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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALBERTO HURTADO,

Defendant and Appellant.

2d Crim. No. B271115
(Super. Ct. No. 2015020888)
(Ventura County)

Jose Alberto Hurtado appeals a judgment following his conviction of attempted murder (Pen. Code, §§ 664, 187, subd. (a))[1] (count 1), assault with a semiautomatic firearm (§ 245, subd. (b)) (counts 2 and 3), and attempted shooting at an occupied vehicle (§§ 664, 246) (count 4). On counts 1 through 3, the jury found Hurtado personally used a firearm. (§§ 12022.53, subd. (b) (count 1), 12022.5, subd. (a) (counts 2 and 3).) The trial court

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

sentenced Hurtado to an aggregate prison term of 23 years 8 months.

We conclude, among other things, that 1) the trial court did not err by admitting motive evidence involving a prior criminal investigation of Hurtado's brother, but 2) the court erred in sentencing by not staying count 4 under section 654. We order the abstract of judgment to be corrected for count 4. In all other respects, we affirm.

FACTS

On March 16, 2015, Felipe Sandoval was driving his car. His passengers were Jose Medina Gamez (Gamez) and Francisco Sandoval (Francisco). Sandoval saw a white Impala automobile following them. Hurtado was in the passenger seat of that car.

The white Impala moved to the side of Sandoval's vehicle. Sandoval made a right turn onto another street because he "got scared" "seeing" Hurtado, whom he had known for three years.

Sandoval drove to an intersection and stopped. The white Impala "got there and blocked [his] way." Sandoval testified that Hurtado "pulled out" a "firearm," pointed it at him, and "tried firing at [him]." The gun "didn't fire." Hurtado pulled the trigger several times. Because the gun would not fire, Hurtado "racked the gun" by moving the top portion of the gun slide "back and forth" two or three times. Hurtado pulled the trigger several times after he racked the gun, but the gun was jammed. Sandoval believed Hurtado was trying to kill him. Sandoval put the car "in reverse" and drove away.

Gamez testified Hurtado "tried killing us" with a "nine millimeter" gun. Hurtado pointed the gun "at us" and was "racking the slide" of the gun because it "jammed."

Francisco testified that a white Impala "cut us off." Hurtado pointed a black gun at them; the gun "jammed." Hurtado appeared "to be angry." Francisco was "scared for [his] life."

Police Detective James Crilly testified that a semiautomatic handgun "has a magazine that you load the ammunition into and you put it into the grip frame or the pistol grip. You have to cycle the slide to get a round into the chamber so it can be fired." If there is a malfunction, one could rack the slide to fix the problem or "to get another round into the chamber."

Police viewed a video surveillance camera from a liquor store at the date and time of the incident. The video showed a car passing by matching the description of the white Impala. Police found a white Impala at Hurtado's residence.

The December 2014 Crime Investigation Evidence

Police Detective Edgar Fernandez testified that Hurtado's brother, Luis, was a suspect in a "December 2014 serious and violent crime." Sandoval witnessed the crime and had spoken with Fernandez "on several occasions." Police Officer Jaime Miranda testified that Sandoval was a friend of the victim in that case and that the victim had died. Sandoval provided the police with information concerning the crime.

The Motion in Limine

Hurtado filed a motion in limine to prevent the People from introducing evidence about the police investigation of the December 2014 crime. The trial court denied the motion. It

found the evidence showed Hurtado's motive for committing the charged offenses. It said Sandoval's "statements to law enforcement regarding defendant's brother are relevant and do survive [section] 352." The court ruled the jury would not be told that the victim of that crime had died. The jury would not "hear anything about a homicide, a death, whatever."

DISCUSSION

Evidence about a Prior Criminal Investigation Involving Hurtado's Brother

Hurtado contends the trial court erred by admitting "irrelevant and highly prejudicial evidence that [his] brother was a suspect in a 'serious and violent' crime" in 2014. (Boldface and initial capitalization omitted.)

The People contend this evidence was properly admitted to show Hurtado's "motive for committing the charged crimes" and any alleged error "was harmless." We agree.

"[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) "[E]vidence of uncharged crimes is admissible to prove . . . the intent with which the perpetrator acted in the commission of the charged crimes." (*People v. Foster* (2010) 50 Cal.4th 1301, 1328; Evid. Code, § 1101.) "The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect." (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) "[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.) A defendant's retaliatory motive, shown from the facts of a prior

incident, may provide "a meaningful link in the People's chain of incriminating evidence against [the defendant]." (*Ibid.*)

Here Sandoval was a witness to the 2014 crime. He provided police with information during their criminal investigation of Hurtado's brother. The trial court could reasonably find such evidence showed a motive for Hurtado's current offense against Sandoval. Evidence of a retaliatory motive provides "a meaningful link in the People's chain of incriminating evidence . . . ." (*People v. Lopez*, *supra*, 1 Cal.App.3d at p. 85.)

