Filed 3/21/13 P. v. Palacios CA2/6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MELVIN PALACIOS et al., Defendants and Appellants.	2d Crim. No. B235222 (Super. Ct. No. BA377687) (Los Angeles County)

Melvin Palacios, Rene Molina and Jessie Morales, (referred to by their surnames and collectively, Defendants), appeal their convictions for attempted murder and the resulting prison sentences of 32 years to life. We affirm.

FACTS AND PROCEDURAL HISTORY

I. *The Crime*

Defendants belonged to the Mara Salvatrucha (MS 13) street gang. In 2007, Palacios had confronted Luis Vasquez (Vasquez) about what gang he belonged to, and Vasquez denied any gang affiliation. In 2008, Molina did the same to Vasquez. Soon thereafter, Palacios, Molina and others chased Vasquez into an ambush and beat him. In early December 2009, Morales threatened Vasquez.

About a week after Morales's threat, Palacios approached Vasquez and two others as they stood in front of an apartment building in South Los Angeles. Palacios

wanted to "hit them up" for tagging the alley behind the building with a rival gang's graffiti. One of Vasquez's companions belonged to that rival gang.

Seeing Palacios approach with a gun tucked into his waistband, Vasquez turned and ran into the building. Palacios gave chase. Vasquez ran through the building and into the alleyway behind it. Molina and Morales were standing next to each other in the alleyway, just to the left of the apartment's back door. Morales had a gun tucked into his waistband. As Vasquez took off running away from Molina and Morales, Palacios walked over to them. Standing beside Molina and Morales, Palacios then shot at Vasquez three times, hitting him once in the back.

II. *The Prosecution*

Defendants were charged with attempted murder, in violation of Penal Code sections 664/187, subdivision (a).[1] The People also charged a gang enhancement, in violation of section 186.22, subdivision (b)(1)(C), as well as three different firearm enhancements. As to each defendant, the jury returned guilty verdicts and found true the gang enhancement and the enhancement for intentional discharge of a firearm causing great bodily injury, in violation of section 12022.53, subdivisions (d) and (e)(1). The trial court sentenced each defendant to seven years to life on the attempted murder charge, and a consecutive twenty-five years to life on the firearm enhancement.[2]

DISCUSSION

I. *Admission of Palacios's Statement to Police*

Police officers interviewed Palacios the day after the shooting. They read him his *Miranda* rights, which Palacios said he understood. (*Miranda v. Arizona* (1966)

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

[2] Palacios argues that the abstract of judgment for each defendant erroneously reflects a seven-year determinate sentence for the attempted murder charges. He argues that this conflicts with the trial court's oral pronouncement of sentence. We agree, and order that the abstract for each of the three defendants be corrected to reflect a sentence of seven years to life for the attempted murder charge. (§ 664, subd. (a); § 3046, subd. (a)(1); *People v. Jefferson* (1999) 21 Cal.4th 86, 95.)

384 U.S. 436 (*Miranda*).) When the officers asked Palacios if he wanted to tell his side of the story, Palacios responded, "I don't know." In response, the officers explained that they were giving Palacios a chance to give his account of what happened. They further stated that it was up to him to decide if he would take that opportunity for the sake of his love for his children and his mother.

Palacios then admitted to being present when Vasquez was shot, but denied any involvement in the shooting. Palacios said he was going to "hit up" the people he believed to be responsible for placing rival gang graffiti in the alleyway. At first, Palacios said he was alone, but later stated he was with Blanco. Palacios never identified who Blanco was. Palacios said he and Blanco heard shots and ran away.

A. *Miranda violation*

Palacios argues that the trial court erred in admitting his statement because it was obtained in violation of *Miranda*. Palacios contends that (1) he did not waive his *Miranda* rights when he said he was unsure whether he wanted to talk; and (2) any subsequent waiver was involuntary due to the officers' promises of leniency. We independently review the validity of a *Miranda* waiver. (*People v. Marshall* (1990) 50 Cal.3d 907, 925.)

A suspect may waive his right to remain silent under *Miranda* by the act of speaking to the police if (1) he understands the *Miranda* advisements read to him; (2) he does not invoke his *Miranda* rights; and (3) his statement is not coerced. (*Berghuis v. Thompkins* (2010) 560 U.S. __, __ [130 S. Ct. 2250, 2264; 176 L.Ed.2d 1098, 1115].) Palacios understood the *Miranda* advisements. Palacios also did not invoke his right to remain silent under *Miranda*. An invocation must be "unambiguous." [130 S. Ct. at pp. 2259-2260; 176 L.Ed.2d at pp. 1110-1111].) Palacios's statement that he did not know whether he wanted to talk was ambiguous.

We also conclude that Palacios's waiver was not coerced. Promises of leniency can render a *Miranda* waiver and subsequent statement involuntary. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 216 [promises of return of property and lesser charges; coercion]; *People v. Vasila* (1995) 38 Cal.App.4th 865, 874 [promises of lesser

charges and release on recognizance; coercion].) However, police do not render a waiver involuntary by encouraging a suspect to tell the truth or by explaining that doing so would be to his advantage. (*Vasila*, *supra*, at p. 874.)

