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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. ARTHUR PEREZ, Defendant and Appellant.	B233296 (Los Angeles County Super. Ct. No. BA358075)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed.

Tara K. Hoveland, 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, James William Bilderback II and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Arthur Perez challenges his conviction for attempted murder on the grounds of insufficiency of the evidence and evidentiary error. We reject his contentions and affirm.

PROCEDURAL BACKGROUND

On September 18, 2009, an information was filed charging appellant with the attempted willful, deliberate, and premeditated murder of Richard Rios (Pen. Code, §§ 187, subd. (a), 644).[1] Accompanying the charge were allegations that appellant had personally used a handgun (§ 12022.53, subds. (b) - (d)) and inflicted great bodily injury (§ 12022.7, subd. (a)).[2] In May 2010, after the jury in appellant's first trial was unable to reach a verdict, the trial court declared a mistrial. The jury in appellant's second trial found him guilty as charged and found the special allegations to be true. On May 27, 2011, the trial court imposed a sentence of life imprisonment for appellant's conviction of attempted murder, and an additional sentence of 25 years to life for an enhancement for personal gun use resulting in great bodily injury (§ 12022.53, subd. (d)).[3] This appeal followed.

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

2 Although the information referred to subdivision (b) of section 12022.7 in connection with the great bodily injury allegation, the jury returned a special verdict on the allegation under subdivision (a) of section 12202.7. Appellant has asserted no contention of error with respect to the allegation.

3 The court imposed and stayed punishment on the remaining enhancements.

FACTS

A. *Prosecution Evidence*

In June 2009, Richard Rios lived with his girlfriend, Ileana Valenzuela, and her daughter in a four-unit apartment building in Lincoln Heights. Close to Rios's apartment building was a second building fronting on Main Street containing businesses at street level and several apartments on a second level (Main Street building). On June 22, 2009, Rosemarie Romero and Greg Reyes, who lived in the Main Street building, invited appellant and his family for a meal in their apartment. According to Romero, the only access to the apartment was through a security door in front of the Main Street Building, near a barber shop in the building.

The prosecution's key witness was the victim, Rios, who testified as follows: Late in the afternoon on June 22, 2009, the smell of marijuana awoke him from a nap. He left his apartment and entered an outdoor area, where he saw appellant 15 to 30 feet away, smoking a marijuana cigarette in front of a neighboring apartment in Rios's building. According to Rios, appellant had a slight mustache and a "fade" haircut, and wore a white T-shirt with long khaki shorts.

When Rios waved his hand near his nose to indicate that he smelled marijuana smoke, appellant replied, "I fucking live here, too." Rios returned to his apartment and put on his shirt and shoes, with the intention of asking appellant to smoke elsewhere. When Rios saw that appellant had disappeared, he walked toward the barber shop in the Main Street building, looking for appellant.

As Rios was about to return to his apartment, appellant emerged from a gated security door in the Main Street building near the barber shop. Rios noticed that appellant had his hand in his right pocket. When appellant asked, "What's [your] fucking problem?," Rios answered, "I'm nobody. I don't want any problems," and stated, "You've got to understand, . . . there's kids that live here."

Appellant replied, "Well, that's why I'm out here. My kids are eating dinner. I have kids upstairs." Appellant also said that he had a gun. At this point, Valenzuela appeared outside Rios's apartment building and called out to Rios. Fearful that appellant might shoot her, Rios told her to return to the apartment.

Rios continued to talk to appellant, hoping to resolve the incident peacefully. With no warning from appellant, Rios heard popping sounds and saw a spark from what appeared to be a chrome gun in appellant's hand. Rios felt a bullet hit his stomach and tried to run away, but fell to the ground and passed out. When he awoke, Valenzuela was holding his hand. Police officers soon arrived.

Valenzuela was determined by the trial court to be unavailable as a witness, and portions of her prior trial testimony were presented to the jury. Accordingly to Valenzuela, at approximately 7:00 p.m. on the date of the shooting she awoke from a nap and saw Rios standing near the apartment's door. He told her that he smelled something and left the apartment. Shortly afterward, Rios returned to the apartment, put on his shirt, and said that he would be "right back."

