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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. BLAIR ODEL HAYS, Defendant and Appellant.	B231901 (Los Angeles County Super. Ct. No. TA108689)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen J. Webster, Jr., Judge. Affirmed.

Kim Malcheski, 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, Susan Sullivan Pithey and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Blair Odel Hays appeals from a judgment entered after a jury found him guilty of first degree murder, willful, deliberate and premeditated attempted murder and shooting at an occupied motor vehicle. The jury also found firearm enhancement allegations to be true. The trial court sentenced him to 70 years to life.

Hays contends that the trial court erred (1) in instructing the jury on flight because there was insufficient evidence supporting the instruction, (2) in denying his motion to continue the trial, made on the last day of testimony, (3) in denying his motion for a new trial, and (4) in imposing a consecutive sentence on the attempted murder count. We affirm.

BACKGROUND

Evidence at Trial

The shooting at issue occurred in Compton on November 18, 2007. At that time Robert Huggins, the attempted murder victim, was working as a pimp in Compton. The night before the shooting Huggins saw "G.G.," a prostitute who used to work for him. She stopped working for him in or about May 2007 when Huggins refused to allow her to move into a position where she would oversee the other prostitutes and the money they brought in. On November 17, 2007, Huggins ran into G.G. at a club and they agreed to meet the next night. G.G. was going to call Huggins on November 18, 2007, when she was ready for him to pick her up for their meeting. Huggins did not receive a call from G.G. on November 18.

On the evening of November 18, 2007, Huggins had three prostitutes working for him on the streets in Compton. He received a call on his cell phone from one of the prostitutes, Amanda Pettaway.[1] Pettaway told Huggins that a police officer had ordered her and her two associates to leave the area. She also indicated that two men dressed in

[1] Pettaway did not testify at trial. In a motion for new trial, Hays argued that his counsel rendered ineffective assistance in failing to call her as a witness, as discussed more fully below.

black were following her and the other prostitutes, and she was concerned that the men were going to rob her.

When Huggins received the call from Pettaway, he was driving his van near the area where the prostitutes were working. He decided to pick them up. Huggins had two passengers in his van at the time. His friend, Avery Dunn, was in the front passenger seat and Dunn's friend, Daena Hamilton, was in the back seat.

As Huggins was driving north on Poinsettia Avenue toward the corner of Myrrh Street, he saw G.G. and a man he later identified as Hays. G.G. and Hays were wearing black hooded sweatshirts. They were walking north on Poinsettia Avenue, on the side of the street closest to the passenger side of Huggins's van. There was sufficient light coming from the streetlamps and the van's headlights for Huggins to see G.G.'s and Hays's faces even though it was about 11:00 p.m. Huggins had seen G.G. and Hays together on multiple prior occasions during the time that G.G. worked for him. Huggins had never spoken to Hays.

Huggins stopped his van next to G.G. and Hays. He rolled down the passenger window, leaned over Dunn and called out to G.G. He called her name twice. Hays was standing on the curb, about 13 feet away from Huggins. Hays pulled a gun out of his waistband, aimed it at Huggins and fired into the passenger window of Huggins's van. Huggins thought he heard more than one shot, but he was not sure how many shots Hays fired. A bullet went through the front passenger side window, cracked the front driver side window, and exited the van on the driver side. Huggins and his passengers were unarmed at the time of the shooting. According to Huggins, Pettaway was about to climb into the driver side door of the van at the time the shooting started. Huggins drove away before any of the three women could get into the van.

Hamilton heard Huggins call out to G.G. through the passenger side window, and then she heard multiple gunshots. She saw that the driver side window of the van was shattered. Hamilton could not see outside from her seat in the back of the van, so she did not see the shooter.

The three prostitutes, Amanda Pettaway, Shenarie Cain, and Danielle Perry, were waiting for Huggins to pick them up when the shooting occurred. They were standing near the corner of Poinsettia Avenue and Myrrh Street, north of the spot where Huggins stopped the van to talk to G.G. Cain and Perry, who testified at trial, both saw Huggins's van stop next to two people that Cain and Perry later identified as G.G. and Hays. Within 30 minutes of the shooting, Cain and Perry had seen G.G. and Hays on multiple occasions walking around the area where the prostitutes were working. Cain felt nervous the first time she saw G.G. and Hays walking near her. They were wearing black hooded sweatshirts and Cain thought that they were men who might cause trouble for her and the other prostitutes. Then Cain recognized one of the two as G.G., a woman who used to work for Huggins.

