court held "that when a defendant makes a motion for a new trial based on newly discovered evidence, he has met his burden of establishing that a different result is probable on retrial of the case if he has established that it is probable that at least one juror would have voted to find him not guilty had the new evidence been presented." (*Id.* at p. 521.) After reviewing the newly discovered evidence Soojian presented in his motion for new trial, the panel concluded his motion should have been granted. (*Id.* at p. 524.)

Villalvazo insists that if his jury had heard that Mancía's fingerprint was on the weapon, at least one of its members would have found the personal discharge allegation not true. We disagree. Initially, we note, as did the trial court, that the fingerprint

evidence was not necessarily exculpatory. Mancía's fingerprint on the gun does not establish that he was the only person to touch it, and neither trial nor appellate counsel suggest otherwise. Despite the lack of a fingerprint linking Villalvazo to the gun, the evidence showing that he was the shooter is compelling. First, police officers saw the car involved in the shooting immediately after it occurred. Detective Clack heard the shots, saw one of the victims hopping on one foot (both victims were shot in the foot), and observed the suspect vehicle driving in her direction. It is clear that the driver and passenger of the vehicle did not have the opportunity to change positions. Second, Herrera said the passenger reached across his body and pointed a gun toward the driver's side of the car. Although it is true Herrera identified Villalvazo as the driver, it is evident from the events following the attack that he was mistaken. Third, as Detective Clack and her partner followed the vehicle, she saw the car come to a stop and Villalvazo get out of the passenger side with a gun in his waistband. He looked in Clack's direction, started to draw the weapon and, instead, got back into the vehicle. Fourth, Officer Avila saw the passenger throw a gun out of the passenger side of the vehicle. Fifth, when Avila stopped the car, Mancía was in the driver's seat and Villalvazo was in the passenger's seat. The evidence was overwhelming that Villalvazo, at the very least, handled the weapon; yet, he left no fingerprint, demonstrating why the exclusion of the print evidence was not prejudicial.³

In a further effort to show a reasonable probability of a different result, Villalvazo points to the jury's inconsistent findings on the firearm allegations. As we discussed, the jury found that Villalvazo personally discharged a firearm proximately causing great bodily injury and also concluded that he did not discharge a weapon. Contrary to Villalvazo, we do not find that this inconsistency is evidence the jury was having difficulty reaching a conclusion. Given that it also determined that Villalvazo personally

³ Villalvazo also argues the court did not apply the correct standard in ruling on his motion. We cannot determine whether that is the case. Neither party directed the court's attention to *Soojian*. Given our application of the appropriate test and our conclusion, we need not discuss the contention further.

used a weapon, the verdicts lead to the logical conclusion that the jury mistakenly believed that if it found Villalvazo discharged a weapon and caused injury, it was precluded from finding he simply discharged a weapon.

As we are convinced there is no reasonable probability that a juror would have concluded that Villalvazo did not personally discharge a firearm had the fingerprint evidence been admitted, the trial court did not abuse its discretion in denying the new trial motion.

II. Mancia's Request for Independent Review

We have examined the entire record and are satisfied that no arguable issues exist, and that Mancia has, by virtue of his counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278, *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

DISPOSITION

The judgments are affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.