Hurtado contends there is no evidence to show that he had knowledge of the circumstances giving rise to an asserted motive.

The People claim the evidence supports reasonable inferences that Hurtado had such knowledge. We agree. Jurors could reasonably infer that Hurtado knew Sandoval could link his brother to the crime police were investigating because Sandoval was the witness to that crime. As the People note, Hurtado and his brother were living together at that time.

Hurtado, his brother and Sandoval lived in the same duplex. The Hurtado brothers lived upstairs; Sandoval lived downstairs. Sandoval had known Hurtado for three years. He also knew his brother. Sandoval had lived in the duplex for two and a half years. That was during the period when the police were investigating the 2014 crime and conducting interviews. Detective Fernandez had interviewed Sandoval on "several occasions." Sandoval testified he thought Hurtado tried to kill him because he had talked with Fernandez. On a prior occasion, Sandoval had seen "the Hurtado brothers get in and out" of the white Impala. When he saw that car following him on March 16,

"the first thing [he] thought" was "that it was them." Taken together, this evidence is "inferentially relevant" to show Hurtado's motive in committing the charged offenses. (*People v. Rogers* (2006) 39 Cal.4th 826, 862.)

Hurtado claims the motive evidence shows an "inference of guilt by association" and "the assumption that [his] brother committed the December 2014 offense." But the trial court did not allow introduction of this evidence for that purpose. As the People note, the evidence showed his brother "was only a *suspect* in the crime, and had not been charged or found guilty." The court properly instructed jurors on the relevant issue of motive and the evidence the People introduced was very limited in scope. Given the court's jury instructions, no reasonable juror could believe this evidence could be used for the purpose of finding guilt by association.

Moreover, here the trial court reasonably determined there was a reduced potential for prejudice. The evidence about the December 2014 crime investigation did not involve Hurtado; it only involved his brother. No evidence was introduced showing that Hurtado was a suspect in that crime. The trial court also knew that the victim in the December 2014 crime had died and the police were conducting a "murder" investigation. But the court took precautions to minimize the potential for prejudice. It ruled that the jury would "not hear anything about a homicide" or "a death." They would only hear that it was a "serious and violent crime."

The trial court instructed the jury that it had the discretion to decide whether to consider the motive evidence. It said, "The People are not required to prove that the defendant had a motive to commit [any of the crimes] charged. In reaching

your verdict, *you may*, however, consider whether the defendant had a motive." (Italics added.) Hurtado has not shown an abuse of discretion.

But even had the trial court erred, Hurtado has not shown a reasonable probability that the absence of the motive evidence would change the result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The People's evidence was strong and the evidence of guilt was overwhelming. Three eyewitnesses identified Hurtado at trial. There was surveillance video evidence. Hurtado did not testify or call witnesses in a defense case.

Sentencing on Count 4

In sentencing, the trial court imposed an aggregate prison term of 23 years 8 months for the sentences on counts 1 though 3 (attempted murder and assault with a semiautomatic firearm) and the firearm enhancements. It then imposed a 16-month concurrent sentence on count 4, attempted shooting at an occupied vehicle. (§§ 664, 246.)

Hurtado contends the trial court erred by not staying the sentence on count 4 under section 654. The People agree. They are correct.

Section 654, subdivision (a) provides, in relevant part: "An act . . . that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act . . . be punished under more than one provision."

Here the acts that established the crimes in counts 1 through 3 were the same acts upon which the conviction in count 4 was based. They all occurred during a single event at the same

time with the same goal. The trial court correctly recognized that section 654 applied. (*People v. Jones* (2012) 54 Cal.4th 350, 353.) It said, "Count 4, it's [section] 654, so he's not sentenced on that."

The trial court then asked defense counsel, "[W]hat do you think I should do for the record? . . . On count 4 it's [section] 654, so what's the *cleaner way*, just not to impose any penalty or just run it concurrent?" (Italics added.) Defense counsel replied, "Concurrent is fine." The court then imposed a 16-month concurrent sentence on count 4.

But the issue is not whether a particular format is "cleaner" or what option counsel elects. It is only whether the sentence is appropriate. As the parties suggest, the trial court and trial counsel apparently believed it did not make a difference whether count 4 was stayed or whether a concurrent sentence was imposed. Although it would not change the length of the aggregate sentence, there is a significant difference between a section 654 stay and a concurrent sentence.

"'It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.'" (*People v. Jones*, *supra*, 54 Cal.4th at p. 353.) "Instead, the accepted 'procedure is to sentence defendant for each count and *stay execution of sentence* on certain of the convictions to which section 654 is applicable.'" (*Ibid.*, italics added.) Here the abstract of judgment must be corrected to reflect that the sentence on count 4 is stayed under section 654.

DISPOSITION

The abstract of judgment is ordered to be corrected to reflect that the sentence on count 4 is stayed under section 654. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

F. Dino Inumerable, Judge

Superior Court County of Ventura

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