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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL ESPINOZA, Defendant and Appellant.	B257969 (Los Angeles County Super. Ct. No. NA092230)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Otto, Judge. Reversed and remanded for further proceedings.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Defendant Miguel Angel Espinoza appeals his conviction of one count of second degree murder. (Pen. Code, § 187, subd. (a).)[1] Among other things, defendant contends he was denied his constitutional right to testify in his own defense. The People contend that defendant never made an unequivocal and timely assertion of the right to testify. We conclude that defendant's request to testify, made prior to closing arguments and instruction of the jury, constituted a timely and adequate assertion of his right to testify, and thus the trial court abused its discretion in declining to reopen the evidence. We also conclude the error was not harmless. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background*

Shortly before noon on May 6, 2012, a car stopped within a block of St. Mary's Medical Center. Defendant and Roberto Rodriguez got out and pulled Isaac Preciado out of the car. Preciado was not moving and appeared unconscious. Defendant then got back in the car and drove away, while Rodriguez stayed with Preciado. After a bystander ran to the hospital to get help, paramedics arrived and transported Preciado to the hospital, where he was pronounced dead.

Preciado had suffered a single gunshot wound to the right chest. There was stippling of the skin around the entry wound, indicating the gun was less than three feet from him when it was fired.

The police arrested Rodriguez. Later that day, around 9:30 p.m., defendant turned himself in at a police station. He spoke with Detectives Gregory Krabbe and Mark McGuire who recorded the interview.

Following the interview, defendant was arrested and was charged with murder (§ 187, subd. (a)) and firearm enhancements (§§ 12022.5, subd. (a); 12022.53, subds. (b), (c) and (d)). A prior robbery conviction in 2010 was charged as a prior strike, a prior serious felony, and a prison prior. (§§ 1170.12, subds. (a)–(d); 667, subds. (b)–(i); 667, subd. (a)(1); 667.5, subd. (b).)

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[1] All further statutory references are to the Penal Code.

2. *Prosecution Case*

At trial, Detective Krabbe testified that defendant initially told him that Preciado had shot himself while playing with a gun. Defendant then said both he and Preciado had been playing with the gun, a revolver with a single bullet in the cylinder. Preciado had checked to see if a bullet was in the chamber and then aimed the gun at defendant and pulled the trigger. The gun did not fire. Defendant then grabbed the gun, aimed it at Preciado, and pulled the trigger. The gun fired, inflicting the fatal chest wound on Preciado.

Defendant gave inconsistent accounts of where the shooting happened, saying that the shooting happened both inside of and outside of the car. He said the gun belonged to Preciado and that he did not know where the gun was. After he shot Preciado, defendant drove him and Rodriguez to the hospital and dropped them off.

Officer John Lugo, a detention officer, testified that he processed defendant at the city jail. According to Lugo, defendant asked him how much jail time he was going to get. Without knowing what defendant had been arrested for, Lugo told defendant "50, 60 years." Then, without any prompting, defendant told Lugo a different version of the events leading to Preciado's shooting.

Defendant said that he and his two friends, Preciado and Rodriguez, were "drinking, smoking weed, and getting fucked up" when Preciado made a comment that upset defendant. Defendant said that Preciado was "acting like a bitch" and that he told Preciado to "shut the fuck up." Preciado continued to make comments. Defendant then "got mad," pulled out his "revolver," pointed it at Preciado, and "fired his gun one time." The gun "didn't go off." Defendant fired it again–"[t]he second time, it went off." Defendant saw Preciado gasping for air and said to him, "how do you feel like a bitch now?"

Defendant told Lugo that he drove Preciado and Rodriguez to the hospital. Once they arrived, Rodriguez started yelling at defendant, so defendant kicked him and Preciado out of the car. Defendant then drove around the corner, parked the car, and

walked back to where he had left Rodriguez and Preciado. When he saw the police at the scene, he left and went to Rodriguez's house, where he "stashed" the gun.

The prosecution also presented testimony from two bystanders who witnessed the wounded Preciado being left near the hospital, and from the officer who arrested Rodriguez. Physicians testified about Preciado's wounds and the efforts to resuscitate him. A criminalist testified about the mechanics of a revolver.

3. *Defendant's Request to Testify*

During the defense case, the court informed defendant that he had "a right to testify . . . [and] a right not to testify in this matter." Defendant said he had chosen not to testify. Rodriguez also did not testify. After the defense rested, the prosecution did not present any rebuttal evidence. The court advised the jury that the defense had rested and that the People had no rebuttal evidence they wished to present, excused the jurors for the day, and ordered them to return in the morning. The court and counsel then discussed the proposed jury instructions.

