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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.

GIOVANNI PEREZ,

Defendant and Appellant.

B270376

(Los Angeles County
Super. Ct. No. TA134452)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Patrick Connolly, Judge. Affirmed.

Steven Schorr, 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, Assistant
Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy
Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Giovanni Perez was convicted of first degree murder and possession of a firearm by a felon arising from a drive-by shooting on Christmas in 2013. At trial, a single witness connected defendant to the crime. Defendant appeals, asserting that the trial court should have given the jury an instruction required when a prosecutor elicits testimony from an accomplice, and contending that there was insufficient evidence to support the convictions. We affirm. There was no evidence the witness was involved in the crime, so there was no basis for an accomplice instruction. In addition, the testimony of the witness, along with the additional evidence presented, constituted sufficient evidence to support the convictions.

BACKGROUND

A. Charges

The Los Angeles County District Attorney charged defendant by information with murder (count 1, Pen. Code, § 187, subd. (a)¹) and one count of possession of a firearm by a felon (count 2, § 29800, subd. (a)(1)). As to count 1, the information also alleged that defendant personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)), defendant had prior felony strike conviction under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12), and defendant had a prior serious felony conviction (§ 667, subd. (a)(1).) Defendant pleaded not guilty and denied all special allegations. Defendant's motion to bifurcate trial on the prior convictions was granted.

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

B. Prosecution case

At trial, Karim Rodriguez testified that on December 25, 2013, he, his girlfriend Juliana B.,² and their two children were visiting Karim's mother and stepfather. The children were three and four years old at the time.

Karim's brother Noel, stepfather Juan Rodriguez, and friend Chino came into the home and said they had been in a fight with some neighbors in an alley about ten minutes earlier. As they talked about the fight, Karim and the others walked outside to the front of the house. They heard gunshots coming from a truck, and Karim ducked. Karim said he "didn't really recognize the shooter or the color of the truck." Karim said he told police that the truck was gray or greenish. He thought there were two people in the truck.

As Karim ducked he turned to look for his children, and found that Juliana was on the ground with one of the children clutched to her chest. Juliana was bleeding from the back of her head or upper back. The family placed Juliana into Karim's truck and drove her to the hospital. By the time they reached the hospital parking lot, Juliana was dead.

Juan Rodriguez, Karim's stepfather, gave inconsistent testimony about who was driving the truck at the time of the shooting. He testified that he was on the sidewalk when the shooting occurred. He said he thought the truck was brown, and he saw two people in the truck. He testified that he saw the truck go by while shots were being fired from it, but he could not

² We refer to the victim by her first name to protect her privacy. (See Cal. Rules of Court, rule 8.90(b)(4).) There are also multiple witnesses that share last names, and we refer to many of them by first names for clarity.

identify anyone in the truck because he is blind in one eye. Juan testified that he “thought it was” defendant driving, “but I can’t see that well.” But he also testified that he was sure it was defendant because “[w]hen the truck went by firing the shots at me, that’s when I saw that it was him.” He later testified that it was hard to see who was driving because the person’s face was partially covered. He also admitted that he told police that the driver was “one of Chema’s sons-in-law.” Defendant is one of Chema’s sons-in-law, but not the only one. Juan later testified that he did not know who was in the truck.

Los Angeles Police detective Gerardo Vejar testified that in the three times he interviewed Juan, Juan never implicated defendant as being involved in the shooting. Instead, Juan gave Vejar very generic descriptions of the two people he said he saw in the truck.

Los Angeles Police detective Charles Hicks testified about a photo showing Juliana’s body in the hospital parking lot where she was declared dead, and a photo showing that a bullet had pierced the back of her head at the base of her skull. Deputy medical examiner Jeffrey Gutstadt testified that Juliana died as a result of a gunshot wound to the back of the head.

Hicks testified that at the scene of the shooting he found about 14 shell casings, bullet holes in the iron gate and house, and a bullet fragment inside the house from a bullet that penetrated the front wall. The casings were .223 casings, indicating that they came from a military-type assault rifle. Because there were so many casings, it was likely the rifle had a large capacity magazine. Hicks also testified about photographs taken at the scene showing bullet holes in the iron fence and gate outside the residence, the walls of the house, a window in the

house, and the living room ceiling. Bullets were fired from the outside into the house, and some penetrated into the living room.

Video surveillance from a warehouse at the end of the block recorded around the time of the shooting showed a green truck coming from the direction of the shooting, turning the corner, and traveling through the warehouse parking lot. The video quality did not allow for identification of a license plate number or anyone in the truck. However, the video showed that at least two people were inside the truck, and an additional person may have been in the back of the truck.