Because Rios did not return immediately, Valenzuela walked to the sidewalk in front of the apartment building and observed Rios down the street, talking to appellant. From her vantage point, she saw only the left profile of appellant's face. Although she could not hear Rios or appellant, the conversation appeared to be "normal." When Rios gestured to her to return to the apartment, she did so. She soon heard what sounded like six or more firecrackers, ran to the sidewalk, and found Rios lying on the street with multiple wounds.

At approximately 7:25 p.m., Los Angeles Police Department (LAPD) Officer Eduardo Borges and his partner were standing in front of their patrol car, which was parked near the Main Street building. Borges heard a gunshot, turned around, and saw a man fire a gun at a second man. As the officers drove toward

the shooting, Borges saw the shooter run into the Main Street building. When they stopped the car, they observed a woman run toward the victim, who was lying in the street. The officers requested backup and watched the Main Street building door into which the shooter had fled. Borges saw no one emerge from the door. When other officers arrived, they formed a perimeter around the Main Street building.

Rios was taken to a hospital. Between 8:00 and 8:15 p.m., he provided a description of the shooter to LAPD Detective Gabriel Barboza. Officers searched the Main Street building and detained several men, including appellant. When found in Romero's and Reyes's apartment, appellant was wearing a baseball cap and a black shirt with black pants.

At approximately 10:40 p.m., Barboza conducted in-field show-ups for Valenzuela. She was initially shown a group of six men from the Main Street building, none of whom she identified as the man she saw talking to Rios. Later, when she viewed appellant, she told Barboza that she was sure he was the man in question. Barboza then ordered a search of Romero's and Reyes's apartment, which did not disclose the white T-shirt and khaki shorts attributed to the shooter.

The next day, LAPD Detective Maria Luisa Arce-Dominguez spoke by telephone with Romero. Romero told the detective that appellant had been a dinner guest in the apartment the night before. She said appellant had left the apartment to smoke and had remained outside approximately 20 minutes. While appellant was outside, Romero heard a shooting. Appellant then returned to the apartment and went into the bathroom.

Following Detective Arce-Dominguez's telephone interview with Romero, two other detectives interviewed Romero in person. She reiterated the version of events she had given Arce-Dominguez, viz., that while dining in the apartment

with his family, appellant had gone out for a smoke, after which Romero had heard a loud bang and appellant had returned to the apartment and gone into the bathroom.

Following the interview with Romero, detectives went to the hospital to show Rios a six-pack photographic lineup. After being given a standard admonishment relating to the six-pack, Rios identified a photo of appellant, as "the one that shot me and tried to kill me. He shot me point blank 1 or 2 feet away." Rios was "110 percent" certain appellant was the shooter.[4]

On August 3, 2009, a man made a phone call from the jail where appellant was incarcerated to a number appellant had given Detective Barboza as a contact number. The man, whose voice Barboza identified as appellant's, spoke to an unidentified woman. An excerpt from an audio recording of the call was played for the jury. During the call, the following exchange occurred:

"[Appellant]: . . . [D]id he give you those metal things or no?

"[Female]: Yeah, yeah. Uh-huh.

"[Appellant]: Okay. If anything, just put those away because . . . if I do beat this, they can re-file on me any time and . . . I don't want them raiding the house."

At trial, Romero was presented as a witness during the prosecution's case-in chief. She acknowledged that appellant and his family were at her apartment for dinner on the night of the shooting, but denied telling LAPD detectives that appellant had gone outside to smoke or that he was outside at the time she heard a loud bang.

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4 Rios also positively and repeatedly identified appellant as the shooter during court proceedings prior to the underlying trial. Although Valenzuela had been in the hospital room with Rios, they did not discuss her identification of the night before, and she left before detectives showed Rios the photographic line-up.

B. *Defense Evidence*

Aurora Navarro, appellant's girlfriend, testified that she, appellant and their three daughters had gone to dinner at Romero's and Reyes's apartment in the Main Street building. She stated that appellant never left the apartment until he was arrested.

