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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS DIAZ RIVERO, Defendant and Appellant.	B267288 (Los Angeles County Super. Ct. No. MA063442)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Carlos Diaz Rivero appeals from the judgment entered upon his negotiated plea of no contest to attempted murder, with an admission he personally used a firearm. (Pen. Code, §§ 664, 187, 12022.5, subd. (a).) The court sentenced appellant to prison for 15 years.[1] We affirm.

FACTUAL and PROCEDURAL BACKGROUND

On August 11, 2014, the court conducted a preliminary hearing. On June 28, 2014, Bertha Lara lived in apartment No. 35 of an apartment complex located in the 38000 block of 11th Street East in Palmdale. About 2:00 a.m. or 2:30 a.m., she heard appellant's wife arguing with someone. About 2:45 a.m., Lara was awakened by the slamming of a door. She then heard gunshots and later saw appellant standing outside apartment No. 24, firing at the door.

On June 28, 2014, Luis Garcia lived in apartment No. 24. He was awakened by the sound of four gunshots. He did not think they were at his door, so he went back to sleep. Later, about 3:00 a.m., appellant's son-in-law telephoned Garcia, asked if he was okay, and made comments causing Garcia to look at his door. Garcia observed four holes in his door. Garcia had not been hit by a bullet.

About a week prior to the shooting, appellant had threatened to kill Garcia if he did not stay away from appellant's wife. Appellant had also threatened to cut off Garcia's private part. Garcia told appellant that the accusations were false and

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[1] On June 14, 2016, appellant, in propria persona, filed a petition for writ of habeas corpus (case No. B275513) and, on June 20, 2016, this court ordered that this appeal and the petition be considered concurrently. The petition will be the subject of a separate order.

suggested to appellant that he was drunk and should go home and rest.

Maria Llamas, appellant's estranged wife, lived in the apartment complex. During the early morning hours of June 28, 2014, appellant came to her apartment and told her that he had been told that a man was inside. Llamas told him no man was in the apartment and appellant left. Appellant had something in his hand that looked to Llamas like a toy gun. Llamas called the police.

Los Angeles County Sheriff's Deputy Jonathan Taylor, trained and certified to testify pursuant to Proposition 115, testified that on June 28, 2014, he and his partner, Deputy Medrano, responded to the apartment complex. When they arrived, appellant had his hands in the air and told the officers "the weapon was in the bushes." Taylor spoke to appellant in English and appellant appeared to understand him. Medrano recovered a nine-millimeter gun from the bushes. Medrano told Taylor that a casing was in the chamber. Medrano removed an expended .380-caliber casing from the chamber.

Taylor, reading appellant's *Miranda*[2] rights from a card, advised appellant of his *Miranda* rights in English. Appellant appeared to understand and waived his rights. During the waiver, Taylor asked appellant if he understood (1) he had the right to remain silent, (2) anything he said might be used against him in court, (3) he had a right to an attorney during questioning, and (4) if appellant could not afford an attorney, one would be appointed for him before any questioning. To each of the four questions, appellant replied "yes."

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].

Taylor subsequently asked appellant questions and conversed with him in English. Appellant stated he went to the apartment of his wife (Llamas) because he thought her lover was there. Appellant had brought a gun just in case the man was there. Appellant and Llamas argued, and appellant slammed the door shut and left.

Taylor testified, "we had another deputy contact the wife to establish that we had a crime. Because the suspect didn't point the weapon at her, we didn't have a 245. All we had was a possession of an unloaded [*sic*] firearm. Therefore, we arrested him for that." Taylor did not expressly identify the deputy who contacted Llamas. Medrano did not testify at the preliminary hearing and Taylor did not testify about any conversations between Medrano and appellant. Taylor later wrote the police report of the incident and included in the report what Medrano had said he had done during the course of the investigation.

After the deputies transported appellant to the sheriff's station, Taylor heard a crime broadcast about another crime at the apartment complex so he returned to apartment No. 24. He found bullet fragments directly in front of the front door, inside the living room about 15 feet from the front door, and in the rear hallway, "to the left of the bedroom."

Because the deputies suspected the two calls were related, they spoke to appellant again. This time Los Angeles County Sheriff's Deputy Abran Rodriguez interviewed appellant in Spanish, a conversation Taylor did not comprehend.

Rodriguez testified that during the early morning hours of June 28, 2014, he *Mirandized* appellant, who agreed to speak with him. Rodriguez interviewed appellant in Spanish at the jail.