Daniel Delgado testified about the fight that occurred in the alley before the drive-by shooting. Daniel and his brothers, Alex and Edgar, went to the house of a friend, Gabriel Vargas. A group of eight to ten people were there, “chilling, having a good time. They were drinking, you know, playing cards, some were smoking weed.” Daniel testified that Vargas was also there, along with Vargas’s girlfriend’s father, Chema. Defendant was there as well.

While in the yard near the alley, Daniel saw Noel, Juan, and Chino approach. “[T]hey started talking shit to us, you know, like trying to fight with us. And so my brother [Edgar] ended up fighting with them.”³ Alex stepped in to break up the fight, but ended up hitting Chino, who either stumbled or fell to the ground. Chino got up, said, “Get me the gun, fool,” and Noel handed him a gun. Alex took off running, and Chino fired the

³ Daniel’s brother, Alex, and Karim’s sister, Lupita, had just had a baby together. The mother of Karim and his siblings lived next door to the mother of Daniel and his brothers. Daniel testified that there had been some “issues” and “family stuff” between the two families.

gun at Alex twice. When the shots were fired, everyone scattered. Vargas grabbed Chino, took away the gun, and pushed Chino out through the gate.

Vargas also testified that Noel, Juan, and Chino were involved in an altercation with Alex, Edgar, and Daniel at his house on Christmas day. Defendant, who was married to Vargas's girlfriend's sister, was at the Vargas house that day as well. Vargas said he did not directly witness the altercation, and he could not remember if defendant was present when the fight occurred. Vargas said he heard one shot that sounded like a firecracker, but he did not see who fired the gun. After that, everyone left. Vargas testified that he saw defendant about 20 minutes later.

Vargas spoke to detectives Hicks and Vejar on May 7 and 8, 2014, but he testified that he did not remember what he said. Portions of the interview were played for the jury. In the interview, Vargas told the detectives that during the fight in the alley, Chino shot the gun, a revolver, into the air. Vargas told everyone to leave. About eight or nine minutes later, Vargas heard the sound of the shots that killed Juliana about a block and a half away.

In his interview, Vargas also told detectives, "It was Gio," referring to defendant. Defendant's "homies came and picked him up in the truck and they left." He said the truck was black, there was a driver and passenger in front, and defendant got into the back seat on the passenger side. Defendant said, "I'll be back. . . .[I]f these fools got a gun, I'm going to dump on them."⁴

⁴ Vargas also recalled this statement as, "If they got a burner, I'm going to dump on these fools." He testified that a "burner" is a gun, and to "dump on" someone is to shoot them.

Vargas then heard the shots down the street. Later, defendant told Vargas that he did what he had to do, and “I hope I didn’t hit nobody.” Vejar asked if this statement made it sound as if defendant were the one doing the shooting, and Vargas answered, “Well, yeah. Basically.” Vargas told the detectives that he was afraid he could be killed for snitching. At trial, Vargas testified that he lied to the detectives because they threatened to implicate him in the shooting and he was scared.

Vargas also testified that after his interview, he was booked into custody. While in jail, he called his girlfriend. The call was recorded, and the recording was played for the jury. In the call, Vargas said, “Damn Gio going to get washed the fuck up.” Vargas told his girlfriend that he tried to lie to the police, but they already knew everything so he had to tell the truth.⁵ In a second call, Vargas told his girlfriend that he tried not to tell the police anything, but the police already knew. Vargas’s girlfriend was at defendant’s house during the second call, and Vargas said, “Just don’t tell him that I said anything,” and later, “Hey, don’t say that I said something, ok?” Vargas also said, “Tell him to flee because . . . they’re going for him.”

On cross-examination, Vargas testified that he sold marijuana from his house and the adjacent alley. Vargas testified that he had been smoking meth the day the police interviewed him, and he was interviewed for about six hours. He agreed with defense counsel that detectives suggested defendant as a possible perpetrator, and Vargas gave the detectives “what they asked for” by implicating defendant so he could go home.

⁵ Vejar testified that when he and Hicks were interviewing Vargas and told him they knew everything about the shooting, it was a ruse to get additional information from Vargas.

Hicks testified that Vargas did not appear to be under the influence of drugs during the interview. Hicks also testified that he and Vejar never told Vargas that he should identify defendant as the perpetrator.

Hicks testified that he obtained search warrants for defendant's phone and the phone of Eric Perez, defendant's brother. A text message was sent from defendant's phone to Eric's phone on May 9, 2014, the day after the police interviewed Vargas and Vargas called his girlfriend from jail. The message read, "Hey, you know the guy from Family Guy, that the [sic] fat one?" The response from Eric's phone read, "Peter Griffin." A message from defendant's phone said, "Yeah. He's talking." Eric's phone responded, "Okay. Got it."