Greg Reyes testified that appellant, Navarro, and their children arrived at his apartment shortly after 5:00 p.m., and that appellant never left the apartment before he was arrested. On cross-examination, Reyes acknowledged that aside from the security door in front of the Main Street building, the only potential exit from his apartment was by an inoperable fire escape. According to Reyes, people who used the fire escape would probably injure themselves because they would be compelled to jump from a considerable height to the ground.

Robert Shomer, a Ph.D. in experimental psychology, testified that even under favorable conditions, eye witness identification of strangers is only 50 percent reliable. He opined that it is almost impossible for someone who has seen only the left profile of a stranger from a distance of 100 feet to re-identify that individual reliably. He also opined that the photographic lineup shown to Rios was suggestive because only one individual in the lineup had a haircut resembling appellant's.

DISCUSSION

Appellant contends (1) that substantial evidence does not support his conviction, and (2) that his recorded phone conversation was improperly admitted.

A. *Substantial Evidence*

Appellant contends the evidence was insufficient to prove he was the person who shot Rios. We disagree.[5] "[A]bsent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.]" (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) Here, Rios positively identified appellant as the shooter immediately after the incident and repeatedly did so at subsequent court proceedings, including the instant trial. Rios's trial testimony was further corroborated by Valenzuela's repeated identification of appellant as the man she saw talking to Rios before the shooting. Upon this evidence, the jury could properly conclude that it was appellant who attempted to murder Rios.

Appellant maintains that Rios's and Valenzuela's identification testimony was inherently improbable or physically impossible. He argues that their initial identifications were not credible because Rios was receiving treatment for multiple bullet wounds when he selected appellant in the photographic lineup and Valenzuela had only a partial view of the man she saw with Rios. Appellant also suggests that Rio's initial identification may have been influenced by Valenzuela, as Rios identified appellant only after talking to Valenzuela, who had already identified appellant in the field show-up.

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5 "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless 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 on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Additionally, appellant directs our attention to evidence in his favor, including the testimony from the defense witnesses, and potential flaws in the evidence against him. He notes that the police never found the shooter's clothing or gun in the Main Street apartment, that no physical evidence -- e.g. gunshot residue -- was presented linking appellant to the shooting, and that there was evidence suggesting that the shooter may have been able to leave the Main Street building through a second door.[6] Appellant also points to apparent inconsistencies in Rios's testimony, and discrepancies between Rios's description of the shooter and descriptions from other witnesses.

Although these aspects of the trial evidence may suggest inferences that conflict with Rios's and Valenzuela's identification testimony, they do not render that testimony insufficient to support appellant's conviction. As our Supreme Court has explained, "[t]o warrant the rejection of the statements given by a witness who has been believed by [the fact finder], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which 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.]" (*People v. Huston* (1943) 21 Cal.2d 690, 693, disapproved on another ground in *People v. Burton* (1961) 55 Cal.2d 328, 352.) As Rios's and Valenzuela's identifications involved no physical impossibility and were not false on their face, any potential conflicts in the evidence were properly presented to the

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6 Regarding the potential alternative exit from the apartment level of the Main Street building, Detective Barboza testified that after the shooting, he found what may have been a door to a second staircase leading up into the building. According to Barboza, he was unable to open the door because "it was under lock and key."

jury, which found no reasonable doubt regarding appellant's guilt. We decline to displace the jury as finder of fact.

We note, moreover, that while the eyewitness testimony alone would be sufficient to support the conviction, in fact, Rios's and Valenzuela's testimony was bolstered by other evidence pointing to appellant as the shooter. Rios's initial account of the incident related that he had been shot by a man who had been smoking. Romero, who was hosting appellant and his family in her apartment, told detectives that appellant had gone out for a smoke and been outside when she heard shooting. Rios also told officers that when he complained that the marijuana smoke could be smelled by his children, the shooter replied that his own children were eating dinner upstairs too. The defense witnesses confirmed that appellant and his children were dining in an upstairs apartment with Romero and Reyes. This evidence further corroborated the accuracy of Rios's and Valenzuela's identifications. In sum, there was sufficient evidence to support appellant's conviction.

