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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES RENE RODRIGUEZ,

Defendant and Appellant.

2d Crim. No.B269468
(Super. Ct. No. 2013022661)
(Ventura County)

A jury found Andres Rene Rodriguez guilty of attempted murder (Pen. Code, §§ 187, 664¹) and assault with a semiautomatic firearm (§ 245, subd. (b)). The jury also found true gang allegations (§ 186.22, subd. (b)(1)) and firearm allegations (§§ 12022.5, subd. (a), 12022.53, subd. (c)) on each count. Rodriguez admitted a prior serious felony conviction (§ 667, subs. (a)(1), (c)(1)) and two prior prison terms. The court sentenced Rodriguez to a total term of 51 years.

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

FACTS

Raul Flores had known Rodriguez for about 26 years. They grew up in the Colonia area of Oxnard, within the territory of the Colonia Chiques gang. They were both members of the gang. Rodriguez's gang moniker was "Wimpy." Flores's gang moniker was "Chepita," named after his grandmother, "Chepa," who raised him.

Eventually Flores left the gang. He had begun working legitimate jobs and the gang members expected him to pay for everything when they were together. He left because he felt the gang was taking advantage of him.

After Flores left the gang, Rodriguez robbed Flores at gunpoint. Rodriguez threatened he would kill Flores if he reported the robbery. Flores spoke to the Oxnard Police Department.

On the morning of June 11, 2013, Flores planned to go to the home of John DeJesus. DeJesus was also known as "Manchas," Spanish for stain, due to a large birthmark on his face. Manchas is associated with the Colonia Chiques gang, and sold methamphetamine and marijuana from his house. Rodriguez also frequented the house.

Flores rode his bicycle to DeJesus's house. As Flores approached the door, he saw a man standing to the side of the house. The man was wearing sunglasses and a hooded top. Flores did not notice who the man was.

When Flores knocked on DeJesus's door, a woman's voice said, "Oh, he's not here right now." Flores was surprised as he and DeJesus had agreed to meet there. Flores began to leave.

As Flores was walking his bicycle down the driveway, the man from the side of the house ran up to Flores. Flores now

recognized the man as Rodriguez. Rodriguez called Flores a rat, meaning informant. Rodriguez held a semiautomatic handgun pointed in Flores's face. Rodriguez said, "What's up, you fucking rat? You know what time it is?" Flores pushed Rodriguez because he believed he was about to be shot. Rodriguez lost his balance, allowing Flores to flee on his bicycle.

Rodriguez fired shots at Flores from the middle of the street in front of DeJesus's house. When Flores heard the first shot, he sped up on his bicycle. Flores continued to accelerate as he heard several more shots fired at him. When Flores looked back, he could see that Rodriguez was shooting directly at him. While Rodriguez was shooting, he called out "Colonia Chiques" and used a Spanish term meaning "you're my bitch."

One bullet went through Flores's right forearm. Flores fell off his bicycle. Rodriguez stopped shooting and ran away. Flores was bleeding. When he called for help, neighbors came to his aid. Flores was not armed.

Wire Tap

At the time of the shooting, the Ventura County Sheriff's Office had a telephone wiretap targeting Alejandro Ornales, a Colonia Chiques gang member. Sheriff's Detective Victor Medina participated in the wiretap investigation. Medina is familiar with Ornales's and Rodriguez's voices from hearing them speak in person and on recordings. Three of the wiretap recordings were admitted into evidence. All three recordings were on the day of the shooting.

On the first recording, Ornales dials an unidentified number at 3:51 p.m. As the telephone rings, Ornales can be heard talking to another man in the same room. Ornales states, "Well, not unless he blasted, fuckin', what's his . . ." The other

man says, “Raul” and “You should see that [unintelligible] homie.” The call ends when it is transferred to the recipient’s voicemail. Medina opined the discussion about blasting Raul referred to Rodriguez shooting Raul Flores.

On the second recording, Ornales receives a call at 4:11 p.m. from the number Ornales dialed in the first recording. The caller identifies herself as Clarissa. She is returning his call. Ornales says he called to talk to Wimpy, Rodriguez’s gang moniker. Clarissa replies that Wimpy was there, but he left “because of what happened.” Clarissa says she lives on the same street as Johnny (DeJesus) and the police were raiding his house. Ornales asks if the “mess happened right there.” Clarissa says it did. Ornales asks, “[W]hich one was it?” Clarissa replies, “Raul, one that they said he was . . . that he was opening his mouth.” Clarissa tells Ornales that Rodriguez asked her for money.

The third recorded telephone call was between Ornales and Rodriguez. After greeting each other, Ornales asks Rodriguez where he is. Rodriguez replies, “I left, dude.” Rodriguez adds, “I’m gonna be over there for you.” Ornales says, “[A]s soon as you go over there, then more things can be done.” Ornales continues, “It’s just that it’s better if you split and go over there because this dude already pointed the finger over here.” Rodriguez agrees. Ornales says, “He already talked and open[ed] up his mouth.” Rodriguez says, “[T]he . . . fucking Angel was with him, you know There was a fucking, there was an angel around.” Rodriguez says, “[H]e already had priors dude, . . . like I told you for singing like a bird” Ornales asks, “And what did they call the dude?” Rodriguez replies, “Like his, like his grandmother, dude.” Rodriguez says the dude “was strapped. . . . And you know . . . I got on the fucking horse first,

dude.” Ornales asks, “But . . . everything is breathing, right?” Rodriguez says yes.