Vargas testified that people sometimes call him Gordo or Fat Boy, and Eric calls him Fat Boy. Eric and other friends sometimes compared Vargas to Peter Griffin, a character from the animated television series Family Guy. Eric was also called as a witness, and he testified that he knows Vargas. When asked about text messages to defendant, Eric said he did not remember anything.

C. Defense case

The defense called a single witness, Terry Martinez. She testified that she lived near the location of the shooting and was inside her home when she heard shots fired. She went outside and saw a dark blue truck pass in front of her house. She called 911. She could not see how many people were in the truck, but she saw the driver. Martinez testified that the driver was wearing a hooded sweatshirt, and from the shape of the person's chin, it appeared the driver was female. Because she saw only the hood and the chin, she was not able to identify the person.

Hicks testified that he showed a six-pack photographic lineup to Martinez, and she did not identify defendant.

The defense rested. In closing, defense counsel argued that Vargas had a motive to lie about defendant's involvement in the shooting because the police were telling him that he could be charged with the crime if he refused to give them information.

D. Verdict and sentence

The jury found defendant guilty of first degree murder (count 1), and found true that he personally and intentionally discharged a firearm in the commission of the offense, causing death. The jury also found defendant guilty of possession of a firearm by a felon (count 2). Defendant admitted his prior convictions.

The court sentenced defendant to a total of 80 years to life, calculated as follows. For count 1, the court imposed a term of 25 years to life, doubled to 50 years to life based on the Three Strikes law. The court imposed a consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), and an additional consecutive five years under section 667, subdivision (a)(1) for defendant's prior serious felony conviction. On count 2, the court imposed the midterm of two years, to be served concurrently. The court granted defendant custody credit and imposed various fines and fees.

Defendant timely appealed.

DISCUSSION

A. Accomplice jury instruction

Before closing arguments, as counsel and the court were discussing jury instructions, defense counsel requested an accomplice instruction. He said he was planning to say in closing argument that Vargas had a motive to lie because he was an

accomplice. The court declined the request for the instruction, stating, “[T]here is no evidence here, whatsoever, that the jury could rely upon to believe that [Vargas] is an accomplice. So, the court will not give that instruction.”

Defendant argues that the trial court erred by refusing to give CALCRIM No. 334, which instructs a jury that it must determine whether a witness was an accomplice before considering that witness’s statements. “A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” (§ 1111.) The requirement that accomplice testimony be corroborated is an exception to the substantial evidence rule. (*People v. Romero* (2015) 62 Cal.4th 1, 32.) ““Whether someone is an accomplice is ordinarily a question of fact for the jury; only if there is no reasonable dispute as to the facts or the inferences to be drawn from the facts may a trial court instruct a jury that a witness is an accomplice as a matter of law.” [Citation.] When a person is not an accomplice as a matter of law, a defendant has the burden of proving by a preponderance of the evidence that a witness was an accomplice in the crime charged against the defendant.” (*People v. Rangel* (2016) 62 Cal.4th 1192, 1222.)

“Because the omitted instruction is based on section 1111, the asserted error is one of state law, subject to the reasonable probability standard of harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836–837 [299 P.2d 243.]” (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; see also *People v. Gonzales* (2011) 52 Cal.4th 254, 304.)

Defendant argues that the accomplice instruction was warranted because the jury “could have reasonably inferred from the evidence that Vargas had both a motive to commit a retaliatory shooting in response to the altercation in the alley and a reason to lie to police to avoid being prosecuted himself for the crime.” Defendant argues that because Vargas sold drugs in the alley and did not want police attention, he “had a motive to encourage retaliation for what occurred in the alley.” Thus, “the jury could have reasonably inferred Vargas either instigated or encouraged [defendant’s] participation in the drive-by shooting.” Defendant also points to Vargas’s testimony that defendant said he was going to “dump on” the victims, and asserts that a “reasonable interpretation of such an exchange is that Perez was acting on Vargas’ instruction and reassuring him that he intended to take care of the situation by retaliating against the person(s) who had disrupted the peaceful transaction of commercial activity in Vargas’ alley.”