The officers who interviewed Palacios did not promise him anything. They mentioned his children and mother, but did not state or otherwise imply that he would see them sooner if he spoke. Instead, they emphasized that he should talk for the sake of giving his side of the story. This did not cross the line into impermissible coercion.

B. *Exclusion of Redacted Portions of Palacios's Statement*

Molina and Morales argue that the trial court should have admitted *more* of Palacios's statement. The court had ordered all references to Blanco redacted. The court concluded that the portions of Palacios's statement involving Blanco were not inculpatory to Palacios. Alternatively, the court ruled that redaction of those portions was necessary to avoid post-trial claims by Molina or Morales that they were Blanco and that admitting Palacios's out-of-court statement violated their right to confrontation under *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123 (*Aranda-Bruton*)).

Molina and Morales contend both rulings are incorrect, and that they have an overriding due process right to admission of this evidence. We review for an abuse of discretion the application of the declaration against interest hearsay exception. (*People v. Valdez* (2012) 55 Cal.4th 82, 143.) We review de novo the admissibility of evidence under the Confrontation and Due Process Clauses of the United States Constitution. (*People v. Schmaus* (2003) 109 Cal.App.4th 846, 857; *People v. Avila* (2009) 46 Cal.4th 680, 698-699.)

1. *Declaration against interest*

A statement is admissible under Evidence Code section 1230 only if the proponent shows that (1) the declarant is unavailable; (2) the declaration was against the declarant's penal interest when made; and (3) the declaration is sufficiently reliable. (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).) Because Palacios is unavailable by virtue of his privilege against self-incrimination, the admissibility of the

redacted portions turns on the other two requirements. The trial court did not abuse its discretion in concluding that Molina and Morales did not establish these other requirements.

In determining whether a statement is a declaration against interest, we examine the context in which the statement was made. (*Duarte*, *supra*, 24 Cal.4th at p. 612.) Palacios was being questioned about his involvement in a shooting death; he admitted to being in the area to stop graffiti taggers and denied any involvement with the shooting. As a whole, the "net exculpatory effect" of this statement was not against Palacios's interest. (*Ibid.*) Even if we focus on the specific portions of Palacios's statement mentioning Blanco (*People v. Leach* (1975) 15 Cal.3d 419, 441), we reach the same conclusion because those portions simply reiterate that Palacios and Blanco had nothing to do with the shooting.

Molina and Morales nevertheless argue that these portions inculpate Palacios for two reasons. First, they contend that Blanco's presence renders Palacios liable for gang enhancements. We disagree. The presence of a second gang member is irrelevant to the charged gang enhancement under section 186.22, subdivision (b) (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139), and only became an element of the separate crime of street terrorism a year after Palacios made his statement when our Supreme Court overturned the majority rule to the contrary (*id.*, at pp. 1132-1139). More to the point, Palacios never admitted that he and Blanco did anything that would constitute street terrorism or otherwise qualify for a gang enhancement (§ 186, subds. (a) & (b)). Second, Molina and Morales assert that Palacios mentioned Blanco only after one of the interviewing officers informed Palacios that Blanco's presence would subject Palacios to greater criminal liability. We need not decide whether an officer's incorrect advisement that a statement is against a declarant's interest could make it so because this claim is unsupported by the record.

These portions are also not trustworthy. Except for the common theme that he was merely in the wrong place at the wrong time, Palacios's statement was ever changing. Palacios initially asserted that he was alone. When he later stated that he was

with Blanco, Palacios failed to identify Blanco or provide any meaningful description of him.

2. *Aranda-Bruton*

Molina and Morales argue that the trial court was wrong to be concerned about *Aranda-Bruton* error. As defined in *Aranda-Bruton*, a defendant's right of confrontation bars the People from introducing the statement of a non-testifying defendant that inculpates other defendants unless the trials are severed or the portions implicating the other defendants are redacted. (*People v. Homick* (2012) 55 Cal.4th 816, 847-848; *People v. Gamache* (2010) 48 Cal.4th 347, 378-379.)

Molina and Morales contend that there was no proof that Palacios's reference to Blanco was a reference to either of them because there was no evidence that they used the moniker "Blanco." The trial court had ample reason to be wary that admitting references to Blanco risked post-trial *Aranda-Bruton* objections: Vasquez identified Molina and Morales as being present; Palacios refused to identify Blanco; and Molina and Morales used multiple monikers. Absent any assurance to the contrary, the trial court acted appropriately in alternatively relying on this reason to exclude mention of "Blanco."