When Huggins's van stopped next to G.G. and Hays, Cain walked into the middle of Poinsettia Avenue and headed toward the van. She was about 60 feet away from the van when she heard the gunshots, but she did not see them being fired. Perry was about 15 feet away from Hays when she saw Hays open fire on the van. Cain, Perry and Pettaway started running north on Poinsettia Avenue when they heard the gunshots. They left their shoes behind on the street as they ran.[2] Huggins picked them up in his van two blocks away at Compton Boulevard and Poinsettia Avenue.

Dunn indicated that he had been shot, so Huggins drove straight to a hospital. Neither Huggins nor Hamilton was hit by the gunfire. Dunn was pronounced dead at the hospital. He died as a result of a gunshot wound to the torso. The bullet "lodged inside" Dunn's left lung after travelling through the pulmonary trunk and the aorta.

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[2] Based on the locations in the street where the three pairs of shoes were later found, Hays argues that the women would not have been able to identify him as the man standing next to Huggins's van because the women were standing too far away. Perry's shoes were found about 111 feet north of the south curb line of Myrrh Street on Poinsettia Avenue. Pettaway's shoes were found about 79 feet north of the south curb line of Myrrh Street on Poinsettia Avenue. Cain's shoes were found almost two blocks north of Myrrh Street on Poinsettia Avenue.

Sergeant Mitchell Loman and his partner Sergeant Rubino arrived at the crime scene at about 2:00 a.m. on November 19, 2007. They recovered one expended nine-millimeter shell casing in a grassy area between the curb and the sidewalk near a brick house at 500 Poinsettia Avenue, which is located south of Myrrh Street.

The same morning, the officers spoke to Huggins and he provided a general description of the suspect. Huggins pointed out the brick house at 500 Poinsettia Avenue and told the officers that he believed the suspect lived there. Huggins also told them that the suspect was "associated with a female named G.G.," and he provided them with G.G.'s full name.

At about 1:00 p.m. on November 19, 2007, the officers canvassed the area of the crime scene, looking for witnesses to the shooting. They saw two men walking on Myrrh Street just west of the crime scene. The officers approached the men and asked for their names. The officers were wearing plain clothes, but their identification badges and firearms were displayed. A man later identified as Hays told the officers that his name was Anthony Smith and he provided a date of birth. The other man identified himself as Ernest Singleton.[3] Hays told the officers that he lived in the brick house at 500 Poinsettia Avenue with his grandmother. He also pointed out a car that he said belonged to him. The officers wrote down the license plate number of the car. The officers asked Hays if he was around the night before, and if he had heard anything. Hays stated that he was home but did not hear anything. The officers did not detain the men.

Using law enforcement databases and the birth date provided by Hays, Sergeant Loman was unable to verify the identity of "Anthony Smith." Sergeant Loman conducted a search through the Department of Motor Vehicles on the car parked at 500 Poinsettia Avenue. Through that search, he learned Hays's true identity.

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[3] Ernest Singleton testified at trial. He recalled that Hays gave the officers a fake name on November 19, 2007. Singleton was familiar with the woman known as G.G. At about 8:00 p.m. on the night of the shooting, Singleton saw Hays and G.G. together at a house down the street from Myrrh and Poinsettia. Singleton saw Hays and G.G. leave the house together.

Sergeant Loman placed Hays's picture in a six-pack photo line-up. In the evening on November 19, 2007, Huggins looked at the six-pack and identified Hays as the man who shot into his van. On November 23, 2007, the officers showed the six-pack to Cain. She did not identify anyone because she "didn't want to get involved" and she "didn't want to point anybody out." On December 28, 2007, officers showed the six-pack to Perry and she identified Hays as the man who shot Dunn. On January 3, 2008, while Cain was in custody on an unrelated charge, the officers showed her the six-pack again. Cain identified Hays as the man who was with G.G. when Cain heard the gunshots. At trial, Huggins, Cain and Perry stated that they did not talk to each other about their identifications or their testimony.[4]

After Huggins identified Hays as the shooter, Sergeant Loman obtained a warrant for Hays's arrest. Loman spoke to Hays's grandmother and sister and told them that Hays was wanted for murder. On December 13, 2007, Loman created a special law enforcement bulletin with Hays's picture, which indicated that Hays was wanted for murder. Loman disseminated the bulletin to law enforcement agencies and to the media. The bulletin was shown on the television show, L.A.'s Most Wanted.