Detective Medina opined that “pointing the finger” referred to Flores’s cooperation with law enforcement. Rodriguez’s statement that Flores had an angel meant he was lucky to be alive after the shooting. Priors for “singing like a bird” meant that Flores had cooperated with law enforcement in the past. The word “strapped” meant armed with a gun. Medina explained gang members often embellish their account of an incident to make themselves seem more impressive. “I got on the fucking horse first” meant Rodriguez drew and shot first. When Ornales asked if “everything was breathing,” he was asking if Flores was still alive.

Gang Evidence

Oxnard Police Detective Cody Collett testified as a gang expert. He said shooting an informant would benefit the reputation of the shooter and the gang as a whole. Collett executed a warrant at 1556 Crawford Street, DeJesus’s house. He found Colonia Chiques gang-related clothing and drawings with gang initials and the names of gang members, including Rodriguez. He also found drugs. Collett testified it would not be unusual for a drug dealer operating within gang territory to help the gang kill an informant.

The parties stipulated as follows:

“Colonia Chiques is a documented criminal street gang as defined in Penal Code sections 186.22 (a) through 186.22 (j).

“On June 11, 2013, the defendant, Andres Rodriguez, was a documented member and an active participant of the Colonia Chiques street gang with a moniker of Wimpy.

“On June 11, 2013, Alejandro Ornales was a documented member and active participant of the Colonia Chiques criminal street gang with the moniker of Danger.

“On June 11, 2013, at approximately 10:31 a.m., Raul Flores called 911 to report being the victim of a shooting in the 1500 block of Crawford Street in the City of Oxnard, County of Ventura.

“The call was received by an Oxnard Police Department 911 call taker.

“On June 11, 2013, the gun used to shoot Raul Flores was a .25 caliber semiautomatic handgun. The gunshot wound Raul Flores suffered to his right forearm was caused by a .25 caliber semiautomatic round.

“On June 11, 2013, the eight shell casings located at evidence markers 1 through 8 as well as the spent bullet located at evidence marker 13 were .25 caliber semiautomatic rounds.

“No fingerprints or DNA could be located on any of the shell casings collected from the 1500 block of Crawford Street in Oxnard.

“On June 11, 2013, the blood located at evidence markers 14 through 22 was Raul Flores’ blood. All foundational facts for the photographs to be admitted into evidence in this case have been established. A legal search was conducted at the residence at 1556 Crawford Street. Colonia Chiques gang paraphernalia as well as drug paraphernalia were located.

“The wiretap or electronic interception of Alejandro Ornales’ telephone number, (805) 816-9156, on June 11, 2013, was legally authorized by a valid Court order. Alejandro Ornales was the target of the wiretap on this day.”

Defense

The only defense evidence presented was a photograph of evidence found at DeJesus's house.

DISCUSSION

Rodriguez contends the trial court erred by failing to instruct sua sponte on the elements of uncharged conspiracy.

A trial court must instruct sua sponte on general principles of law that are “commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case.” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

Rodriguez argues that the People relied on gang evidence to show intent and motive. He points to evidence that gang members knew Flores was an informant and that Flores was “set up” by the gang. Rodriguez concludes there was an uncharged conspiracy.

But the People did not claim Rodriguez is vicariously liable for the acts of some third person. The evidence showed he was the direct perpetrator of the offenses of which he was convicted. With the possible exception of the admission of the first two telephone recordings, the existence of a conspiracy was never a material issue in the case. The jury was perfectly capable of determining whether gang culture gave Rodriguez the intent and motivation to kill without an instruction on the formal legal elements of conspiracy. An instruction on the formal elements of conspiracy was not “necessary for the jury’s understanding of the case.” (*People v. Montoya, supra*, 7 Cal.4th at p. 1047.) Thus the trial court did not have a sua sponte duty to instruct on conspiracy. (*Ibid.*)

Rodriguez's reliance on *People v. Williams* (2008) 161 Cal.App.4th 705 is misplaced. There, an undercover police officer gave Williams \$20 for cocaine. Williams entered a nearby tent. A third person came out of the tent and transferred the cocaine to the officer. At trial, the court gave the jury uncharged conspiracy instructions at the People's request. The jury convicted Williams of selling cocaine base. On appeal, Williams contended the uncharged conspiracy instructions improperly directed the jury to find that a conspiracy existed. We affirmed.

Williams is easily distinguishable. First, the case does not concern the trial court's sua sponte duty to give an uncharged conspiracy instruction. The court gave the instruction at the People's request. Second, because Williams did not directly give the cocaine to the officer, an uncharged conspiracy instruction was proper for vicarious liability in that case. Here, Rodriguez was the direct perpetrator of the crimes of which he was convicted; no instruction for vicarious liability was necessary.

It is true that a conspiracy instruction is required for the jury to find hearsay statements of a coconspirator admissible under Evidence Code section 1223. (See *People v. Earnest* (1975) 53 Cal.App.3d 734, 744-745.) Assuming Evidence Code section 1223 is the only proper basis for the admission of the recordings of the first two telephone conversations between Ornales and Clarissa, it was error not to give the instruction. But the error was harmless by any standard.

The third conversation between Ornales and Rodriguez was admissible under Evidence Code section 1220, admissions of a party. During that conversation, Rodriguez admitted that he shot Flores; that he shot Flores because Flores

is an informant; and that Flores has an angel, that is, he is lucky to be alive. The first two recordings add nothing material to that conversation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Mark S. Borrell, Judge
Superior Court County of Ventura

Dan Mrotek, under appointment by the Court of
Appeal, for Defendant and Appellant.

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