3. *Due process*

Molina and Morales also argue that the hearsay rules must give way to their due process right to present a defense. Adherence to the rules of evidence, including Evidence Code section 1230, does not ordinarily violate due process. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58; *People v. Lawley* (2002) 27 Cal.4th 102, 154-155; *Montana v. Egelhoff* (1996) 518 U.S. 37, 42.) Molina and Morales accordingly point us to *Chia v. Cambra* (9th Cir. 1995) 360 F.3d 997. In *Chia*, the court held that due process required admission of a declarant's statement taking full responsibility for the crime and thereby exculpating the defendant. (*Id.*, at pp. 1004-1005.) By contrast, Palacios has denied any responsibility, and his statement consequently lacks trustworthiness. Moreover, *Chia*'s validity has been questioned. (*Moses v. Payne* (9th Cir. 2009) 555 F.3d 742, 759-760.)

II. *Sufficiency of the Evidence*

Molina and Morales also challenge the sufficiency of the evidence supporting their convictions of attempted murder as aiders and abettors. Both defendants argue that their convictions rest solely on their presence at the scene and their gang membership, neither of which is sufficient to sustain their convictions. Morales additionally asserts that he was only an "associate" gang member who would not have been trusted to engage in such a crime. We review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is "reasonable, credible and of solid value" and that would enable a reasonable trier of fact to find the defendants guilty beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

To convict a defendant under an aiding and abetting theory, the People must prove that a perpetrator committed the charged crime and that the aider and abettor (1) knew of the perpetrator's unlawful purpose; (2) by act or advice, promoted, encouraged or instigated the commission of the crime; and (3) did so with the intent or purpose of committing, encouraging or facilitating the commission of the offense. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118.) A defendant's mere presence at the scene of a crime is insufficient to support aiding and abetting liability. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

The jury's verdicts rested on more than Molina's and Morales's gang membership and presence at the scene, and are otherwise supported by substantial evidence. Molina previously joined Palacios in beating Vasquez, and did so after chasing Vasquez toward a location where other gang members waited. This is similar to the ambush charged in this case. Molina was waiting alongside Morales, who was armed, in the alley into which Vasquez would likely flee if he ran from Palacios. For his part, Morales also previously threatened Vasquez and waited in the alley with Molina and a gun. Morales's status as an associate gang member only exacerbates his culpability, for he admitted he was "putting in work" for the gang; such work would include participating

in an ambush. Based on this evidence, the jury could reasonably conclude that Palacios, Molina and Morales were acting in concert to corner Vasquez in the alley in order to harm him.

III. *Jury Verdict Form Error*

Defendants further contend that their 25-year-to-life sentences for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1), should be reversed because the verdict form used by the jury mistakenly cited the language and statutory citation for a different firearm enhancement. Defendants argue that this violates *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and obligates us to impose the sentence for the less-severe firearms enhancement reflected on the verdict form.

There is no *Apprendi* error. *Apprendi* requires a jury to find beyond a reasonable doubt all elements of offenses or sentence-altering enhancements. (*Apprendi*, *supra*, 530 U.S. at p. 490.) In this case, the jury was properly instructed on the 25-year firearm enhancement. *Apprendi* is not implicated in this situation. (*People v. Lobato* (2003) 109 Cal.App.4th 762, 767.)

The error in the verdict form does not require reversal either. We are to construe a verdict form reasonably and in light of the issues submitted to the jury and the trial court's instructions. (*People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272-1273.) We may disregard technical defects in the verdict form if the jury's intent is "unmistakably clear." (*Ibid.*; *People v. Chevalier* (1997) 60 Cal.App.4th 507, 514 (*Chevalier*).)

The jury's intent to find the 25-year enhancement true is unmistakably clear. The trial court's instructions to the jury were straight-forward: Determine if each defendant is guilty of attempted murder; if so, determine if the gang enhancement is true; and if so, determine if the 25-year firearm enhancement is true. Defendants point out that the verdict form did not recite the great bodily injury element of the 25-year enhancement. However, a verdict form need not list all elements of a sentencing enhancement. (*Chevalier*, *supra*, 60 Cal.App.4th at pp. 514-516.) Defendants say *Chevalier* does not apply because they were initially charged with the very firearm

enhancement mistakenly referenced on the verdict form. This is of no moment. Regardless of what was initially charged, the jury was only *instructed* on the 25-year enhancement, and its finding of "true" on the verdict form "unmistakably" referred solely to that enhancement.

IV. *Sentencing Credits*

Morales also argues that his presentence custody credits were miscalculated. The People agree. Accordingly, we order that Morales be awarded 579 days of actual custody and 87 days of custody credit, for a total of 665 days.

DISPOSITION

We modify the judgment to reflect a sentence of seven years to life for the attempted murder charge for each of the defendants; and that Morales be awarded 579 days of actual custody and 87 days of custody credit, for a total of 665 days. The trial court shall amend the abstract of judgment accordingly and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

HOFFSTADT, J.*

We concur:

GILBERT, P. J.

PERREN, J.

* Assigned by the Chairperson of the Judicial Council.

Alex Ricciardulli, Judge

Superior Court County of Los Angeles

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