On July 8, 2009, police officers in Phoenix, Arizona saw a man later identified as Hays when they served a search warrant at a motel in Phoenix. Hays was not the target of the search warrant, but he was present in the motel room. Hays told one of the officers his name was Dijon Mack and he provided a date of birth. When the officer asked for his social security number, Hays said that he did not know it. Hays told the officer that he had an Oregon driver's license, but he was not able to provide it. Hays did not provide a residential address in Oregon. Although the officer could not confirm Hays's identity, the officer released him.

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[4] At the time of the shooting, Huggins, Pettaway and Cain were living together. Perry was not living with them and she did not stay in contact with Huggins or Cain after the shooting. At trial, Cain testified that she and Huggins had a child together and they still had a relationship.

On July 11, 2009, Hays was pulled over for a traffic stop in Surprise, Arizona, which is located about 26 miles from Phoenix. A police officer who was following a car driven by Hays activated the lights on his marked patrol car and then turned on the siren, but Hays did not stop right away. He drove for about one-third of a mile before turning into a gated community and pulling into a driveway. Hays got out of the car and started walking to the front door of a residence. The officer ordered Hays to stop and asked for his license and registration. Hays stated that he left his license at his grandmother's house five miles away. Hays told the officer his name was Dijon Mack and he provided a date of birth. When the officer could not verify his identity in Arizona, Hays told the officer he had an Oregon driver's license. The officer did not find a match in Oregon either.

The officer called for back-up and others arrived. A sergeant informed Hays that he was going to be arrested because he did not have identification. Hays "took off running." Officers chased Hays for about one-quarter of a mile and apprehended him. At the station, officers determined Hays's true identity and that he had a murder warrant in California.

Verdicts and Sentence

The jury found Hays guilty of the first degree murder of Dunn (Pen. Code,[5] § 187, subd. (a); count 1), and found special firearm enhancement allegations to be true as to the murder count (§ 12022.53, subds. (b), (c) & (d)). The jury also found Hays guilty of the willful, deliberate and premeditated attempted murder of Huggins (§§ 187, subd. (a), 664; count 2), and found special firearm enhancement allegations to be true as to the attempted murder count (§ 12022.53, subds. (b) & (c)). The jury further found Hays guilty of shooting at an occupied motor vehicle (§ 246; count 3).

After denying Hays's motions for new trial, which we discuss below, the trial court sentenced Hays to 70 years to life in prison. On count 1, the court sentenced Hays to 25 years to life for first degree murder, plus a consecutive term of 25 years to life for

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[5] All statutory references are to the Penal Code.

the firearm enhancement under section 12022.53, subdivision (d). On count 2, the court sentenced Hays to a consecutive life term for the willful, deliberate and premeditated attempted murder, plus a consecutive term of 20 years for the firearm enhancement under section 12022.53, subdivision (c). Pursuant to section 654, the court stayed the sentence on the other firearm enhancement allegations found true on counts 1 and 2. The court also stayed the sentence on count 3 for shooting at an occupied vehicle.

DISCUSSION

I. Flight Instruction

Hays contends the trial court committed reversible error in instructing on flight because there was insufficient evidence supporting the instruction. Hays did not object to the instruction below, but argues that this court may review his claim because the instruction affected his "substantial rights. (§ 1259 ["The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].) He also argues that his trial counsel's failure to object to this instruction constitutes ineffective assistance of counsel. Accordingly, we review the merits of his claim.