B. *Recorded Phone Conversation*

Appellant asserts several challenges to the admission of the excerpt of the recorded phone call that he purportedly made on August 3, 2009. Appellant argues that the phone call was inadmissible under *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), that no adequate foundation and authentication was provided for the recorded call, and that the call's potential for prejudice exceeded its probative value (Evid. Code, § 352). As explained below, appellant has failed to establish reversible error.

1. *Underlying Proceedings*

Prior to trial, appellant's defense counsel objected to the admission of the August 3, 2009 phone call, insofar as it encompassed references to a prospective plea bargain. In reply, the prosecutor stated that he intended to admit only the portion of the phone call during which the male participant requested that some "metal things" be "put . . . away." The trial court made no ruling regarding the phone call, but remarked that the prosecutor would be required to lay a foundation for its admission.

The day before the pertinent portion of the phone call was admitted at trial, defense counsel objected to the call and the accompanying transcript, arguing that the remarks regarding "'metal things'" were "vague" and prejudicial and the identity of the male participant had not been properly established. The trial court overruled the objection. Later, defense counsel sought an order directing the prosecutor to present evidence that the term "metal things," as used by appellant during the excerpt of the phone call, was properly translated in the accompanying transcript. The court rejected the request, noting that the pertinent remarks were in English.[7]

To lay a foundation for the admission of the pertinent portion of the phone call, the prosecutor presented testimony from Alex Mancia, a criminalist assigned to the Inmate Telephone Monitoring Service (ITMS), and Detective Barboza. Mancia testified that ITMS records inmate phone calls at the request of police officers. After a "target" phone number is provided, ITMS makes recordings of phone calls to the target number and preserves them "in the ordinary course of business." According to Mancia, ITMS records showed that on August 3, 2009,

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[7] The excerpt of the call presented to the jury contains some remarks in Spanish. According to the transcript, prior to the discussion of the "metal things," the female informed the male participant in Spanish that "we" had put the male participant's "things" in a big plastic bag.

the pertinent call was placed from the facility where appellant was incarcerated to a target number Barboza had provided.

Barboza testified that shortly after the shooting, he talked to appellant, who gave him a contact phone number. Barboza then asked ITMS to record calls to the contact number. Later, ITMS provided Barboza with a recording of the August 3, 2009 call, which had been made to the contact number. Barboza stated that he recognized appellant as the male participant in the call on the basis of his conversation with appellant in June 2009.

Defense counsel's sole objection to Barboza's and Mancia's testimony challenged Barboza's ability to identify the male participant in the call. The trial court overruled the objection and admitted the recorded phone call. Later, after the close of the presentation of evidence, defense counsel asserted an objection to the recorded phone call based on a lack of foundation, which the trial court overruled.

2. *Melendez-Diaz*

Pointing to *Melendez-Diaz, supra*, 557 U.S. 305, appellant contends that the phone call constituted inadmissible hearsay and that its presentation at trial contravened his Sixth Amendment right to confront witnesses. However, as he never raised these contentions before the trial court, he has failed to preserve them on appeal. As our Supreme Court has explained "'[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal [citations].' [Citations.]" (*People v. Belmontes* (1988) 45 Cal.3d 744, 766, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Furthermore, the objection before the trial court must be "on the exact ground being raised on appeal. [Citations.]" (*People v. Bury* (1996) 41 Cal.App.4th 1194,

1201.) This principle is applicable to challenges based on the hearsay rule and the Confrontation Clause of the Sixth Amendment. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.)