The instruction conference continued the next morning. Before the jury returned to the courtroom, defense counsel informed the court off the record that defendant wanted to testify. The court transcript reflects the court's statements in response: "Counsel has communicated that the defendant would now like to testify; however, the People have rested. Before the People rested, I personally talked to the defendant. He waived his right to testify. The court finds the People used their witnesses, so I'm not going to reopen the case. Secondly, I understand the defendant was thinking about not coming out; but, sir, so you understand, if you refuse to come out, I'll deem you to be willfully absenting yourself from these proceedings. It will continue on . . . with or without you. I see you've chosen to come out." The court then instructed the jury and counsel gave closing arguments.

4. *Conviction and Sentencing*

The jury convicted defendant of second degree murder and found the firearm allegations to be true. In a bifurcated bench trial, the prior conviction allegation was

sustained. Defendant was sentenced to an aggregate term of 60 years to life. He timely appealed.

CONTENTIONS

Defendant contends, inter alia, that the court abused its discretion in denying his request to testify. The People contend there was no abuse of discretion because defendant did not clearly assert his right to testify and his request was untimely.

DISCUSSION

1. *Legal Principles*

a. *The Right to Testify on One's Own Behalf*

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' [Citation.] The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony: [¶] 'A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense* — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' [Citation.] [Fn. omitted.] [¶] . . . [¶]

"The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. [Citation.] Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense,' [citation], is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. . . . [¶] . . . [¶]

"The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In *Harris v. New York*, 401 U.S. 222, 230 (1971) the Court stated: 'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.' [Citation.] Three of the dissenting Justices in that case agreed that

the Fifth Amendment encompasses this right: '[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." . . . The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege.' [Citation.]" (*Rock v. Arkansas* (1987) 483 U.S. 44, 51–53, fn. omitted.)

b. *The Need for a "Timely and Adequate" Demand to Testify*

Notwithstanding the foregoing, the right to testify is subject to a significant condition: The defendant must make "a *timely* and *adequate* demand to testify." (*People v. Alcala* (1992) 4 Cal.4th 742, 805, italics added; see also *People v. Enraca* (2012) 53 Cal.4th 735, 762-763 ["When the record fails to disclose *a timely and adequate demand* to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity' "], italics added.)

Determining the timeliness and adequacy of defendant's request to testify is a matter committed to the discretion of the trial court. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1520; *People v. Earley* (2004) 122 Cal.App.4th 542, 546–547.) In exercising its discretion, the trial court must balance the State's interest in not reopening the evidence against the interest of the defendant in exercising a fundamental constitutional right. (*Rock v. Arkansas*, *supra*, 483 U.S. at pp. 55–56, fn. 11.) Our review is for an abuse of discretion. (*People v. Earley*, *supra*, at p. 546.)

2. *The Court Abused Its Discretion by Denying Defendant's Request to Testify*

In the present case, defense counsel informed the court of defendant's desire to testify after the close of evidence, but before closing arguments and the instruction of the jury. The court declined to allow defendant to testify. Defendant contends the court abused its discretion by declining to reopen evidence to allow him to testify. We agree.

a. *Adequacy of Defendant's Request to Testify*

We first address the People's argument that defendant never clearly asserted his desire to testify and, therefore, effectively waived his right to testify. The People contend that defendant "made contrary indications" to the trial court because he indicated "he did

not want to be present for the remainder of the trial" and this "reluctance to participate in the proceedings was at odds with his alleged assertion to testify."

In support of this argument, the People cite *People v. Hayes* (1991) 229 Cal.App.3d 1226 (*Hayes*). In *Hayes*, the defendant engaged in several outbursts during the course of the victim's testimony, in which he expressed anger and attempted to cross-examine the victim and argue his case. (*Id.* at p. 1231.) The trial court removed the defendant from the courtroom, and the defense rested without presenting any evidence. (*Ibid.*) On appeal, the defendant argued that he was deprived of his right to testify and that his outbursts in court constituted an adequate request to testify. (*Id.* at p. 1232.) The Court of Appeal held that defendant did not make "any unequivocal statement he wished to take the stand to testify," noting that the subject statements "carried no reference to a desire to take the stand" but rather were "outbursts" that "reflect[ed] an apparently angry and frustrated effort by [the defendant] to cross-examine [the victim]" and "a desire to argue his case before the court." (*Ibid.*)

In contrast to *Hayes*, here the defendant adequately communicated to the court his desire to testify. The trial court's comments indicate it accepted that defendant had told his attorney he wished to testify: The court stated "counsel has communicated that the defendant would now like to testify." The court then concluded that defendant had "waived his right to testify" and declined to "reopen this case." Only after the court denied defendant's request to testify did it address defendant's reluctance to "com[e] out." Thus, the record is clear that the court did not think defendant made any "contrary indications" about his desire to testify, but separated defendant's request to testify from his reluctance to join the proceedings.

b. *Timeliness of Defendant's Request to Testify*

The California Supreme Court has said that a defendant's demand to testify must be "timely," but has not adopted an explicit test for determining the timeliness of defendant's demand. (*People v. Alcala*, *supra*, 4 Cal.4th at p. 805.) Because in the present case defense counsel sought to introduce defendant's testimony *after* the defense

had rested its case, defendant's demand to testify constituted a request to reopen to permit the introduction of additional evidence. (*People v. Jones* (2012) 54 Cal.4th 1, 66.)

