Filed 1/24/17 P. v. Zavala and Moreno CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ZAVALA and JAIRO MORENO, Defendants and Appellants.	B267660 (Los Angeles County Super. Ct. No. BA432027)

APPEAL from judgments of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Zavala.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant Jairo Moreno.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Carlos Zavala and Jairo Moreno of one count of carrying a loaded firearm (Pen. Code, § 25850, subd. (a)),[1] finding that neither was a registered owner (§ 25850, subd. (c)(6)). The jury convicted Zavala alone of possession of a firearm by a felon (§ 29800, subd. (a)(1)), finding true the allegation that he had suffered a prior felony conviction. The court placed Moreno on formal probation for 36 months subject to various terms and conditions, including that he spend the first 270 days in county jail.

Zavala had already been sentenced in another unrelated case (case No. BA433835) to four years in state prison. Consolidating the sentence in the current case with the earlier sentence, the court in the current case sentenced Zavala to a consecutive term of eight months for carrying a loaded firearm. The court stayed the sentence on the remaining count under section 654, and struck a prior prison prior (§ 667.5, subd. (b)).

In Moreno's appeal from his judgment of conviction, Moreno's appellate counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asking that we independently review the record. We find no arguable issues and affirm Moreno's judgment.

In his appeal, Zavala contends that the trial court erred in instructing the jury pursuant to CALCRIM No. 315 that an eyewitness' level of certainty is a factor to be considered in evaluating identification testimony. We disagree and affirm Zavala's judgment.

---

1 Undesignated section references are to the Penal Code.

BACKGROUND

Around 9:30 p.m. on December 5, 2014, Los Angeles Police Officer Michael Knoke was on patrol as the passenger officer when he observed Moreno near Trinity and 35th Streets in Los Angeles. Moreno looked surprised, clutched his jacket, and walked away. Officer Knoke got out of the car, trained his flashlight on Moreno, and followed as Moreno ran through a gate into a backyard, holding a small, stainless steel gun in his right hand. Officer Knoke ordered Moreno to stop. When Officer Knoke was about 25 feet away, he observed Moreno pause at the backyard fence and hand the gun over the fence to another person, whom Moreno identified as Zavala. According to Officer Knoke, the exchange was illuminated by the light from his flashlight and he got a good look at Zavala's face (he had never seen Zavala before). Zavala was about the same height as Moreno and was wearing a black baseball cap, hooded sweatshirt and dark jeans. As Zavala ran off and scaled a gate, Officer Knoke continued his pursuit of Moreno, who was soon detained at gunpoint by Officer Knoke's partner officer.

Officer Knoke then spotted Zavala running on 35th Street several houses down the street, still holding the gun. Officer Knoke pursued him and Zavala passed between two homes, at which point Officer Knoke lost sight of him.

With the help of other officers, Officer Knoke set up a perimeter. After knocking on the doors of several homes, police officers knocked on Zoila Enciso's door and asked for her consent to search her home. According to Enciso, she lived at that residence with her husband, her three children, her parents, and her brother's family, which included his

wife and four children. That night, the family members got together because Enciso's aunt had passed away. When the police knocked, the family members gathered in the living room and then were directed to go outside. Enciso observed Zavala exit the house, where he was arrested. She was surprised that he was there. She had never seen Zavala before. He was not a family member, only family members had gathered at the house, and he had not been invited into the house.

When Officer Knoke arrived, Zavala was seated among Enciso family members on a couch. When the occupants exited, Zavala passed close to Officer Knoke, and he recognized Zavala as the man who had received the gun from Moreno and fled. At Officer Knoke's direction, Zavala was arrested. Officer Knoke had no doubt of his identification. At that point, Zavala was wearing a black hat, black long-sleeved shirt, and dark jeans. His build and height were consistent with the man who received the gun from Moreno.

A search of Zavala's person and the Enciso's house failed to produce the gun. A stainless steel .25 caliber semiautomatic pistol was later found in the backyard of the house next door to the Encisos'.

DISCUSSION

Zavala's Appeal

The trial court instructed the jury on evaluating eyewitness testimony using CALCRIM No. 315, which includes as a question to be considered: "How certain was the witness when he or she made an

identification?"[2] At trial, Zavala requested no modification of the instruction.

On appeal, he contends that including this factor, without cautionary language, deprived him of due process because studies suggest that an eyewitness' level of certainty is not a reliable indicator of the accuracy of the identification. Zavala acknowledges that despite

---

[2] As given by the trial court, the full version of CALCRIM No. 315 was as follows: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.

"In evaluating identification testimony, consider the following questions:

"Did the witness know or have contact with the defendant before the event?

"How well could the witness see the perpetrator?

"What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?

"How closely was the witness paying attention?

"Was the witness under stress when he or she made the observation?

"Did the witness give a description and how does that description compare to the defendant?

"How much time passed between the event and the time when the witness identified the defendant?

"Was the witness asked to pick the perpetrator out of a group?

"Did the witness ever fail to identify the defendant?

"Did the witness ever change his or her mind about the identification?

"How certain was the witness when he or she made an identification?

"Are the witness and the defendant of different races?

"Was the witness able to identify other participants in the crime?

