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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN BONIFACIO,

Defendant and Appellant.

B270882

(Los Angeles County
Super. Ct. No. YA091574)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Donna L. Harris, 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, Noah P. Hill and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Marvin Bonifacio was convicted by a jury of the murder of his girlfriend, Zuly Flores. On appeal, Bonifacio argues that: (1) the trial court erred in admitting Instagram images showing Bonifacio with firearms; and (2) the trial court abused its discretion in refusing to strike his prior strike conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Investigation

1. Law Enforcement Response to the Crime

In November of 2014, Defendant Marvin Bonifacio was living at his parents' house with his girlfriend, Zuly Flores, and their two children: K.B. (then five years old) and S.B. (then two years old). At 11:09 p.m. on November 13, 2014, Officer Ana Kiefer of the Inglewood Police Department responded to a report of a shooting at the home of Bonifacio's parents. When Kiefer arrived, she saw Flores lying on a couch in the living room, with blood coming from her left temple. Bonifacio was standing over Flores and attempting to administer CPR. Kiefer noticed that Bonifacio "had blood on him." Paramedics arrived shortly thereafter and pronounced Flores dead at the scene.

Bonifacio told Kiefer that Flores had been struck by a bullet fired from outside the house that had traveled through the window. During a subsequent search of the house, officers did not find a bullet hole in the window, nor did they find any bullet casings outside of the house.

2. Bonifacio's Statements to Detectives

Detective Loy Waters, the lead investigator in the case, interviewed Bonifacio the morning after the murder. Bonifacio stated that he had taken a "Xanax" and was drinking beer and watching television when he heard a loud bang. He then saw Flores bleeding. Bonifacio stated that neither he nor Flores was holding a gun when the shooting occurred, that there were no guns in the house, and that the only type of gun he owned was a BB gun. Waters explained that officers had not found any evidence suggesting the bullet had been fired from outside the house and asked whether the victim had been depressed. In response, Bonifacio stated that Flores "was fine" and insisted that the bullet had come from the exterior of the house.

During the interview, Waters was informed that Bonifacio's daughter K.B. had made a statement to police indicating that she had seen Bonifacio shoot Flores. After receiving this information, Waters told Bonifacio that K.B. had been speaking with the police about what she had witnessed in the house and would be called to testify against him at trial. At that point, Bonifacio admitted Flores had not been shot from outside the house and claimed that she had shot herself in the head. Bonifacio said that while he was sitting on the couch with Flores, she pulled out what he thought was a knife. Bonifacio explained that he tried to grab the knife from Flores because he was worried about a prior incident in which she had run into the bathroom with a knife. As he was reaching for the knife, he realized the object was in fact a gun, which then discharged. He did not know whether he or Flores had pulled the trigger. After the shooting, Bonifacio said he had put the gun in the bed of a black truck outside the house.

When asked why he had lied initially about how the shooting had occurred, Bonifacio said he “was out of it.” Bonifacio said he dropped the gun into the bed of a truck because he “didn’t want any problems coming . . . to [his] dad’s house. At the conclusion of the interview, Detective Waters placed Bonifacio under arrest. Officers searched the home of Bonifacio’s parents, the surrounding premises, and vehicles in the immediate area that matched Bonifacio’s description. No gun was ever found.

3. Bonifacio’s Jailhouse Calls

On November 14, 2014, Bonifacio made two phone calls from jail. In the first call, Bonifacio said the police had informed him that his mother told officers he had gone outside after the gunshot and that he had committed the shooting. Bonifacio’s friend said “you should have taken off, fool.” Bonifacio replied, “I – I thought about it. That’s why I was outside but my mom didn’t let me go. She started telling me things and she didn’t let me get out.” Bonifacio’s friend repeated that he “should have split.” Bonifacio replied, “I wanted to do that. Mom didn’t let me.” On a second call later that day, Bonifacio asked his friend to “go on [his] Instagram” and “delete [his] profile.”

The next day, Bonifacio made another call from jail to his brother. In the call, Bonifacio’s brother put their mother on the line. Bonifacio told her “you, you handed me over to them, you, you turned me in.”

B. The Charges and Pre-Trial Evidentiary Disputes

1. The Charges

On April 10, 2015, the Los Angeles County District Attorney filed an information charging Bonifacio with one count of murder (Pen. Code,¹ § 187, subd. (a).) The information also contained special allegations asserting that Bonifacio had: (1) personally and intentionally discharged a firearm, resulting in death (§ 12022.53, subd. (d)); and (2) suffered a prior conviction that qualified as a “strike” under the Three Strikes law. (See §§ 667, subds. (b)-(j) & 1170.12.)

