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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. EDWARD ROY, Defendant and Appellant.	B262617 (Los Angeles County Super. Ct. No. TA130577)

APPEAL from judgments of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Michael R. Johnsen and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Edward Roy appeals from his judgment of conviction on one count of attempted murder and two counts of assault with a firearm. Appellant challenges the court's denial of his new trial motion, which was based on proposed new testimony by one of the victims, and the prosecutor's reference in closing argument to a juror's comment during voir dire. He also argues one of the assault counts is not supported by the evidence. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

At about 4:15 p.m. on October 20, 2013, Lillie Jones was outside one of the minimarkets north of the corner of Wilmington Avenue and Stockwell Street in Compton. The people she was talking to suddenly started running toward Stockwell Street. Somebody moved behind her back, and a gun was pointed at her face. She closed her eyes because she was frightened and heard three shots being fired across her shoulder.[1] She then heard footsteps, and when she opened her eyes, she saw two men running away. She could not identify the shooter.

At about the same time, Jamel Carodine had come out of a minimarket located next door to the one referenced by Jones. He was walking around the corner of Wilmington Avenue and Stockwell Street, past the white gate of an apartment building, when he heard gunshots. He saw "some kids" start running. On

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[1] Jones's testimony was unclear about the direction of the shots. She claimed they were fired "across my back, to the back." She agreed with the prosecutor's statement that shots were fired "from right next to your face to the right," but disagreed they were being fired "down Wilmington" and stated they were fired "in the back—back of the gate" and she "saw somebody move back there."

Stockwell Street, he was confronted by someone who asked him where he was from. Carodine responded he did not "gang bang" and started walking away. He was shot twice in the leg. The shooting occurred near a yellow house. Carodine identified the gun as chrome but claimed not to have seen the shooter.

Vanessa Vargas was next to her car at the southwest corner of Stockwell Street and Bandera Avenue, a block away from Wilmington Avenue, when she heard three gunshots. She thought they came from an alley behind Wilmington Avenue. She then heard someone across Stockwell Street saying, "Where you from? Where you from?," followed by a second set of shots in the direction of a yellow house. The shooter left in a grey car parked next to Vargas's car. Vargas selected appellant and another individual from a photographic lineup. Of the two, she thought appellant looked more like the shooter, but she did not positively identify him at trial.

Guillermo De La Torre was in his house at the southeast corner of Stockwell Street and Bandera Avenue when he heard gunshots, followed by screams, coming from the corner of Stockwell Street and Wilmington Avenue. He went to a window and saw a man shooting a silver gun at a yellow house located at 817 Stockwell Street. He then went to another window facing Bandera Avenue and saw the shooter get into a silver Nissan. From his vantage point, De la Torre could see the back of the shooter's head and the side of his face. Two days after the shooting, De la Torre identified appellant as the person resembling the shooter in a photographic lineup, but at trial failed to identify him.

Miya Boyce was in her house at 817 Stockwell Street when she heard gunshots coming from Wilmington Avenue. When she

went outside, she saw Carodine and exchanged words with him before she ran up Stockwell Street towards Wilmington Avenue and bumped into appellant who was running from an alley. Appellant told her, "Oh, bitch. You from Fish Heads. I'mma kill you." "Fish Heads" is a term Fruit Town Piru Blood (Fruit Town) gang members use to disrespect their rival Front Hood Piru Crip (Front Hood) gang members. Appellant pointed the gun at Boyce and followed her as she started running back towards her house. Appellant pulled the trigger, but the gun did not fire; he then shot at Carodine in front of her house.[2] Responding officers found the wounded Carodine in Boyce's house.

Appellant was a member of the Fruit Town gang. Two days after the shooting, Boyce picked him out of a photographic lineup.[3] She wrote next to his photo her initials "M-B" and the letters "F-T-P-K," which stands for "Fruit Town Piru Killer." Boyce recognized appellant because he hung out on Cherry Street, a Fruit Town gang area, where she went to buy marijuana. Appellant had asked her for her number once. Boyce's house was in Front Hood gang territory. Boyce admitted to police that she had been a Front Hood gang member. At trial, she testified she associated with members of both gangs.

Three bullet casings were recovered from the sidewalk in front of the mini market on Wilmington Avenue. Four casings

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[2] Carodine denied having seen Boyce outside her house before the shooting.