Appellant initially said he was not sure what had happened earlier in the day. Appellant later admitted he was involved in "shooting at a door in an apartment with – at our victim [Garcia]." Appellant told Rodriguez he went to Llamas's apartment and found Llamas and Garcia having sex. Appellant "had a firearm in his right hand that he didn't remember having." (*Sic*.) Garcia saw appellant and ran into his apartment (No. 24) with appellant in pursuit. Appellant arrived at apartment No. 24 but was unable to catch Garcia.

Appellant asked Garcia to come out and be a man, but Garcia did not exit. Appellant fired two rounds into the apartment door. Appellant tried to kick the door open so he could enter. Appellant admitted firing two more rounds into the door. Appellant said he wanted to "fuck him up."

Rodriguez asked appellant what he was intending to do with the gun. Appellant replied to the effect, " 'I had the gun in my hand for a reason; to use it.' " Appellant indicated he had heard footsteps behind the closed door and fired the shots in what he thought was Garcia's direction. During Rodriguez's interview of appellant, appellant stated his purpose was to kill Garcia and he asked Rodriguez if Garcia was dead or if something had happened to Garcia. Rodriguez told appellant that Garcia was fine, which appellant did not believe.

At the conclusion of the preliminary hearing, the magistrate discussed *People v. Smith* (2005) 37 Cal.4th 733, for the proposition that intent to kill is established if the defendant desires to kill or knows to a substantial certainty that that result will occur. The magistrate held appellant to answer for attempted willful, deliberate, and premeditated murder. The magistrate indicated there was sufficient evidence for an

additional count but did not specify what it was, and the People indicated they would file it in the information.

The information filed August 22, 2014, alleged as count 1 that appellant committed attempted willful, deliberate, and premeditated murder with firearm use (Pen. Code, § 12022.5, subd. (a)). Count 2 alleged appellant committed the offense of shooting at an inhabited dwelling (Garcia's apartment) (Pen. Code, § 246).[3]

At all times prior to February 10, 2015, appellant was represented by retained counsel. On February 10, 2015, the court relieved retained counsel and appointed the public defender, at appellant's request.

On July 13, 2015, appellant filed a Penal Code section 995 motion on the ground there was insufficient evidence that a crime was committed and that appellant was guilty of it. Appellant argued that when he fired at the door he could not have intended to kill Garcia because Garcia testified he was in bed when he heard what he thought were gunshots, and that Garcia ignored them and went back to sleep. On July 14, 2015, the People filed an opposition.

An amended information, filed August 13, 2015, replaced the Penal Code section 12022.5, subdivision (a) firearm allegation with firearm allegations pursuant to section 12022.53, subdivisions (b) and (c). The amended information realleged

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[3] On August 25, 2014, defense counsel told the court appellant had instructed appellant's counsel to enter pleas of not guilty by reason of insanity. The court appointed two psychiatrists to evaluate appellant's sanity at the time of the offense. The reports were prepared and each indicated appellant was not legally insane. The record does not reflect further sanity proceedings.

counts 1 and 2. It also included three new counts: count 3, assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)); count 4, assault with a firearm (Pen. Code, § 245, subd. (a)(2)); and count 5, attempted first degree burglary (of Garcia's apartment) with a person present. (Pen. Code, §§ 459, 664). As to each of counts 3 through 5, the amended information alleged firearm use (Pen. Code, § 12022.5, subd. (a)).

On August 13, 2015, the court denied appellant's Penal Code section 995 motion. Appellant pled not guilty to the amended information. On August 18, 2015, appellant waived his constitutional rights, was advised of the consequences of his plea, and entered a negotiated plea of no contest to attempted murder. He also admitted he personally used a firearm. During the taking of the plea, appellant stated he had had enough time to speak with counsel about his case. Counsel stipulated there was a factual basis for the plea and concurred in the waivers and plea.

The advisements and plea were reflected in a plea form signed by appellant and defense counsel. Appellant affirmed the interpreter had read and translated the entire form to him. Appellant indicated he understood the information on the form, which he had initialed and signed. In one portion initialed by appellant, he stated that, before entering his plea, he had had a full opportunity to discuss with counsel the facts of the case, available defenses, and anything else appellant thought was important to his case.