"Were there any other circumstances affecting the witness's ability to make an accurate identification?

"The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."

such studies, consideration of an eyewitness' level of certainty has been accepted by the United States Supreme Court (*Neil v. Biggers* (1972) 409 U.S. 188, 199-200) and in a line of authority by the California Supreme Court (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232; *People v. Ward* (2005) 36 Cal.4th 186, 213-214; *People v. Arias* (1996) 13 Cal.4th 92, 168) and the Court of Appeal (*People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303, overruled on other grounds, *People v. Martinez* (1995) 11 Cal.4th 434; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562). Nonetheless, relying on out-of-state authority, Zavala contends that California "clings to an outdated notion and instructs juries that a witness who is certain of his or her identification is likely to be correct."[3]

The California Supreme Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 411 (*Sanchez*), disposes of the contention. There, the trial court gave CALJIC No. 2.92 (the CALJIC equivalent of CALCRIM No. 315), which instructed that one of the factors that the jury should consider in judging the accuracy of eyewitness testimony was "'the extent to which the witness is either certain or uncertain of the identification.'" (*Sanchez, supra*, 63 Cal.4th at p. 461.) The

---

[3] Zavala finds developments in New Jersey particularly relevant. In *State v. Henderson* (2011) 208 N.J. 208, 241, the New Jersey Supreme Court ordered that the standard New Jersey instruction on eyewitness identification testimony be modified, resulting in a new pattern instruction (later adopted by the Court) which states in part: "Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification."

defendant contended that the trial court erred in not modifying the instruction to delete that factor. The Supreme Court rejected the contention.

The court first held that the claim was forfeited because the defendant made no request in the trial court to modify the instruction. "If defendant had wanted the court to modify the instruction, he should have requested it. The trial court has no sua sponte duty to do so." (*Sanchez, supra*, 63 Cal.4th at p. 461.)

Second, the court found no error. "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new. We cited some of them three decades ago to support our holding that the trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification. [Citation.] In *People v. Wright* (1988) 45 Cal.3d 1126, 1141, we held 'that a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.' We specifically approved CALJIC No. 2.92, including its certainty factor. [Citation.] We have since reiterated the propriety of including this factor. [Citation.] [¶] Defendant correctly notes that some courts [in other states] have disapproved instructing on the certainty factor in light of the scientific studies. [Citations.] But, in a case like this involving uncertain as well as certain identifications, it is not clear that even those cases would prohibit telling the jury it may consider this factor. . . . Any reexamination of our previous holdings in light of

developments in other jurisdictions should await a case involving only certain identifications." (*Sanchez, supra*, 63 Cal.4th at p. 462.)

Finally, the court found no prejudice because "[t]he instruction cited the certainty factor in a neutral manner, telling the jury only that it could consider it. It did not suggest that certainty equals accuracy. In this case, telling it to consider this factor could only benefit defendant when it came to the uncertain identifications, and it was unlikely to harm him regarding the certain ones." (*Sanchez, supra*, 63 Cal.4th at pp. 462.) Also, there was significant corroborating evidence tending to connect him to the string of robberies of which he was convicted. (*Id.* at pp. 462-463.)

In the instant case, as in *Sanchez,* there was no request to modify the eyewitness identification instruction to delete or elaborate on the certainty factor. Therefore, the claim is forfeited. (*Sanchez, supra,* 63 Cal.4th at p. 461.) Even if it were not forfeited, we would find no error. Inclusion of the certainty factor has been upheld by a long line of California authority; whatever reexamination might be necessary we leave to the California Supreme Court under the doctrine of stare decisis.

Finally, even if we were to conclude that inclusion of the certainty factor was erroneous, we would find that the error was harmless under the state (*People v. Watson* (1956) 46 Cal.2d 818, 836) and federal (*Chapman v. California* (1967) 386 U.S. 18) constitutions. Like CALJIC No. 2.92 in *Sanchez,* CALCRIM No. 315 (fn. 2, *ante*) listed the "certainty factor in a neutral manner, telling the jury only that it could consider it

[and] not suggest[ing] that certainty equals accuracy." (*Sanchez, supra*, 63 Cal.4th at p. 462.) Thus, it was "unlikely to harm" Zavala regarding the certainty of Officer Knoke's identification of him as the man who received the gun from Moreno and fled. (*Id.* at pp. 462.) Further, there was independent corroborating evidence. Zavala was discovered inside the Enciso residence, where he had no reason to be: he was not a family member, he had not been invited, and Zoila Enciso had never seen him before. Further, a stainless steel pistol like the one seen by Officer Knoke was discovered in the backyard of the house next door to the Enciso residence. These facts strongly corroborated Officer Knoke's identification of Zavala. They created a compelling inference that Zavala, while being pursued by Officer Knoke, discarded the gun in the back yard next door to the Enciso house, and then entered the house to hide, even though he knew no one there and was not part of the family gathering at the house that night. Thus, there was strong corroboration of Officer Knoke's identification of Zavala, and any error in including the certainty factor in CALCRIM No. 315 was harmless.

Moreno Appeal

Pursuant to *Wende, supra,* 25 Cal.3d 436, we have independently reviewed the record and find no arguable issue that would undermine Moreno's judgment of conviction.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.