[3] At trial, Boyce denied having immediately identified appellant as the shooter, but the investigating detective confirmed appellant became a suspect based on Boyce's identification of him on the day of the shooting.

were recovered near the driveway of Boyce's house. There was a bullet hole in the bumper of a car parked in the driveway. The casings had different strike marks, which meant they could have come from a poorly maintained firearm, a firearm loaded with wrong caliber bullets, or different firearms. No test was performed to eliminate the latter possibility.

Appellant was charged with the premeditated attempted murder of Carodine, whose name was misspelled (Pen. Code, §§ 187, subd. (a), 664),[4] and two counts of assault with a firearm—against Boyce and Jones. (§ 245, subd. (a)(2).) There were firearm, gang, and out-on-bail allegations, as well as a prior strike allegation. (§§ 186.22, subd. (b)(1)(C), 667, 1170.12, 12022.1, 12022.5, 12022.53, subds. (b) & (c).)[5]

At trial only Boyce identified appellant as the shooter. Vargas and De La Torre confirmed they had picked him out of photographic lineups after the shooting, but were unsure if he was the shooter. Carodine and Jones did not identify appellant at all.

Appellant presented a third-party-culpability defense through the testimony of Calandra Cuba, his child's maternal aunt; Sylvia Mitchell, his mother; and Nakeisha Mixon, his girlfriend. All three women testified that Franze Bledsoe,

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[4] Statutory references are to the Penal Code.

[5] Firearm allegations were attached to the attempted murder count under section 12022.53 and to the assault against Boyce count under 12022.5. The jury verdict form included an allegation under 12022.5 as to the assault against Jones count as well.

another Fruit Town gang member, had admitted to them that he was the shooter, and appellant was innocent.[6]

Mixon also testified she and appellant spent October 20, 2013 together at her apartment on Cypress Street in Compton and went out only to Burger King before noon and to a nearby liquor store at 4:00 p.m. Sometime before 5:00 p.m., a fight broke out in front of Mixon's building, and appellant, who was outside at the time, was briefly detained by the responding officers. Mixon's neighbor, Brandon Clark, testified he saw appellant and Mixon return from Burger King at noon, and saw them again around 3:00 p.m. He claimed appellant was outside when the fight started at about 4:15 p.m.

In rebuttal, the prosecution presented evidence that police received a call about the altercation at Mixon's apartment building, 2.4 miles away from the crime scene, at 5:57 p.m. Call data for appellant's and Mixon's cell phones suggested the two had not spent the day together at her apartment on Cypress Street. A call placed from appellant's phone at 1:42 p.m. was consistent with him being in the area of Wilmington Avenue and Stockwell Street, rather than at the Cypress Street address. Mixon's phone data indicated she was moving between 3:00 p.m. and 5:00 p.m. because her phone connected to seven cell phone

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[6] In a police interview, Bledsoe denied knowing anything about the shooting or taking credit for it. When she was shown Bledsoe's photograph, Boyce said Bledsoe looked like "a younger version" of appellant. When shown a photographic lineup that included photos of appellant, Bledsoe, and two others, she immediately identified appellant as the shooter. When Vargas was shown Bledsoe's photo at trial, she could not identify him as the shooter.

towers, including one near the border with the city of Carson. She called appellant at 4:12 p.m., but did not connect.

Appellant was convicted as charged, and the enhancement allegations were found to be true. His successive motions for new trial were denied. The court found the prior strike and out-on-bail allegations to be true. On the attempted murder count, the court imposed an indeterminate sentence of 15 years to life, doubled under the Three Strikes law, plus additional 20 years for one of the gun enhancements attached to this count; the other gun enhancement was stayed. On the assault counts, the court imposed a sentence of 3 years, 4 months each, consisting of one-third of the mid-term for the offense, doubled, and one-third of the gun enhancement; the gang enhancement on these counts was stayed. The court imposed 5 additional years for the prior conviction, and 2 years for the out-on-bail enhancement. Appellant received 572 days of presentence custody credit and was ordered to pay various fines and fees.

This appeal followed.

DISCUSSION

I

One of appellant's motions for new trial was based on a declaration by Carodine that appellant was not the person who shot him. Appellant argues that the erroneous denial of that motion violated his due process rights.

