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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SIMON VEGA, Defendant and Appellant.	B270612 (Los Angeles County Super. Ct. No. BA372143)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed as modified.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Simon Vega appeals his conviction of murder committed in the course of a kidnapping. On appeal, he raises issues of evidentiary and instructional error, which we reject, and uncontested sentencing errors, which we accept. We modify the judgment to resolve the sentencing errors and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

At about 7:00 p.m., on June 3, 2010, the victim, Debora Alvarado, was walking to church with three friends. As they approached the church, defendant arrived in a car. Defendant approached Alvarado, with whom he had previously been in a relationship. He hugged her, and she pushed him away. Her friends tried to take her hand and walk her away from defendant, but defendant would not release his hold on her.

The group walking with Alvarado consisted of two women and one man. When the man, J.D., tried to intervene, defendant told J.D. he would kill him if J.D. did not let Alvarado go with him. Alvarado told J.D. to "just go." J.D. crossed the street, while Alvarado's two female companions remained with Alvarado and defendant. After they had walked a short distance, defendant told the two women to go on ahead and that he was not going to do anything bad to Alvarado. He said that if he had wanted to do something bad to her, he would have done it

already. Alvarado told her friends to let her talk to defendant. The friends walked away, but continued watching.

From here, defendant became more violent. He cornered Alvarado against a wall, and she screamed and told defendant "No." At this point, Alvarado's friends called the police. Alvarado attempted to create some distance between herself and defendant, but he grabbed her by the hair and dragged her toward a nearby car wash. He pulled her through the car wash "dragging her on the ground as if he were mopping the ground with her." Alvarado screamed and begged for defendant to let her go.

At this point, two of Alvarado's friends tried to intervene, but the third stopped them, believing defendant had a weapon and fearing he would hurt them as well. They called the police a second time.

Defendant dragged Alvarado away and hit her head against a dumpster. He hit her repeatedly. He then stabbed her multiple times with a kitchen knife, breaking the knife into several pieces. Although no eyewitness actually saw the knife in defendant's hand, they saw him make a thrusting motion toward Alvarado, different from when he had been beating her. Defendant then ran off.

Alvarado lived long enough to stumble across the street, begging for help, before she collapsed. Her friends took her hand,

and she told them to care for her children. She died of multiple stab wounds. She suffered a total of five stab wounds, at least two of which, piercing her lung and heart, were fatal.

When police arrived on the scene, Alvarado's friends and other bystanders pointed them in the direction that defendant had run. Police drove after him. While defendant was running away, police saw him discard his sweatshirt. Defendant was detained without incident. Defendant was identified in a field show-up by at least two witnesses.

Police recovered pieces from the broken steak knife at the scene. A bloodstain on the blade matched Alvarado's DNA profile. The knife handle had DNA from both defendant and Alvarado. Defendant's discarded sweatshirt contained defendant's DNA, with a bloodstain containing Alvarado's DNA.

2. *Charges*

Defendant was charged by information with one count of murder. (Pen. Code, § 187, subd. (a).)[1] The special circumstance that the murder was committed while the defendant was engaged in a kidnapping was also alleged. (§ 190.2, subd. (a)(17).) Defendant was charged with a second count, the kidnapping itself. (§ 207.) A personal use of a knife enhancement was also alleged (§ 12022, subd. (b)(1)), but only with respect to the

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1 All undesignated references are to the Penal Code.

murder count, not the kidnapping. Defendant pleaded not guilty and proceeded to jury trial.

3. *Pretrial Pitchess Motion*

Defendant twice moved under *People v. Pitchess* (1974) 11 Cal.3d 531 (*Pitchess*) to discover information about the officers involved in arresting him and investigating the crime. The motions were granted in part. As to the first motion, defendant was entitled to discover information relating to claims of false evidence, false testimony, and false police reports with respect to Officers Razo and Duenas. The court held an in camera hearing and concluded there was nothing to disclose. As to the second motion, defendant was entitled to similar information with respect to a third officer, Officer Faber. The court conducted an in camera hearing and ordered certain disclosures.

4. *Trial*

At trial the prosecution elicited the testimony of two of Alvarado's friends who had witnessed the crime, O.A. and E.C. O.A. and E.C. both testified with the assistance of an interpreter.