Appellant acknowledged that by initialing and signing the form, he was waiving his constitutional rights and subjecting himself to the consequences. The court asked if appellant was doing that "freely and voluntarily because you think it's the best

thing for you to do" and appellant replied yes. The court accepted the plea and admission, and found appellant guilty. The court sentenced appellant to prison as previously indicated, awarded him presentence credit, and imposed various fines and fees. At all proceedings appellant was assisted by a Spanish interpreter.

On September 22, 2015, appellant filed a notice of appeal and a request for a certificate of probable cause. In his request, appellant asserted there was no factual basis for the plea, he was not guilty, and if he had received effective assistance of counsel, he would not have pled no contest. The trial court issued a certificate of probable cause.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed March 30, 2016, the clerk of this court advised appellant to submit within 30 days any contentions, grounds of appeal, or arguments he wished this court to consider. On June 14, 2016, appellant filed a supplemental opening brief. In it, appellant argues that (1) because Taylor did not speak Spanish and appellant did not speak English, appellant did not clearly and unequivocally waive his *Miranda* rights, (2) appellant's statements were involuntary in violation of the Fifth Amendment, and (3) there was no independent corpus delicti supporting his statements.

Although the trial court executed a certificate of probable cause (Pen. Code, § 1237.5), the certificate does not expand the grounds upon which an appeal can be taken following a no contest plea. The certificate merely establishes a procedure for

screening out frivolous claims among issues not waived. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8-9; *People v. DeVaughn* (1977) 18 Cal.3d 889, 895-896.)

"A plea of guilty, . . . is the most serious step a defendant can take in a criminal prosecution. . . . As to the merits, the plea is deemed to constitute a judicial admission of every element of the offense charged. [Citation.] Indeed, it serves as a stipulation that the People need introduce no proof whatever to support the accusation: the plea ipso facto supplies both evidence and verdict. [Citation.]" (*People v. Chadd* (1981) 28 Cal.3d 739, 748.) A guilty plea constitutes an "implied admission that the People have established or can establish every element of the charged offense, thus obviating the need for the People to come forward with *any* evidence. [Citations.]" (*People v. Martin* (1973) 9 Cal.3d 687, 693-694.) A plea of no contest has the same effect as a plea of guilty. (Pen. Code, § 1016, 3d par.)

Subject to an exception inapplicable here, appellant, by his no contest plea, waived any error in the trial court's denial of his Penal Code section 995 motion. (Cf. *People v. Lilienthal* (1978) 22 Cal.3d 891, 897 (*Lilienthal*).) Moreover, appellant, by that plea, waived issues based on *Miranda* (*People v. Gibbs* (1971) 16 Cal.App.3d 758, 765) and the Fifth Amendment (*DeVaughn*, 18 Cal.3d at pp. 895-896, fn. 6). He also waived sufficiency of the evidence issues (*People v. Hayton* (1979) 95 Cal.App.3d 413, 416-417), and corpus delicti issues (see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 453-454 [corpus delicti rule pertains to evidentiary sufficiency, not admissibility]). He further waived issues of alleged ineffective assistance of counsel during the preliminary hearing. (Cf. *People v. Marlin* (2004) 124 Cal.App.4th 559, 563-564, 567-568.)

Under a heading indicating the trial court employed the wrong standard when denying appellant's Penal Code section 995 motion, appellant asserts Medrano recovered the discarded weapon and had conversations with appellant at the scene.[4] Noting Medrano did not testify at the preliminary hearing, appellant argues Taylor's preliminary hearing testimony about what Medrano told him was inadmissible double hearsay, rendering the trial court's decision erroneous.

Again, however, appellant, by his no contest plea, waived his challenge to the trial court's ruling on his Penal Code section 995 motion. (Cf. *Lilienthal, supra,* 22 Cal.3d at p. 897.) Testimony by Taylor about what he was told was single-level hearsay. Its admission into evidence is authorized by Proposition 115. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1067-1068, 1070.) There was no preliminary hearing testimony that Medrano conversed with appellant at the scene. Even if Medrano had done so, any statement by appellant to him would have been admissible under the Evidence Code section 1220 admissions hearsay exception.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*People v. Wende* (1979) 25 Cal.3d 436, 443; *Smith v. Robbins* (2000) 528 U.S. 259, 278-284.)

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[4] Appellant asks this court to take judicial notice of the above asserted facts. There is no need for this court to do so.

DISPOSITION

The judgment is affirmed.

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STRATTON, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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