A new trial motion may be granted based on newly discovered noncumulative evidence that could not have been discovered and produced at trial with reasonable diligence and would probably result in a more favorable verdict on retrial. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The court may

consider both the credibility and the materiality of the new evidence. (*Ibid.*) We review the court's determination for abuse of discretion. (*Ibid.*)

In his declaration, Carodine stated the shooter was "a skinny kid, age 16-17[,] . . . approximately 5'9" tall with a dark complexion," whereas the photographic lineups he was shown included "pictures of grown men." Carodine claimed he had told the detective that appellant was not the person who had shot him. At the hearing on appellant's motion, Carodine testified he had seen the shooter well enough to know appellant was not him, as appellant was shorter, lighter, and older. Carodine testified he had told the officers the shooter looked like a "kid" and was not in the photographic lineups. But Carodine claimed it was after he saw appellant at trial and talked to appellant's mother afterward that he decided to write a declaration in appellant's favor. Carodine also told appellant's mother that police had been harassing him, that he had seen three witnesses talking to each other at the courthouse, and that he had seen the prosecutor and defense counsel high-five in court. Carodine testified he knew Boyce to be a "transient," or a "smoker" and admitted going into her house for help after the shooting, but claimed not to have seen her outside.

Defense counsel and the prosecutor stipulated they had not high-fived in open court. The prosecutor testified Carodine had been uncooperative and had insisted he had not seen the person who shot him, but a police report indicated Carodine had told officers the shooter was "young and dark-skinned." Detective Magdaleno testified Carodine had become progressively less cooperative over time, and had insisted he had not seen the shooter. The detective remembered seeing other witnesses in the

prosecutor's office when Carodine was interviewed, but the witnesses were instructed not to talk to each other, and the detective did not see them do so.

The court found Carodine's claims "completely unbelievable," expressly rejecting the claim that the prosecutor and defense counsel had high-fived during trial. The court also found Carodine could have testified at trial that appellant was not the shooter, but instead chose to testify he did not see the person who shot him and decided to change his testimony only after talking to appellant's mother.

Carodine did not identify appellant in photographic lineups, and, at trial, when asked to look around the courtroom to see if he recognized anyone as the shooter, he said, "No, Sir." His position at trial was that, at the time of the shooting, he "didn't want to see nobody," and that he had told police he had not seen "anybody." Carodine's subsequent declaration and his testimony at the new trial motion hearing contradicted his own trial testimony to the extent they suggested he had seen enough of the shooter to know appellant was not him. While the record shows Carodine had described the shooter as "young and dark-skinned," that does not support his claim that he had identified the shooter to police by his age and height. Nor is it clear from the record that appellant's appearance is significantly different from Carodine's description of the shooter as "young and dark-skinned."

Carodine's proposed testimony contradicted not only his own trial testimony, but also Boyce's identification of appellant as the shooter. Carodine's admission that he decided to help appellant after speaking to appellant's mother, who testified in appellant's defense, suggests a motive to change his testimony

that goes beyond seeing appellant in person at trial. For all these reasons, the court was within its discretion in finding Carodine's new testimony lacked credibility and was not likely to change the result on retrial. (See *People v. Delgado*, *supra*, 5 Cal.4th at p. 329.)

II

Appellant argues the prosecutor engaged in prejudicial misconduct that deprived appellant of a fair trial when, in closing, he referenced juror comments made during voir dire.

Prosecutorial misconduct violates due process if the prosecutor engages in a pattern of misbehavior so egregious as to render the trial fundamentally unfair. (*People v. Bennett* (2009) 45 Cal.4th 577, 594–595; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Use of deceptive or reprehensible methods in an attempt to persuade the jury that is not so systematic or pervasive as to render the trial fundamentally unfair results in error under state law. (*Ibid.*) Prosecutorial misconduct does not require reversal absent prejudice to the defendant. (*People v. Cash* (2002) 28 Cal.4th 703, 733.) The federal standard is whether the misconduct was harmless beyond a reasonable doubt. (*People v. Williams* (2013) 58 Cal.4th 197, 274.) The state standard is whether it is reasonably probable the defendant would have obtained a more favorable result. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324.)

On the first day of voir dire, prospective juror No. 17, a Compton resident, disclosed he had witnessed a shooting as a teenager, but his grandparents had told him not to talk about it. The prosecutor asked the juror if he agreed that was a common reaction because no one wants to say anything about crimes committed by gang members in that area, and that some people

lie on the stand for fear of retaliation. The juror agreed. He was excused, along with six other prospective jurors, at the start of the second day of voir dire. A number of other prospective jurors were seated in the jury box and excused on that day, and a second jury venire had to be called in.

