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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER B. GOMEZ,

Defendant and Appellant.

In re ALEXANDER B. GOMEZ,

on Habeas Corpus.

B233431

(Los Angeles County
Super. Ct. No. VA108556
consolidated with No. VA113062)

B242009

APPEAL from a judgment of the Superior Court of Los Angeles County.
Peter Espinoza, Judge. Affirmed.

ORIGINAL PROCEEDING. Petition for writ of habeas corpus. Writ denied.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant,
Appellant and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang,
Deputy Attorneys General, for Plaintiff and Respondent.

Alexander Gomez appeals from the judgment after a jury found him guilty of one count of first degree murder. We affirm.

FACTS AND PROCEEDINGS BELOW

On the evening of October 13, 2008, Rigoberto Arevalo and Julio Figueroa were riding their bicycles near their homes in South Central Los Angeles when a van pulled up alongside of them and stopped. Someone in the van yelled, “Fuck Flowers”¹ and the driver stuck a black revolver out of his window and started shooting at the boys. Figueroa dived under a parked car and was uninjured. Four bullets struck Arevalo and he died from his wounds.

Jaime Diaz testified for the prosecution. He told the jury that he was 15 years of age at the time of the shooting and had been a member of the Aztlan gang for approximately a year and a half.² On the night of the shooting he was riding in the back of defendant Gomez’s van. Gomez was driving and another Aztlan gang member (“Droopy”) was in the front passenger seat. Diaz stated that he, Gomez and Droopy were cruising the area looking for members of the Florencia gang. At one point in the evening Gomez handed a black revolver to Diaz and told him to “go kill” a man who was standing at the end of a cul de sac. Before Diaz did so, however, Gomez took the gun back and told Diaz to “forget it. Later that evening they saw Arevalo and Figueroa on their bicycles. Gomez remarked that he thought the boys were members of the Florencia gang. He stuck the black revolver out his window and yelled, “Fuck Flowers” and “Aztlan Trece gang” and started firing the gun at the boys. After the shooting Gomez drove to the home of his girlfriend, Erika Frias. Diaz saw Gomez hand Frias the gun that he had used in the shooting and heard him tell her to hide it. Diaz denied being the shooter and bragging about being the shooter.

¹ This was a reference to the Florencia gang. Neither Arevalo or Figueroa belonged to a gang.

² Aztlan and Florencia were rival gangs.

On cross-examination Diaz testified that the police arrested him for the Arevalo murder but later released him. He stated that while he was in custody the police told him that he needed to cooperate with them and testify in the trial, and if he didn't, he would be charged with murder and face spending the rest of his life in prison. Prior to trial the police had assisted Diaz and his family to relocate in another state.

Gomez's girlfriend, Erika Frias, also testified for the prosecution. She confirmed Diaz's testimony that Gomez handed her a gun on the night of the shooting. The gun was wrapped in a white shirt. Gomez told Frias to "put it away" so she hid it in a pot by the side of her house. Later, at Gomez's urging, she gave the gun to her next door neighbor who was also a member of the Aztlan gang. Gomez instructed Frias that if she was questioned by the police she should say that Gomez's uncle dropped him off at her house the day of the shooting and that he was with her the whole day and did not have his van. Frias admitted she told the police that on the night of the shooting Gomez told her: "We just got some Flowers" but, she testified, she lied to the police because she was scared. She also admitted telling the police she saw the gun that Gomez handed her the night of the shooting and that it looked like a black "cowboy gun." She claimed this statement too was a lie. On cross-examination Frias testified that she had never seen Gomez or Droopy with the "cowboy gun" before the shooting but that she saw Diaz with the gun two days earlier. She told the jury that after the shooting Diaz bragged about the shooting and claimed that he was the "trigger man." She admitted, and other testimony corroborated, that she had never before told anyone about Diaz's claim to have shot Arevalo.

Several days after Arevalo was killed, the police responded to a "shots fired" call involving a van similar in description to Gomez's van. The police were in the process of impounding the van when Gomez arrived on the scene and admitted that the van was his. Gomez was arrested for public intoxication. Further investigation led to his being charged with Arevalo's murder.

Gomez testified on his own behalf. He admitted that he had been convicted of assault with a firearm six months before the shooting and that at the time of the shooting he was a member of the Aztlán gang. He stated that on the day of the shooting he had been drinking with Droopy and Diaz. That evening he started to drive the group to Frias' house in his van but was too drunk so he turned the van over to Diaz and fell asleep in the front passenger seat. He was awakened by the sound of Diaz shooting a gun from the driver's window. Until then, he did not know Diaz had a gun. He did know, however, that 15-year-old Diaz knew how to drive and that he got his nickname, Clever, from stealing cars. Gomez admitted that when the group got to Frias's house after the shooting, he gave the gun to her to hide.

The jury found Gomez guilty of one count of first degree murder and found true the gun use allegations under Penal Code section 12022.53 and the street gang allegation under section 186.22, subdivision (b)(1)(C). Gomez admitted the prior conviction allegations. The court sentenced Gomez to a term of 25 years to life, doubled under the "Three Strikes" law, an additional 25 years to life for the gun enhancement under section 12022.53, subdivision (d), and an additional 5 years for a prior serious felony conviction. Gomez filed a timely appeal.