In addition to testifying about the facts of the murder, E.C. briefly testified to two telephone calls she had subsequently received from defendant in October 2010. In the first call, defendant said, "Bitch, I'm going to kill you. Wherever I find you,

I'm going to kill you because you stole my woman."[2] E.C. knew it was defendant calling because she recognized his voice. Nonetheless, she asked who was speaking, and defendant hung up. The second time, defendant called and said he was going to kill E.C.'s husband wherever he found him. E.C. was, by this time, married to J.D., who had also witnessed the murder. E.C. was "really scared." She called J.D. and told him to leave work. They packed some bags and left their home for a week.

The prosecution also offered the testimony of B.P., a witness who had not known defendant or Alvarado, but had also witnessed the kidnapping and murder. The prosecution further submitted video obtained from the security cameras at the car wash, which was consistent with the eyewitnesses' testimony.

Defendant presented a minimal defense, offering only the testimony of a police detective who agreed that defendant had been working with an FBI gang task force. The task force, which included LAPD members, was focused on street gangs, particularly Mara Salvatrucha. In June 2009, defendant contacted the task force and indicated that he was willing to cooperate with law enforcement. Defendant was himself a

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[2] The interpreter made a correction that the actual word used was "perro," which literally means "dog."

member of Mara Salvatrucha, and was paid by the task force to give it information about his fellow gang members.[3]

In argument to the jury, while defense counsel did not affirmatively concede defendant's guilt of second-degree murder, counsel argued only that the evidence did not establish first-degree murder or kidnapping.

The jury found defendant guilty as charged.

5. *Sentencing and Appeal*

Defendant was sentenced to life in prison without the possibility of parole for the murder, plus one year for the knife enhancement. He was given credit for 1992 days presentence credit. Sentence on the kidnapping count was the high term of eight years, plus an additional year for the knife enhancement. That sentence, however, was stayed under section 654. Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant raises five contentions: (1) this court must independently review the trial court's in camera *Pitchess*

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[3] It is not entirely clear how defendant's assistance of the gang task force was intended to provide a defense to the murder and kidnapping charges. From defendant's statements at a pretrial hearing under *People v. Marsden* (1970) 2 Cal.3d 118, it appears that defendant believed law enforcement members were in cahoots with a "cartel" on whom he had been informing, and that they had planted evidence on him. He also believed the FBI had implanted a chip in his head.

hearings; (2) the trial court erred in admitting E.C.'s testimony regarding defendant's threatening phone calls; (3) the trial court erred in failing to instruct the jury with CALCRIM No. 121, regarding the jury's duty to abide by the translation provided in court; (4) defendant's sentence for the kidnapping count was improperly enhanced for the weapon enhancement, when that enhancement was not alleged nor found true with respect to that count; and (5) defendant's presentence credits were improperly calculated.

1. *Pitchess Review*

Defendant requests that we independently review the records from the in camera hearings, to assure that the proper *Pitchess* procedure was followed, in connection with the grant of his *Pitchess* motions. The Attorney General concurs that the request is appropriate. The procedural requirements for a *Pitchess* hearing are set forth in *People v. Mooc* (2001) 26 Cal.4th 1216. "When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself. [Citation.] . . . A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding

the completeness of the record. [Citation.] [¶] The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. . . . If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined." (*Id.* at pp. 1228-1229.)

Here, the trial court complied with the procedural requirements set forth by *Mooc*. The police department witness, who testified she was acting in the capacity of the custodian of records, described the contents of the files relating to the three officers. The court questioned the custodian of records as to any complaints against the officers which would be potentially relevant. We have conducted an independent review of the transcripts and find no abuse of discretion.

2. *No Error in Admitting the Threatening Telephone Calls*

Defendant contends the court erred in admitting the threatening telephone calls he made to E.C. after the murder. He argues the calls were inadmissible on two bases: foundation and relevance.

There was a sufficient foundation. Evidence Code section 403, subdivision (a) provides that the proponent of proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible

unless the court finds there is sufficient evidence to sustain a finding of the existence of the preliminary fact. This applies when the proffered evidence is a statement of a particular person "and the preliminary fact is whether that person made the statement." (Evid. Code, § 403, subd. (a)(4).) The identity of a caller is a preliminary fact which the proponent of the evidence of a phone call has the burden of establishing. (*People v. Collins* (1975) 44 Cal.App.3d 617, 628.) If the evidence is sufficient to sustain a finding either way, the question is for the jury. However, the trial court "had the sole function of deciding whether there was sufficient evidence of the caller's identity to submit the question to the jury. [Citations.]" (*Ibid.*) Here, E.C. testified that she had met defendant five times before the murder, and heard him speak on each occasion. Further, she had spoken to him on the phone twice. E.C. testified that she recognized defendant's voice when he called to threaten her. E.C.'s familiarity with defendant's voice constituted a sufficient basis for concluding defendant had called her. The court did not abuse its discretion in finding a sufficient foundation had been established.