Defendant’s arguments about Vargas’s motives are based on speculation, not evidence. An accomplice is “one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (§ 1111.) “An accomplice must act ‘with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ [Citation.]” (*People v. Clark* (2016) 63 Cal.4th 522, 606.) Here, there was no evidence that Vargas was liable for either Juliana’s murder or possession of the firearm involved in the murder. The evidence did not show that Vargas intended to commit the crime or that he encouraged or facilitated the crime. Vargas told police only that defendant

told him his plans as he left for the scene of the crime, and when defendant returned he said he hoped he had not hit anyone.

The evidence does not support the inference that Vargas was an accomplice. “If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony.” (*People v. Horton* (1995) 11 Cal.4th 1068, 1114.) Here, there was no evidence that could have supported an accomplice instruction, and the trial court did not err by refusing defendant’s request to instruct the jury pursuant to CALCRIM No. 334.

B. Sufficiency of the evidence

Defendant also argues that there was insufficient evidence to support his conviction. “To assess the evidence’s sufficiency, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the

trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Defendant acknowledges that “unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) However, defendant argues that Vargas was not credible. He contends that no evidence connected defendant to the fight in the alley. Instead, the evidence showed that Vargas took the gun from Chino, and Vargas had a motive to retaliate for the alley shooting. He asserts that this “tends to undermine confidence in the reliability of Vargas’ statements tying [defendant] to the crime.” Defendant also argues that coercive tactics used by Hicks and Vejar when questioning Vargas render Vargas’s statements inherently unreliable. In addition, defendant argues that the detectives suggested to Vargas that defendant was the perpetrator.

The theme of defendant’s arguments is that Vargas’s testimony is not credible. However, it is the exclusive province of the jury to determine the credibility of a witness; we may not substitute our evaluation of a witness’s credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Arguments that Vargas was not credible therefore do not support a reversal. Moreover, the jury had ample information to evaluate

Vargas's credibility. Vargas testified that he did not know anything about defendant's involvement in Juliana's death, which contradicted what he told police. Defense counsel argued below that Vargas's testimony was not credible because Vargas was either under the influence of or withdrawing from drugs. The jury heard the interview, including the detectives' tactics attempting to get Vargas to talk. The jury also heard Vargas's jailhouse phone calls, in which he told his girlfriend that he tried to lie to police but eventually had to tell the truth. The jury heard Vargas tell the detectives he was afraid to be labeled a snitch, and they heard him ask his girlfriend not to tell defendant that he gave information to police. Moreover, Vargas's testimony about the fight in the alley was largely corroborated by Daniel's testimony. Defendant has not pointed to anything in the record that suggests the jury was unable to assess Vargas's credibility.

Defendant also argues that Vargas's statements about what defendant said were hearsay. Defendant acknowledges that any statements by defendant fall under the party admission exception to the hearsay rule,⁶ but he argues that because defendant chose not to testify at trial, Vargas's statements cannot be considered substantial evidence supporting the conviction.

Defendant did not object to Vargas's testimony or the contents of his interview as hearsay, and as a result he has forfeited any argument on appeal based on the hearsay rule. (Evid.Code, § 353, subd. (a); *People v. Alexander* (2010) 49 Cal.4th 846, 908.) Moreover, there is no requirement that a defendant testify at trial for the party admission hearsay exception to apply,

⁶ "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party." (Evid. Code, § 1220.)

and defendant cites no authority for this argument. We therefore reject defendant's argument that Vargas's statements to police were hearsay that cannot be deemed substantial evidence supporting the convictions.

Moreover, there was sufficient evidence to support the convictions. The evidence showed there was a fight in the alley, during which Chino fired a gun. Minutes later, someone in a truck used a military-type assault rifle to fire more than a dozen shots at a group of people standing with Chino. Juliana, holding her child, was shot in the head and killed. Multiple sources—Karim, Juan, Martinez, and the warehouse video—indicated that the truck was a dark-colored pickup truck. Vargas told police that he saw defendant get into a dark-colored pickup truck moments before the shooting, and then he heard shots. Vargas also told police that defendant said to him as he left in the pickup truck that he planned to shoot at people, saying, “[I]f these fools got a gun, I’m going to dump on them.” When defendant returned, he told Vargas that he hoped he had not hit anyone. Vargas told police he could be killed for snitching on defendant. Vargas later called his girlfriend and told her that he had had to tell the truth and defendant was in trouble, and he asked her not to tell anyone that he had talked to the police. Defendant and his brother exchanged text messages shortly after Vargas was interviewed, stating that Vargas was talking to the police.

“A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied.” (*People v. Barnwell* (2007))

41 Cal.4th 1038, 1052.) Here, viewed in the light most favorable to the judgment, there was substantial evidence the jury could have relied upon in finding defendant guilty of both counts.

DISPOSITION

Affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.