The trial court must instruct on flight when the prosecution relies on evidence of flight of the defendant "as tending to show guilt." (§ 1127c.) Using CALCRIM No. 372, the trial court instructed the jury on flight as follows: "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." An instruction allowing the jury to draw an inference is proper only if the record contains evidence which, if believed, supports the inference. (*People v. Hart* (1999) 20 Cal.4th 546, 620.)

There is no requirement that the flight "be commenced" within "a defined temporal period" after the crimes are committed. (*People v. Carter* (2005) 36 Cal.4th 1114, 1182 [flight instruction proper where the defendant "left California in the days immediately following the charged offenses"]; *People v. Howard* (2008) 42 Cal.4th 1000, 1021 [flight instruction proper where the defendant "had remained at home for two days" after the victim disappeared and only left his home after the victim's body was found].)

There is substantial evidence in the record supporting the flight instruction. At the time of the shooting, Hays lived at 500 Poinsettia Avenue in Compton with his grandmother. The day after the shooting, officers were investigating the shooting in the area where Hays lived. They contacted Hays and asked him if he heard anything the night before. Hays gave the officers a fake name. Shortly thereafter, the officers determined Hays's true identity, Huggins identified him as the shooter and the officers obtained a warrant for Hays's arrest. The officers could not locate Hays. They told his grandmother and sister that he was wanted for murder. They disseminated a bulletin with his picture indicating that he was wanted for murder. Still they could not locate him. About a year and a half later, they learned that he had been arrested in Arizona and was using a fake name. A reasonable inference from this evidence is that Hays fled to Arizona and concealed his true identity from Arizona law enforcement because he did not want to be arrested for the murder in California.

"[T]he instruction merely permitted the jury to consider evidence of flight in deciding defendant's guilt or innocence; it did not suggest that the jury should consider such evidence as dispositive." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1182.) There was no error.

II. Motion to Continue Trial

Hays contends the trial court committed reversible error in denying his motion to continue the trial, a motion he made on the last day of trial testimony.

Proceedings below

The trial started on March 1, 2010. At the beginning of the morning trial session on March 4, 2010, defense counsel informed the trial court that a relative of Hays "just"

told counsel that morning that "there might be a witness, an alibi witness." Counsel stated that he had just spoken to his investigator, who had been "trying to locate this person." Counsel requested time to speak to the investigator. The court told counsel that he needed to make arrangements to bring the witness in right away because "this is time for the People to close and for you to put on your case-in-chief." The court noted that this was the first time counsel had informed the court about this witness.

Defense counsel came back and told the trial court: "I just had a phone conversation with a gentleman. My understanding his name is William Blalock . . . . I believe he is on probation. . . . He indicated he was on his way to a doctor's appointment in East L.A. He's being shuttled by another driver. It is a work-related injury." Counsel asked Blalock if he could appear in court at 1:30 p.m., but Blalock was unsure. According to counsel, Blalock stated that Hays was with him from 8:30 p.m. on the night of the shooting until about 1:00 or 1:30 a.m. the following morning. Counsel stated: "I would ask the court to be able to let me interview this person and call him this afternoon if I'm going to call him." The prosecutor objected on grounds of belated notice of the witness.

The trial court noted that the case originally was set for trial in January 2010, and counsel was mentioning this witness for the first time on March 4, 2010. The court commented: "So the court's a little concerned and a little surprised, but all of a sudden this person is showing up. I don't know where this person has been. But this incident occurred in 2007. It seems to the court that if this particular person was with Mr. Hays in 2007, certainly the court should be knowing about it and, you too, long before this morning at a quarter to 10:00."

The trial court agreed to put the matter over until 1:30 p.m. that day. The court instructed defense counsel to obtain information to corroborate Blalock's representation about his doctor appointment and industrial injury. The court stated that it would call the doctor's office "if need be."

After the deputy medical examiner testified for the prosecution, discussions about the alibi witness resumed. Defense counsel informed the trial court: "Well, I spoke to

Mr. Blalock briefly, probably more than an hour ago. I have not since been able to reach him. I left him one message. I've given him personally through the first conversation the court's phone number and asked him to call to let us know when he would be available. And I know the court in chambers tried to make a call to him and left a message with the court's contact information." Blalock told counsel that he had an appointment with someone named "Donahue," but counsel did not know if that person was a physician, physical therapist or chiropractor. Counsel also learned that Blalock had a felony conviction, "a few misdemeanor cases," and "perhaps a juvenile robbery sustained petition." Counsel stated: "So I'm asking the court to give me time to interview this person and determine if he is a witness we should call in our case."