DISCUSSION

I. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S IMPEACHING GOMEZ WITH HIS CONVICTION FOR ASSAULT WITH A FIREARM AND FAILURE TO REQUEST A LIMITING INSTRUCTION ON THE JURY'S USE OF THAT CONVICTION WERE HARMLESS ERRORS.

On appeal and in an accompanying writ petition Gomez contends that his conviction resulted from his trial attorney's negligent failure to object to the prosecutor impeaching his testimony with evidence of his prior conviction of a similar crime—

assault with a firearm—and failure to request a limiting instruction on the use of that prior conviction.

Even assuming counsel was negligent in his representation, Gomez has failed to show a reasonable probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

The evidence against Gomez showed that he had the means, motive and opportunity to murder Arevalo. The shots were fired from Gomez’s van and he had a revolver with him in the van the night of the shooting. The motive for the shooting was “getting some Flowers,” which meant killing members of the rival gang, Florencia. The opportunity arose when Gomez saw Arevalo and Figueroa, whom he believed were members of the Florencia gang in vulnerable circumstances as they rode their bicycles on the street.

The most damaging evidence against Gomez came from Diaz and from Gomez himself.

Diaz testified that he, Gomez and Droopy were driving around in Diaz’s van looking for “Flowers” (members of the Florencia gang) when Gomez yelled gang slogans and shot the victim from the driver’s side window of the van. Diaz’s testimony was supported by Gomez’s actions after the shooting that strongly demonstrated consciousness of guilt. These actions included Gomez’s telephone conversations with his mother (recorded by the police and played to the jury) in which he told his mother to dispose of the gun he gave to his girlfriend Frias shortly after the shooting, and in which he fabricated two inconsistent alibis: (1) that his uncle dropped him off at Frias’s house the day of the shooting and that he was with her the whole day and did not have his van, and (2) that he was working with his uncle the day of the shooting and that later his uncle dropped him off at Frias’s house. He also told his mother “the van wasn’t involved in no shooting” but testified at trial that he turned the van over to Diaz to drive and that Diaz shot the victim from the van. In another conversation he told his mother that if she

would put up his bail, he would go to Mexico and never come back. Finally, when he arrived at Frias's house after the shooting he told her: "“We just got some Flowers.”"

At trial Frias's attempt to help Gomez blame the shooting on Diaz lost credibility when she confessed on cross-examination that despite numerous conversations with the police she had never before told anyone that Diaz admitted to her that he was the shooter.

II. THE COURT DID NOT ERR IN ADMITTING THE “SHOTS FIRED” EVIDENCE.

Prior to trial Gomez moved to exclude evidence that a few days after the murder the police arrested him in the course of investigating a “shots fired” report involving a van similar to his. He argued the evidence that the police were investigating a “shots fired” call was not relevant to any issue in the case. The court took the matter under submission and ultimately ruled the evidence was admissible because it was relevant and “not that prejudicial” in light of other evidence tying Gomez to the van.

Based on this ruling Deputy Sheriff Arnulfo Loreto testified that in the afternoon of October 16, 2008 he responded to a report of shots fired. The reporting party gave Loreto the description of a van which Loreto broadcast to other deputies in the area. A deputy reported seeing a van matching the description and Loreto went to the location. Gomez arrived at the scene as the van was being prepared for towing. Loreto arrested Gomez for public intoxication.

In the trial court the People maintained that the evidence the police encountered Gomez and his van while investigating a report of “shots fired” was relevant because it kept the jury from thinking “that the police just swooped in and picked Mr. Gomez basically out of a hat just because they have some vendetta or some grudge against him.”

The Attorney General essentially repeats that argument here. The evidence tying Gomez to a “shots fired” investigation a few days after Arevalo’s murder explained the police presence but did not suggest that Gomez was the shooter. Thus, even if minimally relevant, the evidence was not unduly prejudicial under Evidence Code section 352.

In any case, even if the court erred in admitting the “shots fired” evidence, the error would not be a ground for reversal. For the reasons explained in Part I (*ante*, at p. 4), it is not reasonably probable that absent this error, Gomez would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818.)

III. THE COURT PROPERLY ENHANCED GOMEZ’S MURDER SENTENCE WITH THE FIREARM ENHANCEMENT UNDER PENAL CODE SECTION 12022.53, SUBDIVISION (d).

Gomez argues that imposing the 25-years-to-life gun enhancement under Penal Code section 12022.53, subdivision (d), on top of a sentence for murder violates the rule barring multiple convictions based on necessarily included offenses (*People v. Ortega* (1998) 19 Cal.4th 686, 692-694) and the double jeopardy clause of the United States Constitution. He concedes, however, that the California Supreme Court disagrees with his position. (*People v. Sloan* (2007) 42 Cal.4th 110; *People v. Izaguirre* (2007) 42 Cal.4th 126.) We are bound by our high court’s decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied.

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ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.