

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO VILLANUEVA,

Defendant and Appellant.

B235006

(Los Angeles County
Super. Ct. No. BA376234)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Lisa B. Lench, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Fernando Villanueva appeals the judgment entered following his conviction by jury of second degree robbery in which he personally used a firearm. (Pen. Code, §§ 211, 12022.53, subd. (b).) Villanueva contends the trial court erred in refusing to modify CALCRIM No. 3400, the standard instruction on the defendant's burden of proof for an alibi defense. We reject Villanueva's claim and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. The prosecution's evidence.

On September 19, 2010, at approximately 10:00 a.m., Valentin Dominguez made a delivery of frozen goods to a popsicle store on James Wood Boulevard in Los Angeles and received a bag containing approximately \$1,280 in cash as payment. As Dominguez stepped outside, Villanueva pressed a small revolver into Dominguez's ribs and told Dominguez to give him the money or Villanueva would kill him. Two additional individuals approached and surrounded Dominguez. After Dominguez surrendered the bag containing the cash, Villanueva and his associates ran to a Chevy Tahoe parked in front of Dominguez's truck and fled the scene.

Dominguez memorized the license plate number of the Tahoe and asked the store owner to call 911. When Los Angeles Police Officer DeShawn Green arrived at the store, Dominguez gave him a piece of paper on which he had written 4RW7407.

Officer Green ran the license plate number but found no matches. He changed the first 7 to a Z and obtained a match to a Chevy Tahoe with a registered owner and an address. A police helicopter flew over the address but the vehicle was not seen.

On September 23, 2010, Los Angeles Police Officer Jessie Swartz obtained updated information regarding the Tahoe and went to an address on Cecelia Street in Cudahy. As Swartz and other plain clothes officers arrived at the address, they saw a Chevy Tahoe being driven by a male Hispanic who matched the description of the robbery suspect. The officers followed the Tahoe in the hope it would lead them to the other suspects. When the vehicle returned to Cecelia Street, Swartz stopped the vehicle and detained the driver, Villanueva, for investigation. The registered owner, Erica Huezo, was in the passenger seat. Dominguez was summoned to the Rampart station

where he identified Villanueva in a photographic lineup as the individual who had robbed him. Swartz testified Dominguez's identification of Villanueva was "very immediate."

Dominguez testified Villanueva's picture "looked the most like" the robber. Dominguez identified Villanueva at the preliminary hearing and at trial and testified he had no doubt Villanueva was the individual who had robbed him.

2. Defense evidence.

Villanueva presented an alibi defense. Gabriela Escobedo testified that on September 19, 2010, at 10:00 a.m., Villanueva arrived at her aunt's home in Rialto, California, driving a green Lincoln in order to transport Escobedo and her boyfriend, Anthony Comeda, to Paramount, California. Esperanza Pereyra, one of the residents of the Rialto home, also testified Villanueva arrived at the home at approximately 10:00 a.m.

Escobedo indicated they arrived in Paramount at approximately noon. Villanueva and Comedo left in the Lincoln and returned to Escobedo's home with Erica Huezo at approximately 5:00 p.m.

Erica Huezo testified she and Villanueva have known each other for approximately eight years and have had an on and off relationship. In September of 2010, they were separated. Villanueva was living on Cecilia Street in Cudahy and Huezo was living in Maywood. On September 19, 2010, Villanueva and Comedo arrived at Huezo's home in Maywood in Villanueva's Lincoln at approximately noon.

Huezo further testified she lent her Chevy Tahoe to one Eric Garcia on the morning of September 19, 2010, and he returned the car that evening. Huezo claimed she had dated Garcia, unbeknownst to Villanueva. However, Huezo does not know where Garcia lives, his phone number or what he does for a living and is not certain his name is Eric Garcia. Huezo testified she suspected Garcia committed a robbery in 2009 after Huezo gave him a ride to a medical shop. When Garcia came out of the shop with property, he told Huezo not to say anything or he would kill her. Huezo lent Garcia her car on September 19, 2010, because he threatened to tell Villanueva about their relationship if she did not.

Mitchell Eisen, Ph.D., testified stress, trauma, weapon focus, suggestibility and numerous other factors can have a detrimental effect on memory and can result in misidentification.

3. *Jury instruction conference.*

Villanueva asked the trial court to modify CALCRIM 3400 to add the italicized sentence so the instruction would read as follows:

“The defendant contends he did not commit this crime and he was somewhere else when the crime was committed. The People must prove that the defendant was present and committed the crime with which he is charged. The defendant does not have to prove he was elsewhere at the time of the crime. [¶] *The defendant merely needs to raise a reasonable doubt that he was elsewhere at the time of the crime and is not required to prove this beyond a reasonable doubt or by a preponderance of the evidence.* If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find him not guilty.”

The trial court agreed the proposed modification of the instruction correctly stated the law but ruled the standard instruction adequately addressed the issue.

4. *Defense counsel’s closing argument.*

During closing argument, defense counsel asserted, “[A]ll the defendant is required to do is raise a reasonable doubt in your mind that he was somewhere else at the time of this event. [¶] He’s not required to prove an alibi beyond a reasonable doubt. He’s not required to prove it even by what they call a preponderance of evidence, meaning a substantial amount of evidence.”

At that juncture the prosecution objected defense counsel had misstated the law. The trial court overruled the objection and defense counsel continued as follows:

“All he has to show you is that the likelihood is in your mind that he was somewhere else. That’s all. He has no burden of proof. And that continues through the testimony regarding his alibi.”

DISCUSSION

Villanueva concedes CALCRIM No. 3400 is a correct statement of law but contends the requested modification would have clarified the instruction by framing the issue as a positive statement. He claims the failure to modify the instruction was prejudicial, noting Dominguez testified he selected Villanueva from the photographic lineup because he most closely resembled the robber and Villanueva's expert explained that such an identification is one of the problems with photographic lineups. Also, Villanueva's alibi witnesses established that Villanueva was far from the scene of the robbery at the time it occurred.

Villanueva also claims the prosecutor exacerbated the error by objecting when defense counsel argued Villanueva was required only to raise a reasonable doubt he was elsewhere at the time the crime was committed. Although the trial court overruled the objection, without the requested addition to the instruction, the jury could not have been certain defense counsel correctly had stated the law.

Villanueva's claim is meritless. Indeed, where the jury is instructed to acquit if the prosecution fails to establish guilt beyond a reasonable doubt, the alibi instruction is redundant. (See *People v. Alcala* (1992) 4 Cal.4th 742, 804; *People v. Freeman* (1978) 22 Cal.3d 434, 437-439.)

In any event, the instruction as given was correct. Moreover, even assuming error, Villanueva cannot show prejudice. Officer Swartz testified Dominguez immediately identified Villanueva in the photographic lineup and Dominguez testified he had no doubt Villanueva was the individual who had robbed him. Dominguez's identification was corroborated by the evidence that showed Villanueva had access to and drove the getaway car. Huevo's claim she lent the Tahoe to Eric Garcia on the morning of the robbery was entirely lacking in credibility. Finally, after the trial court overruled the prosecutor's objection, defense counsel reiterated the point counsel had been making when the prosecutor objected.

In sum, the trial court committed no instructional error and, even assuming error, Villanueva cannot show prejudice under any standard of review.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.