The prosecutor argued that Blalock did not appear credible, based on defense counsel's representations about the conversations. The prosecutor noted that Blalock was unable to provide defense counsel with "detailed information about the doctor, the appointment, the telephone number, the address," even though Blalock stated that he sees this person five days a week for his work-related injury. When defense counsel asked Blalock if he could speak with the person who was driving Blalock to the appointment, Blalock indicated that he could no longer hear counsel on his cell phone. Counsel was using a landline in the courtroom, and could hear Blalock clearly before the line disconnected. The prosecutor also noted that the trial court had been unable to find a listing in the phonebook for a "Dr. Donahue in East L.A."

The trial court denied Hays's motion to continue the trial. The same day, the parties argued the case to the jury.

Analysis

"Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) To establish good cause for a continuance "to secure the presence of a witness," Hays "'had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the

facts to which the witness would testify could not otherwise be proven.' [Citation.]" (*People v. Roybal* (1998) 19 Cal.4th 481, 504.)

A trial court has broad discretion to grant or deny a defendant's request for a continuance. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "Once a continuance has been denied, the burden is on appellant to establish an abuse of discretion. [Citation.]" (*People v. Strozier* (1993) 20 Cal.App.4th 55, 60.) "'Discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citation.]' [Citation.] 'In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, "'particularly in the reasons presented to the trial judge at the time the request [was] denied.'" [Citations.]' [Citations.]" (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his or her motion for a continuance does not require reversal of a conviction." (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

Hays cannot demonstrate that the trial court abused its discretion in declining to continue the trial. At the time the court ruled, it was not clear (1) if Hays wanted to call Blalock as a witness, (2) if Blalock was willing to testify, and (3) if and when Blalock would be available to testify. By declining to return phone calls from defense counsel and the court, Blalock indicated that he did not want to testify. It appeared that a continuance would be fruitless because Blalock was not cooperating.

The trial court did not exceed the bounds of reason by declining to give defense counsel additional time to attempt to interview this witness. The trial originally was scheduled for January 2010. Yet Hays did not mention this potential alibi witness until March 4, 2010, the last day of trial testimony, more than two years after the incident. Hays had sufficient time to secure this witness.[6]

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[6] "For these same reasons, [Hays] has failed to demonstrate a violation of his federal constitutional rights . . . ." (See *People v. Samayoa*, *supra*, 15 Cal.4th at pp. 840-841.)

III. Motions for New Trial

Hays contends he was entitled to a new trial based on newly discovered evidence and his trial counsel's ineffective assistance in declining to call Amanda Pettaway as a witness at trial. He argues that the trial court committed reversible error in denying his motions for new trial.

Proceedings Below

Hays filed two motions for new trial. His trial counsel filed the first motion on April 22, 2010, arguing that Hays "was denied his right to a fair trial when he was unable to obtain the necessary continuance to call then-just-discovered alibi witness William Blalock. Attached to this motion were (1) an appointment card showing that Blalock had an appointment with someone named Dr. Patel on October 15, 2009, several months before the start of Hays's trial, (2) a business card for orthopedic surgeon John Donahue, M.D., who had an office located in Whittier, and (3) pharmacy receipts for medications prescribed by Dr. Donahue and filled a few weeks before trial started in February 2010.

Hays's first new trial motion also included a declaration from William Blalock, who met with the defense investigator on April 8, 2010. In the declaration, Blalock stated: "I grew up in the Compton area and I was friends with Blair Hays and his family members. I knew his aunt Trina Hays who was a neighbor." When Blalock "grew older," he moved away from Compton. He explained: "It was common for me, Blair, and other neighborhood friends to get together when everyone was in the area visiting their families. We would often go to the house next-door to Trina's and have a bonfire in the back yard." Blalock stated that Hays was with him at a bonfire party from 8:30 p.m. on November 18, 2007, until about 1:00 or 1:30 a.m. on November 19, 2007.