2. Admission of Instagram Evidence

Prior to trial, the prosecution informed the court that it intended to admit certain pictures from an Instagram account that Bonifacio maintained under the username “Ice Money Productions.” The prosecution said that they would call Brenda Rodriguez, Flores’ cousin, to authenticate that the account belonged to Bonifacio.

The prosecution further explained that it had obtained evidence related to the Instagram images from two sources. First, Rodriguez had provided investigators with six screenshots she had taken of images that Bonifacio had posted to his Instagram account. Many of the images were accompanied by captions. Second, the prosecution had also obtained business records (the Instagram Business Record) from Instagram in response to a subpoena. The Instagram Business Record showed

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

various details about the account along with photos the account owner had posted. It indicated the account owner's gender was listed as male and the email address on record was Flores_03@yahoo.com.

Three of the six screenshots that Rodriguez had provided to investigators were also present in the Instagram Business Record. They consisted of: (1) an image of a hand with a gun, captioned "for u girl;" (2) an image of Bonifacio kissing Flores on the cheek, captioned "Took 6 years 2 kids to find out this was fckn bullshit. Oh well she make me do it but fck it;" and (3) an uncaptioned image of a tattooed hand holding a rifle over red basketball shorts.

The three photographs that appeared in Rodriguez's screenshots, but not in the Instagram Business Record, consisted of the following: (1) an image of a shirtless man with a tattoo on his stomach with two separate captions stating "Fuck you, bitch, ass nigga. Your fam may not know how much of a hoe you are cause you play them stupid, but I know your hoe ass bitch, I got that for you play me. I put you down like my dog, bitch, fuck cacas, fuck Zuly" and "#zulykilla;" (2) an image of three handguns with two separate captions stating "Bitch hope u ready" and "Dispensa 2 ur fam but we on now @zfloress1994;"² and (3) an image of Bonifacio's entire Instagram profile page, which shows multiple photos of Bonifacio (including some images of him with

² Rodriguez testified that "ZFloress1994" is Flores' Instagram username.

Flores), and an accompanying profile caption stating “FUCK A DUMB BITCH. I RUN MY MONEY. ICE MONEY. Zfkillla.”³

Defense counsel objected to the admission of the Instagram evidence, arguing that the account did not bear Bonifacio’s name and that the prosecution had failed to establish that the account was in fact his. Counsel also argued that the screenshots Rodriguez had provided included “a lot of text” that did not appear in the Instagram Business Record and that there was no proof of “where [they] came from” or that “[Bonifacio] even posted [them].” The prosecution responded that Rodriguez’s testimony would provide a sufficient foundation that the account belonged to Bonifacio and that he was the person who had posted the images and captions in the six screenshots she had provided. The prosecution also argued that Bonifacio had deleted the posts not present in the Instagram Business Record before Detective Waters had served the subpoena and that explained why they were not included within it.⁴

The court found all of the images and captions admissible, explaining that there was “a sufficient nexus to establish a foundation for the admissibility of any of these Ice Money Production Instagrams.” The court further explained that, as to the three screenshots and captions that did not appear in the

³ Many of the photos shown in the screenshot of the account’s profile page are also included as individual posts in the Instagram Business Record.

⁴ The prosecution did not produce any evidence that posts, if any, Bonifacio had made to his account and then removed prior to the subpoena would not be reflected in the Instagram Business Record.

Instagram Business Record, there was “sufficient foundation” for the inference that the posts had been deleted before Detective Waters served the subpoena on Instagram and were therefore not included in the Instagram Business Record.

C. The Evidence At Trial

1. The Prosecution’s Evidence

a. Detective Waters’ Testimony

At trial, Detective Waters confirmed that he had interviewed Bonifacio the morning after the murder. Waters summarized the beginning of the interview and described how Bonifacio had initially insisted that the bullet had come from outside. He also testified that while interviewing Bonifacio, he had learned that the defendant’s daughter had told police he shot the victim. The prosecution then played the jury a recording of the remainder of the interrogation and also provided a transcript.

The prosecution also introduced records of Bonifacio’s three calls from jail. Detective Waters testified that he recognized one of the male voices as Bonifacio’s. The jury heard recordings of the first two calls and the prosecution read aloud a transcript of the third.

b. K.B.’s Testimony

Shaun Rivas, a children’s social worker, testified that he had traveled to the police station on the night of the shooting to take K.B. and S.B. into protective custody. Shortly after Rivas had left the station with the children, K.B. told him she had seen Bonifacio pull a gun out from under the couch and shoot Flores in the head. She made this statement without prompting or questioning from Rivas. Rivas turned the car around, went back

to the police station, and told the officers what K.B. had said. After speaking with the officers, K.B. repeated the same statement to Rivas, again un-prompted, despite Rivas' attempts to change the subject.