Nor did the court err in concluding the evidence was relevant. "As decisions of this state have long recognized [citations], a threat made by a defendant against a prospective prosecution witness, with the apparent intention of intimidating

the witness, is properly admitted because an accused's efforts to suppress evidence against himself indicate a consciousness of guilt. [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 866-867.) Here, defendant called E.C. twice, once threatening to kill her, and once threatening to kill her husband – both of whom had seen him kidnap and murder Alvarado. The threats were taken seriously enough that E.C. and her husband moved away from their home for a time. Even though the calls did not specifically reference testifying against him, the threats against two witnesses defendant knew demonstrated defendant's consciousness of guilt, and were therefore admissible.

Even were the admission erroneous, any error is harmless under any standard due to the overwhelming evidence of defendant's guilt. Two eyewitnesses – one of whom did not know defendant at all – testified to seeing defendant drag Alvarado away from her friends, beat her, and stab her. Defendant was apprehended running from the scene, and identified by witnesses. His DNA was on the murder weapon; the victim's blood was on his sweatshirt. Defendant was convicted of murder based on the overwhelming evidence of his guilt, not the fact that he threatened two of the witnesses against him.

3. No Prejudicial Error in Failing to Instruct with CALCRIM No. 121

CALCRIM No. 121 provides, in pertinent part: "Some testimony may be given in [foreign language]. An interpreter will

provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for the jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff)." Although E.C. and O.A. testified in Spanish, with assistance of an interpreter, this instruction was neither requested nor given.[4]

As the bench notes for the instruction explain, "The committee recommends giving . . . this instruction whenever testimony will be received with the assistance of an interpreter, though no case has held that the court has a sua sponte duty to give the instruction. The instruction may be given at the beginning of the case, when the person requiring translation testifies, or both, at the court's discretion." (Bench Note to CALCRIM No. 121 (2016 ed.) p. 20.) The parties have not identified, nor has independent research disclosed, any case

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[4] When the court discussed jury instructions with counsel in preparation to instruct at the end of the case, the court began, "so the 100 series we've already done. That's the pretrial instructions." But the court had not pre-instructed with CALCRIM No. 121, perhaps having been unaware any witnesses would be using an interpreter. Neither counsel noticed the omission.

authority imposing a sua sponte obligation to give the instruction.

We do not doubt that the better practice is to give this instruction whenever testimony will be received with the assistance of an interpreter; in fact, the case may arise in which a court will conclude a sua sponte duty exists to do so. We need not reach the issue here, however, because the failure to give the instruction is harmless in any event. Defendant has not established that any juror was bilingual, used his or her knowledge of Spanish in listening to the testimony of O.A. and E.C., imparted his or her knowledge of Spanish to another juror, or disregarded the English interpretation provided in court. There is nothing but rank speculation that the failure to give this instruction may have impacted defendant's trial in any way.

4. *The Weapon Enhancement Should Not Have Been Imposed on the Kidnapping Count*

Defendant's sentence for kidnapping, stayed under section 654, was enhanced by one year for the personal use of a knife. However, the knife enhancement had been alleged only with respect to the count of murder, not the count of kidnapping. The enhancement had also been presented to the jury only on the murder count, not the kidnapping.

Defendant contends, the prosecutor concedes, and we agree that, under these circumstances, the enhancement must be

stricken from the kidnapping count. We therefore will order the abstract modified to strike the enhancement.

5. *Defendant is Entitled to Additional Presentence Credit*

Defendant was awarded 1992 days of presentence credit. It is undisputed that defendant was arrested on the day of the murder, June 3, 2010, and sentenced on November 20, 2015. Including both terminal days, this constitutes 1997 days. Defendant contends he is entitled to an additional 5 days of presentence credit; the prosecution concedes the error. We agree, and will modify the sentence accordingly.

DISPOSITION

The abstract of judgment is modified to strike the sentence enhancement under 12022, subdivision (b), with respect to count 2 only. Defendant's actual presentence credit is increased from 1992 to 1997 days. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and forward a certified copy to the Department of Corrections. In all other respects, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.