At trial, the gang expert testified extensively that witnesses of gang crimes are reluctant to cooperate with police or testify in court for fear of gang retaliation. During closing argument, the prosecutor argued that the failure or reluctance of some witnesses to identify the shooter was due to fear of gang retaliation. The prosecutor referenced the gang expert's testimony in nonspecific terms: "We talked a little bit about those fears. We talked about snitching. We talked about the gang intimidations and the threats, and how people feel regardless of whether there's actually a threat or not, people feel threatened by these gang members." Shortly thereafter, the prosecutor stated, "We even had a juror here in the very beginning that talked about nobody wants to come forward. Everybody knows not to say anything." Defense counsel's objection that the prosecutor was using voir dire as evidence was overruled, and the prosecutor continued, "Everybody knows not to testify in a gang-type case. 'I didn't see anything. I didn't hear anything. Just leave me alone.'"

"Argument is improper when it is neither based on the evidence nor related to a matter of common knowledge. [Citations.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 702.) Prospective jurors' answers are not evidence. (*Id*. at p. 704.) Nor is the issue of gang intimidation necessarily a matter of common knowledge. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 945 [expert opinion on witness reluctance to testify against gang

members was proper because issue was "sufficiently beyond common experience"].) Hence, the prosecutor's reference to the juror's comments during voir dire was improper.

But the prosecutor's passing reference to the excused juror did not amount to a systematic or pervasive misconduct and did not render appellant's trial fundamentally unfair. (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.) Nor can defendant show prejudice as there is no reasonable likelihood the jury construed or applied the prosecutor's statements in an objectionable manner. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202–1203.) The jury was instructed that evidence was limited to the sworn testimony of witnesses, exhibits admitted into evidence, and anything the court told the jurors to consider as evidence. The jury also was instructed that counsel's argument is not evidence, and the jury is presumed to have followed those instructions.

Appellant's reliance on *People v. Morris* (2015) 239 Cal.App.4th 276 is misplaced. There, a seated juror was excused in the midst of trial and allowed to testify as a witness for the prosecution. (*Id*. at p. 278.) The court held the error violated due process and was prejudicial because "the jurors could have been influenced by their close association with the testifying former juror." (*Id*. at p. 286.) No such error occurred in this case because prospective juror No. 17 did not testify at trial.

Appellant assumes the jurors would have remembered prospective juror No. 17, or the fact that he was from Compton, where the crimes in this case occurred, but the prosecutor did not mention that fact in closing argument. The record of voir dire shows a significant turnover during jury selection, and it is unclear how many members of the final jury panel heard the juror's comments. We are not persuaded that the jury, as finally

constituted and instructed, was reasonably likely to rely on the excused juror's voir dire comments about witnesses fearing gang retaliation, rather than on the gang expert's testimony on the same issue.

III

Appellant argues his conviction of assault against Jones is not supported by the evidence because Jones did not identify him as the person who pointed the gun at her; the assault occurred at a different location from the other two crimes; and there may have been more than one person with a gun.

"'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]" [Citation.] "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

Since Jones did not identify appellant, the case against him depended on circumstantial evidence. None of the witnesses clearly testified there was more than one shooter. Even if that evidence is susceptible to two interpretations, as appellant argues, we cannot reweigh it or draw inferences from it in his favor.

Appellant points to Carodine's testimony that he heard 15 or 16 shots before he ran into appellant. Appellant argues that suggests a shootout involving more than one shooter took place in front of the minimarket on Wilmington Avenue. However, Carodine's testimony conflicted with that of Jones and Vargas, who heard three gunshots. Their testimony was consistent with the three casings recovered from the area in front of the minimarket. Because the ballistics evidence was inconclusive, it does not mandate the inference that two shooters were present.

Appellant relies on De La Torre's testimony that the initial shots he heard came from "pretty far." But De La Torre also said the shots came from "not even a block away." Appellant also relies on Jones's testimony that when she opened her eyes she saw one man chasing another. This testimony was part of her speculation that one of the men was the shooter and the other was someone chasing him, to which an objection was sustained. Jones, Carodine, and De La Torre all testified they saw people run during the shootings, but there is no testimony about the shooter's movements in between the shootings on Wilmington Avenue and Stockwell Street.

Nonetheless, Carodine testified he was still on Wilmington Avenue when the first set of shots was fired, and he was shot in front of Boyce's house on Stockwell Street. Carodine's testimony indicates it was not physically impossible for the same person to

be at the two locations during the shootings. (*People v. Brown* (2014) 59 Cal.4th 86, 106 [testimony of single witness is sufficient to support conviction unless it is physically impossible or inherently improbable].)

Since substantial evidence reasonably supports the jury's verdict, we cannot reverse appellant's conviction of assault against Jones.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.