K.B., then six years old, also testified at the trial. K.B. stated that immediately prior to the shooting, she had been sitting on the couch with her parents and S.B. She recalled that she and S.B. had been watching a cartoon called "Fin Tails." The prosecutor asked K.B. whether she remembered testifying at the preliminary hearing that Bonifacio and Flores were arguing. After K.B. said she could not recall her testimony, the court permitted the prosecution to read the testimony into the record. In the prior testimony, K.B. stated that Bonifacio had been accusing Flores of having boyfriends and threatening to take the children away from her.

K.B. testified that Flores began crying, and that Bonifacio had told Flores she "should be dead by now." K.B. stated that Bonifacio then made "a bullet com[e] at [Flores]" with a gun he was holding. K.B. said she heard a loud noise, and her ears hurt and felt "wiggly." K.B. then "saw a hole" in Flores' head and blood spilling onto the floor. She heard S.B. saying "Mommy, wake up. Mommy, wake up." K.B. saw Bonifacio leave the living room and go outside right after the shooting. Later, K.B. saw Bonifacio talking to officers and "pretending that he didn't know" what had happened.

On cross examination, K.B. testified that, after speaking with Rivas on the night of the shooting, she had been sent to the home of her maternal grandmother. Defense counsel asked K.B. if her maternal grandmother had told her Bonifacio was holding the gun. After K.B. said no, the defense counsel read her

preliminary testimony into evidence, where K.B. had said her grandmother told her “[Bonifacio] was holding the gun,” and that was how “[Flores] got killed.” On redirect, however, the prosecution read into the record another portion of the preliminary testimony in which K.B. had clarified that she and her grandmother had been “talking back and forth about what [she] saw.”

c. Instagram Photos

The prosecution called Brenda Rodriguez, Flores’ cousin, to testify about images and captions she had seen on Bonifacio’s Instagram account. Rodriguez explained that Flores had introduced her to Bonifacio at a family gathering five years ago. Shortly after they had met, Rodriguez had received a request to follow her Instagram account from an individual with the username “Ice Money Productions.” Rodriguez concluded the account was Bonifacio’s because the account photo was an image of him.

In approximately April 2014, Rodriguez saw images of guns on Bonifacio’s account with captions that contained threatening language toward Flores. Rodriguez testified that the posts caused her to become concerned for Flores’ safety. Rodriguez used her phone to take screenshots of the photos and the accompanying captions. When Rodriguez later attempted to view the photos on Bonifacio’s Instagram profile, she discovered that they had been deleted. She did not tell Flores about the photos. The prosecution showed Rodriguez all of the screenshots admitted into evidence and she confirmed that these were in fact the screenshots she had taken of Bonifacio’s posts. Rodriguez testified that she had not manipulated the photos.

Defense counsel renewed its foundation objection to the admission of Rodriguez's screenshots. In response, the prosecution argued that Rodriguez's testimony that she had met Bonifacio, and received a request from an account bearing his photo shortly thereafter, provided a sufficient foundation for all of the images. The court overruled the objection and admitted all of the screenshots.

2. The Defense Case

Bonifacio's mother, Patricia Flores,⁵ testified on his behalf. Patricia said Bonifacio and Flores had a good relationship and that she had never seen Bonifacio get physical with, threaten, or speak badly of Flores. Patricia had known Flores since she was 14 or 15 years old and considered her like a daughter.

Patricia said that on the night of the shooting, she had been awakened by a noise, and then heard K.B. screaming. Patricia went downstairs and saw Bonifacio walking in the front door. Flores was on the couch, bleeding from her nose and mouth. Patricia said she then picked up K.B. to take her to her bedroom and that Bonifacio had picked up S.B. to do the same. Patricia's husband called 9-1-1, and the police came almost immediately. Patricia denied trying to stop Bonifacio from leaving. Patricia told Detective Waters she had seen Bonifacio with a gun in the past, but she was not sure if it was real.

Patricia also testified about the recorded phone conversation she had with Bonifacio while he was in prison. She said that, during the call, Bonifacio was talking to her about

⁵ For clarity and convenience, and not out of disrespect, we will refer to Patricia by her first name.

wanting to go to a party earlier on the day of the shooting and how she had not let him. On cross examination, the prosecutor asked if, during that call, Bonifacio had said “you handed me over to them, you turned me in.” Patricia said no. The prosecutor read from the call’s transcript in which Bonifacio says “you, you handed me over to them, you, you turned me in.” Patricia insisted that Bonifacio was talking about her not allowing him “to go with his friends” to a party. The prosecution asked if that was what she thought Bonifacio was talking about, and Patricia said yes.