On April 29, 2010, the trial court granted Hays's request to substitute private counsel for his appointed trial counsel. On January 4, 2011, Hays filed his second motion for new trial. He argued that he was entitled to a new trial based on newly discovered evidence. In support of this argument, he attached the declaration from William Blalock that was attached to his first motion and described above. He also attached a declaration from his trial counsel, who explained that he had been working

with Hays and his family since August 2009 to develop Hays's defense case, including identifying and locating alibi witnesses. In December 2009, Hays told counsel for the first time that he was with a man named William on the night of the shooting, but he did not have a last name or contact information for William. On March 4, 2010, Hays's aunt, Trina Hays, told counsel that William's last name was Blalock.

In this second motion Hays also argued that his counsel rendered ineffective assistance by failing to call Amanda Pettaway as a witness at trial. He asserted that she "would have impeached the prosecution's key witnesses." (Initial caps. omitted.) In support of this argument, he attached a summary of his investigator's September 17, 2009 pretrial interview with Pettaway. According to the investigator, Pettaway stated, in pertinent part, "that she and the other girls were about a block north from where the shooting occurred when they got the call from Mr. Huggins. Moments later Mr. Huggins said he saw Gigi [sic] and then shots were heard. Mr. Huggins called as the shots ended and told the girls to run and he would pick them up. Ms. Pettaway ran out of her shoes to hide. When she saw the van pulling up she and Ms. Cain ran up and entered the back of . . . the car. The third girl did not ever get into the van. Ms. Pettaway was immediately informed by Mr. Huggins that it was Gigi [sic] and 'her dude' who did the shooting." Hays argued that Pettaway's statements to the investigator showed "that the women were not close enough to the crime scene to have identified the shooter and that the perpetrator's identity was revealed to them by Huggins immediately after the incident."

Hays also attached to his second motion a declaration from his trial counsel, stating in pertinent part: "I did not call Amanda Pettaway as a witness because when Ms. Rodriguez [the investigator] interviewed her, she did not contradict the other witnesses. She maintained that she did not see much before the shooting and that she did not witness the shooting. It did not appear to me that her testimony would be helpful to our case."

Hays argued that the cumulative effect of the errors discussed in his second motion for new trial required reversal, even if each error by itself did not require reversal.

After hearing oral argument, the trial court denied Hays's motions for new trial. On the claim of newly discovered evidence, the court found it incredible that Hays could

not discover Blalock's last name until March 4, 2010, when the incident occurred in November 2007 and Blalock had been "life-long friends" with Hays and his family. The court also noted that Blalock never returned the calls from counsel and the court, so the court could not confirm if Blalock was willing to testify and if he would be available to testify. The court did not believe that the outcome would have been different if Blalock had testified.

On the ineffective assistance of counsel claim, the trial court did not believe the outcome would have been different if Pettaway had testified. The court found the witnesses who did testify to be "very, very credible."

Newly discovered evidence

A defendant is entitled to a new trial based on newly discovered evidence where he can show: """1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."""" (*People v. Martinez* (1984) 36 Cal.3d 816, 821, quoting *People v. Sutton* (1887) 73 Cal. 243, 247-248.) We review the denial of a motion for new trial based on newly discovered evidence for abuse of discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

In his motions, Hays did not demonstrate that he was entitled to a new trial based on newly discovered evidence. In his declaration, William Blalock stated that he grew up with Hays and often associated with Hays and his family members. Blalock claimed to have been "celebrating [Hays]'s upcoming birthday" on the night of the shooting. Hence, Hays knew about this alibi witness in November 2007. Yet he did not mention this witness to the trial court until March 4, 2010. Hays wanted the trial court to believe that he did not know, and could not have learned, Blalock's last name before March 4, 2010. Hays did not explain how his aunt was able to discover Blalock's last name on the morning of the last day of trial testimony.

The trial court did not abuse its discretion in denying Hays's motions for new trial based on newly discovered evidence. Hays did not demonstrate that he exercised diligence in trying to secure Blalock's testimony at trial.