" 'A "motion to reopen [is] one addressed to the [trial] court's sound discretion." [Citation.] In determining whether an abuse of discretion occurred, the reviewing court considers four factors: " '(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.' " [Citation.]' [Citation.]" (*People v. Masters* (2016) 62 Cal.4th 1019, 1069.)

In the present case, each of these factors weighed in favor of permitting defendant to testify:

(1) *Stage of the proceedings*: Here, defendant requested to testify after evidence closed, but before the jury had been instructed or heard closing arguments. The only intervening event between the close of evidence and defendant's request to testify was the discussion of jury instructions outside of the jury's presence. Accordingly, reopening the evidence and allowing defendant to exercise his constitutional right to testify would not have disrupted the flow of the trial in any significant way. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1110-1111 [trial court abused its discretion in refusing to reopen case where defense request to reopen was "made shortly after the closing of evidence"]; *People v. Carter* (1957) 48 Cal.2d 737, 757 [trial court abused its discretion in refusing to reopen to allow defendant to present additional evidence where "[d]efendant had only just rested, argument had not begun and the jury had not been instructed, and it does not appear that granting defendant's request would have entailed any great inconvenience"]; compare *People v. Marshall* (1996) 13 Cal.4th 799, 836 [no abuse of discretion in denying defendant's request to reopen to present new evidence after the prosecutor had begun summation].)

(2) *Defendant's diligence*: There is no indication that defendant failed to act diligently in asserting his desire to testify. At the end of the day on July 2, defendant indicated he did not wish to testify. The very next morning, before the jury was called

into the courtroom, defense counsel said defendant had reconsidered and wished to testify.

(3) *Undue emphasis*: In *People v. Funes*, *supra*, 23 Cal.App.4th at p. 1521, the court concluded a jury would likely have accorded undue weight to new evidence defendant sought to introduce "*after* the jury had begun deliberations and in direct response to their request." Under these circumstances, the court opined the jury "may have given the evidence more weight than it deserved, and put the prosecution at an unfair disadvantage." (*Ibid*.) In the present case, in contrast, had defendant been permitted to testify, his testimony would have immediately followed the testimony of the other defense witnesses. Accordingly, there is no reason to believe the jury would have accorded defendant's testimony undue emphasis.

(4) *Significance of the evidence*: A defendant's testimony in his own defense at a criminal trial "is unique and inherently significant. 'The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.' *Green v. United States*, 365 U.S. 301, 304 (1961). When the defendant testifies, the jury is given an opportunity to observe his demeanor and to judge his credibility firsthand. As the United States Supreme Court noted in *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), 'the most important witness for the defense in many criminal cases is the defendant himself.' Further, in a case such as this where the question was not whether a crime was committed, but whether *the defendant* was the person who committed the crime, his testimony takes on even greater importance. Indeed, '[w]here the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.' [Citation.]" (*Nichols v. Butler* (11th Cir. 1992) 953 F.2d 1550, 1553.)

We are not aware of any California case that has applied these factors in circumstances similar to those of the present case. However, the Michigan Court of Appeals addressed similar circumstances in *People v. Solomon* (1996) 220 Mich.App. 527 (*Solomon*). In *Solomon*, after the defense rested, the jury was dismissed and the court reviewed jury instructions with counsel. (*Id.* at p. 532.) The court then reconvened

and inquired whether the parties were ready for closing arguments. (*Id.* at p. 533.) At that point, defense counsel informed the court that the defendant sought to testify. (*Ibid*.) The trial court concluded that the defendant was merely " 'playing games' " in a tardy attempt to change his trial strategy, and denied the request. (*Ibid*.)

The Court of Appeals held that the court had abused its discretion in declining to reopen the evidence to allow defendant to testify. (*People v. Solomon*, *supra*, 220 Mich.App. at p. 533.) The court emphasized the unique importance of the defendant's own testimony at a criminal trial, noting that the Supreme Court has identified the right to testify on one's own behalf as a right " 'essential to due process of law in a fair adversary process.' " (*People v. Solomon*, *supra*, at p. 533, quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 51–52.) Moreover, only a short time had passed between the time the defense rested and the time defendant indicated he wished to take the stand, and neither side had yet delivered its closing arguments. Finally, "there was no indication . . . that defendant would have gained any undue advantage or that the prosecution would have suffered any surprise or prejudice if defendant had testified." (*Id*. at p. 535.) On these facts, the court concluded, "allowing defendant to exercise his constitutional right to testify would not have disrupted the flow of the trial in any significant way. Therefore, we conclude that the trial court abused its discretion in denying defendant's motion to reopen the proofs." (*Ibid*.)