D. Verdict and Sentencing

The jury found Bonifacio guilty of second-degree murder (§ 187, subd. (a)). The jury also found he had personally and intentionally discharged a firearm, resulting in the death of the victim (§ 12022.53, subd. (b)). Bonifacio waived his right to a jury trial on the prior conviction allegation. The trial court found the allegation true, and that the conviction qualified as a prior strike under the Three Strikes law. The court denied Bonifacio’s motion to strike the prior strike offense and imposed a total sentence of 55 years to life in state prison.

DISCUSSION

Bonifacio raises two issues on appeal. First, he contends the trial court should have excluded all of the Instagram evidence. Second, he argues the court should have struck his prior felony conviction for purposes of sentencing under the Three Strikes law.

A. Admission of Instagram Evidence

“A trial court’s exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Moreover, evidentiary error is generally evaluated under the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Under *Watson*, an error is reversible only if “it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.” (*Watson, supra*, 46 Cal.2d at p. 836.)

Bonifacio argues that the trial court erred by admitting the Instagram evidence. He argues that Rodriguez’s testimony failed to provide a proper foundation that he owned or controlled the Instagram account, or was otherwise the person who had posted the images. He also argues that the discrepancies between the screenshots and the Instagram Business Record, which do not contain any reference to several of the images depicted in Rodriguez’s screenshots, call into question the accuracy of all the images.

We need not resolve whether the court abused its discretion in admitting the Instagram evidence because even if it did err, there is no reasonable probability the jury would have reached a more favorable verdict had the evidence been excluded. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 671 [even if “the testimony should have been excluded . . . any error was harmless under the [*Watson*] standard. . . . There is no reasonable

probability the jury would have reached a more favorable verdict had the trial court struck [the testimony]”).)

The record shows that the prosecution introduced overwhelming evidence of guilt that had nothing to do with the Instagram posts. First, Bonifacio’s six-year-old daughter K.B. testified that she saw Bonifacio point a gun at the victim’s head, say “you should be dead by now,” and then shoot her. A social worker testified that K.B., completely unprompted the morning after the crime, told her that Bonifacio had shot the victim.

Second, Bonifacio also provided conflicting stories about how Flores had died. Initially, Bonifacio insisted that a bullet had come through a window and that neither he nor Flores owned a gun. However, after Waters informed him that his daughter had told police about what she witnessed, Bonifacio immediately changed his story, claiming that Flores shot herself in the head. Although he claimed it was a suicide, Bonifacio disposed of the gun immediately after the shooting and had no rational explanation for why he did so.

Third, a recorded jailhouse call reveals Bonifacio talking about how he wanted to flee the scene but his mother stopped him. He later accuses her of “turn[ing] [him] in.” In another call, Bonifacio asks his friend to delete his Instagram posts.

In light of such evidence, it is not reasonably probable that the verdict would have been more favorable to Bonifacio had the Instagram screenshots been excluded.

B. Trial Court’s Refusal to Strike Prior Felony Conviction

Bonifacio contends that the trial court abused its discretion when it denied his motion to strike his prior conviction under

People v. Superior Court (Romero) (1996) 13 Cal.4th 497 for the purposes of applying the Three Strikes law. In deciding whether to strike a prior serious and/or violent felony conviction under the Three Strikes law, the court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Bonifacio contends that his prior strike should have been stricken because the nature and circumstances of the murder are not singularly dispositive. Bonifacio argues that the trial court failed to give fair consideration to the nature of his prior conviction, as well as his background, character, and prospects. Bonifacio emphasizes that the second degree robbery was his only prior conviction and that it was not as serious as other robbery offenses because there was no evidence he was charged with the use of a weapon. Furthermore, he asks the court to consider that there was no evidence of domestic violence between Bonifacio and the victim; he had a stable living arrangement; and, if he had been sentenced without the prior strike, his prospects for committing future serious or violent acts would greatly diminish by the time he is eligible for parole. Consideration of all of these factors, Bonifacio argues, supports the conclusion that he is outside the spirit of the Three Strikes law and that dismissal of the prior conviction would be in the furtherance of justice.

We review rulings on motions to strike prior convictions for an abuse of discretion (*People v. Williams, supra*, 17 Cal.4th at p. 162), and find none here. At the hearing on Bonifacio’s *Romero* motion, the trial court stated that it had read the probation report for the murder. The court noted that Bonifacio had been convicted of the prior strike only four years before the date of the current offense and that they found “nothing” in his record to suggest “that he falls outside the spirit of the Three Strikes law.” As to the nature of the present felony, the court stated that “the present crime doesn’t get any more serious than murder.” In light of this record, Bonifacio has not shown that the court abused its discretion in finding that he did not fall outside the spirit of the Three Strikes law and denying his petition to strike the prior offense.

DISPOSITION

We affirm the trial court’s judgment.

ZELON, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

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