Ineffective assistance of counsel

"[I]neffective assistance of counsel may be argued in a new trial motion." (*People v. Smith* (1993) 6 Cal.4th 684, 693.) "'To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."' [Citation.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "'Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Hays did not submit a declaration from Pettaway with his new trial motion. Trial counsel, however, submitted a declaration in connection with Hays's new trial motion. Counsel explained that he did not call Pettaway as a witness because "[s]he maintained that she did not see much before the shooting and that she did not witness the shooting." Counsel did not believe that her testimony would contradict that of the prosecution witnesses, nor did he believe that her testimony would be helpful to the case. Counsel made a tactical decision not to call Pettaway as a witness.

Even if Hays had demonstrated deficient performance, which he has not, he cannot demonstrate that the decision not to call Pettaway resulted in prejudice. Huggins and Perry both identified Hays as the shooter in a six-pack photo lineup, at the preliminary

hearing and at trial, and they were positive about their identifications. To the extent Huggins told Pettaway immediately after the shooting that "Gigi [sic] and 'her dude'" did the shooting, this only bolsters Huggins's identification. There is no evidence indicating that Perry or Cain heard Huggins say that to Pettaway.

Pettaway's statements to the investigator do not demonstrate that Cain and Perry were too far away from the scene to identify Hays. Pettaway told the investigator that she and the other woman were a block north of the scene when Pettaway was on the phone with Huggins. It was sometime shortly thereafter that she heard the shots. The evidence at trial indicates that the woman saw Huggins's van and started moving toward it. The jury heard the testimony from Huggins, Cain and Perry about where the women were when the shots were fired. Although their testimony differed on this point, the jury nonetheless convicted Hays. Hays cannot demonstrate prejudice based on the investigator's report of Pettaway's statements.

Because there was no error here, Hays's claim of cumulative error is without merit.

IV. Consecutive Sentencing

Hays contends the trial court abused its discretion in imposing a consecutive sentence on count 2 for attempted murder. He argues (1) that the court did not "recognize it had the discretion to impose concurrent sentences" and (2) that "a consecutive sentence was not warranted under the facts of this case." These arguments are not supported by the record.

At the sentencing hearing, Hays did not ask the trial court to impose a concurrent term for the attempted murder count.[7] The only request he made was that the court stay the firearm enhancement allegation. His counsel stated: "The only argument I would

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[7] Notwithstanding that, the People do not argue on appeal that Hays has forfeited this claim by failing to object below to the imposition of consecutive terms on counts 1 and 2. (*People v. Scott* (1994) 9 Cal.4th 331, 356 ["complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal"].)

make for the record, is going to be that the special allegation on count 2 of 12022.53(c), I understand that the allegation should run consecutive. My argument is that it should be stayed pursuant to 654. That's all, Your Honor." The court explained that it did not have discretion to stay the enhancement: "I would have no problem staying it. But it's all by law and it's automatic as tomorrow is Saturday, you know. I mean, if it wasn't I would have no problems entertaining that as an issue. But I don't think the court has any jurisdiction to do so. . . ."

Hays cites this exchange between counsel and the trial court in support of his assertion that the "court thought that the consecutive sentence on count 2 was 'automatic' and required by law." He argues that "the court did not even recognize it had the discretion to impose concurrent sentences" on counts 1 and 2. This argument is disingenuous given that counsel and the court did not discuss the propriety of running the sentence on count 2 consecutively with the sentence on count 1. There is nothing in the record indicating that the court failed to understand its sentencing discretion.

When the trial court imposed sentence, it explained that the sentence on count 2 is "going to run consecutive to that in count 1 because it is a separate victim." This is a proper ground for imposing consecutive terms. (See *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1061, disapproved on other grounds in *People v. Superior Court* (*Sparks*) (2010) 48 Cal.4th 1, 18 ["the naming of separate victims in separate counts is a circumstance on which a trial court may properly rely to impose consecutive sentences"].)

Hays argues that a consecutive sentence on count 2 was improper because "there was only a single shot fired by the shooter." He points out that only one shell casing was found at the scene. Substantial evidence in the record indicates that more than one shot was fired. The bullet that killed Dunn remained inside his body. At least one more shot must have been fired because the evidence showed that a bullet struck the driver side window after the shooter fired into the car through the passenger side window.

The trial court did not abuse its discretion in imposing a consecutive sentence on count 2.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.