Furthermore, we would reject the contentions were we to address them on the merits. In *Melendez-Diaz,* the United States Supreme Court concluded that because certain laboratory analyses prepared for trial were "testimonial statements" under the Confrontation Clause, they were not admissible under the "business records" exception to the hearsay rule, in lieu of testimony from the analysts who prepared them. (*Melendez-Diaz, supra,* 557 U.S. at pp. 311-324.) In contrast, appellant's statements during the phone conversation fall within the so-called "admissions of a party" exception to the hearsay rule (Evid. Code, § 1220). (*People v. Horning* (2004) 34 Cal.4th 871, 898 & fn. 5.) Furthermore, as appellant did not make his remarks with the expectation that they would be presented at trial, the audio recorded remarks did not constitute "testimonial statements" under the Confrontation Clause. (*U.S. v. Tolliver* (7th Cir. 2006) 454 F.3d 660, 666.)

3. *Foundation and Authentication*

Appellant contends the recording was admitted without an adequate foundation and sufficient authentication. He argues (1) that the recording was not properly authenticated, (2) that Detective Barboza's testimony was insufficient to identify the male participant as appellant, and (3) that there was no evidence to support the accuracy of the transcript's translation of remarks in Spanish. However, as appellant asserted timely objections only to Barboza's testimony and the transcript's translations, he has forfeited his contention regarding the recording's authentication. (*People v. Williams* (1997) 16 Cal.4th 635, 661.) Nonetheless, even if there were no forfeiture, we would find no reversible error.

Regarding item (1), it is well established that "'[t]o be admissible in evidence, an audio or video recording must be authenticated.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 952.) Generally, an audio recording is authenticated by evidence that "'"it accurately depicts what it purports to show."'" (*People v. Williams*, *supra*, 16 Cal.4th at p. 662, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 747.) Here, Mancia testified that ITMS records phone calls to designated target numbers and stores the recordings; in addition, he testified that ITMS's equipment "picked up" the pertinent phone call and that the recording was provided to Barboza. In our view, this evidence was sufficient to authenticate the audio recording. (See *People v. Fonville* (1973) 35 Cal.App.3d 693, 708-709 [jailhouse recording of conversation between the defendant and a visitor was adequately authenticated by circumstances of the recording, even though no witness testified that the recording accurately reproduced the conversation].)

Regarding item (2), there was sufficient evidence to identify appellant as the male participant, for purposes of admitting the recording. "[O]n the issue of identification of the participants in [a] conversation[], testimony of a witness who recognizes a voice and uses this identification to name the speaker is properly admissible [citations], and any uncertainty of the recognition goes only to the weight of the testimony." (*People v. Sica* (1952) 112 Cal.App.2d 574, 586-587.) Here, Barboza testified that he recognized appellant as the male speaker on the basis of his conversation with appellant in June 2009. In addition, the circumstances surrounding the call corroborated Barboza's testimony, as the call was made from the jail in which appellant was incarcerated to the contact phone number he provided to Barboza. In view of this evidence, the trial court correctly ruled that it was up to the jury to determine whether appellant "was or wasn't [the male speaker]."

Finally, regarding item (3), any error involving the translations in the transcript cannot be regarded as prejudicial, as the recorded remarks concerning the "metal things" were spoken in English, not Spanish. Accordingly, we conclude that appellant has demonstrated no reversible error due to lack of foundation or inadequate authentication.

4. *Evidence Code Section 352*

Appellant contends the trial court erred under Evidence Code section 352 in admitting the recorded call. The crux of his argument is that the uncertainty regarding the male participant's identity and the vagueness of the term "metal things" rendered the call's probative value "minimal compared to its likely prejudicial effect." We find no abuse of discretion.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, italics omitted.)

No abuse of discretion appears here. As noted above (see pt. B.3, *ante*), there was considerable evidence that appellant was the male speaker. Viewed in light of this evidence, the phone call cannot be regarded as having merely minimal probative value, as appellant's desire to hide "metal things" from the police was directly relevant to an issue in the case, namely, the failure of the police to uncover the shooter's gun. For this reason, the vagueness of the remarks did not create the

type of prejudice material to rulings under Evidence Code section 352. As our Supreme Court has explained, "'"[t]he prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."'" (*People v. Karis* (1988) 46 Cal.3d 612, 638, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) In sum, appellant has failed to show reversible error in connection with the recorded phone call.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.