The present case is analogous. As in *Solomon*, the evidence defendant sought to introduce was his own testimony. Only a short time had passed between the close of defendant's case and defendant's request to testify, and neither side had yet delivered closing arguments. Thus, as in *Solomon*, allowing defendant to testify would not have disrupted the flow of trial in any significant way. Finally, there was no suggestion in the trial court, and the People make none here, that defendant would have gained any undue advantage had defendant been allowed to testify.

On this record, therefore, the trial court abused its discretion in denying defendant's request to reopen to the evidence to allow defendant to testify in his own defense.

3. *The Failure to Allow Defendant to Testify Was Not Harmless*

The trial court's erroneous denial of a defendant's request to testify is subject to the "harmless beyond a reasonable doubt" standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (See *People v. Johnson* (1998) 62 Cal.App.4th 608, 634–636.) "The beyond-a-reasonable-doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

The People urge that because defendant did not make an offer of proof as to the substance of his testimony, we cannot conclude that he was prejudiced by the exclusion of the testimony. We do not agree. As the court noted in *United States v. Walker* (5th Cir. 1985) 772 F.2d 1172, a case very like the one before us (although not decided on the ground of Constitutional error), a criminal defendant's failure to make a formal offer of proof as to his testimony is not dispositive of the issue of prejudice: "Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance. [¶] While no formal proffer of the content of [defendant's] testimony was timely made, and in other circumstances this might count heavily against him, we do not regard it as of any real significance here. . . . [I]t was obvious what [defendant] (who had not already testified) would testify about—namely, his version of his own conduct and statements as portrayed by the government's witnesses and asserted by the prosecution as constituting the offenses charged. These were matters that were, in the vast majority of instances, not covered by the testimony of any of the defense witnesses. It is and was unmistakable, undisputed, and obvious that [defendant's] testimony would have been highly relevant and significant and in no meaningful sense cumulative. Plainly, [defendant's] testimony had 'exculpatory potential' and 'would have enhanced [his] defense.' " (*Id*. at p. 1179, fn. omitted; see also *People v. Harris* (1987) 191 Cal.App.3d 819, 824, ["[W]e entertain the gravest doubts regarding the propriety of any court requiring a defendant to announce his anticipated testimony simply to justify his right to take the stand."].)

In the present case, as in *Walker*, it "was obvious" what defendant would testify about—namely, his role in Preciado's shooting death. This testimony was necessarily relevant to defendant's criminal culpability for the shooting, the primary issue before the jury. Indeed, on the facts of this case, defendant's testimony would have been of particular relevance to the jury's decision, because defendant told three versions of the events to the police—that Preciado shot himself, that defendant shot Preciado by accident, and that defendant deliberately shot Preciado in anger. Had defendant testified either that Preciado had shot himself or offered yet another version of the events, the jury might have found defendant's statements on the stand to be credible. On this record, therefore, we cannot conclude that the trial court's failure to allow defendant to testify on his own behalf was harmless beyond a reasonable doubt.

Nor do we agree with the People that the evidence of defendant's guilt was so overwhelming that defendant's own testimony could not have caused the jury to reach a different verdict. The People argue in this regard that "the evidence that [defendant] fired the gun that killed Preciado was not disputed"—but, in fact, no eyewitness to the shooting testified at trial, and the *only* evidence the jury heard regarding the shooter's identity were (a) a recording of one of defendant's statements, and (b) the police officers' testimony regarding defendant's other statements. As one of defendant's three versions of the relevant events was that Preciado shot himself, we cannot conclude that it was "undisputed" that defendant fired the gun that shot Preciado. We also do not agree with the People that the "[a]dditional evidence demonstrating [defendant's] guilt and consciousness of guilt," including defendant's admissions to police and flight, was so strong that a guilty verdict was inevitable. In the absence of eyewitness or forensic evidence establishing that defendant was the shooter, we believe it possible that, had it heard defendant's testimony, the jury might have returned a different verdict. For all the foregoing reasons, we cannot say that the court's error in denying defendant's request to testify was harmless beyond a reasonable doubt.

We are mindful that the trial court is vested with broad discretion to manage the conduct of trials and to make efficient use of scarce judicial resources. Nonetheless, after

weighing all the relevant considerations, particularly the absence of any prejudice to the People and the potentially exculpatory nature of defendant's testimony, we conclude that there were compelling reasons to grant the request to reopen evidence. Accordingly, the judgment must be reversed.[2]

[2] Because we conclude the trial court's denial of defendant's request to testify was reversible error, we do not reach defendant's contentions on appeal regarding the trial court's alleged instructional errors.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

HOGUE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.