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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANGEL ELIEL OLIVA SANCHEZ, Defendant and Appellant.	B228633 (Los Angeles County Super. Ct. No. TA103776)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Ronald White for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Angel Eliel Oliva Sanchez appeals from a judgment of conviction entered after a jury trial. In a five-count information, the People charged defendant with murder (Pen. Code,[1] § 187, subd. (a); count 1); two counts of attempted willful, deliberate, premeditated attempted murder (§§ 187, subd. (a), 664; counts 2 & 3); and conspiracy to commit perjury (§ 182, subd. (a)(5); count 5). Defendant's brother, Gerson Oliva Sanchez (Gerson), was charged with solicitation to commit a crime (§ 653f, subd. (a); count 4), and he was also charged in count 5 with defendant.

The jury found defendant guilty of second degree murder on count 1. The jury also found true the allegations that defendant personally and intentionally used and discharged a firearm in the commission of the crime (§ 12022.53, subds. (b), (c), & (d)). Defendant was found not guilty on counts 2, 3, and 5. Gerson was found not guilty on counts 4 and 5. Defendant was sentenced to state prison for a total of 40 years to life.

On appeal, defendant claims several errors regarding the admission of Gerson's statements under the coconspirator's exception to the hearsay rule. Defendant also contends that the trial court erred in failing to instruct the jury with CALCRIM No. 418 concerning the limitation on the use of the statements. Finally, defendant claims that he received ineffective assistance of counsel because his trial counsel failed to object to admission of Gerson's statements and failed to request the jury be instructed with CALCRIM No. 418. We find no grounds for reversal and affirm the judgment.

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[1] All further statutory references will be to the Penal Code, unless otherwise specified.

FACTS

A "crew"[2] party was held on Coleman Avenue on November 15, 2008. Various members of different "party crews" were at the party. A "NOS" (nitrous oxide) tank was used at the party so guests could fill balloons and "take hits." Ulysses Real (Real) was selling balloons from the tank.

Gerson and Johnny Medina (Medina) took the tank by force, with one of the men pushing Real out of the way. Nancy Gonzales (Gonzales) confronted the men about taking the tank. When she did so, Gerson tried to hit her and missed.

Defendant arrived at the party with his cousin and with Erika Avendano (Avendano), her sister Roxana Garcia (Garcia), and her friend Janet. Defendant refused to pay the fee that was being charged and pushed his way into the party. At some point, Avendano heard someone shout, "He has a knife." Later, defendant and Gerson approached Real. Avendano heard defendant cursing and saying words to the effect that someone was messing with his brother and that his family was not to be "messed with."

Defendant pulled a pistol from his grey "hoodie" sweatshirt. Avendano and Martin Larios (Larios) saw defendant shoot Real. Real grabbed his chest and collapsed. Five to ten seconds later, more shots were fired. Larios was also shot by defendant. Natalie Ku was grazed by a bullet on her leg.

About 15 to 20 minutes before the shooting, defendant had asked Alejandro Rivera (Rivera) whether anyone had been trying to pick a fight with him and showed Rivera a .22 caliber gun under his sweater.

Avendano ran to defendant's truck after the shooting. Defendant had previously told her that if anything went down, she should go to his truck. Defendant, his cousin, and Janet also went to the truck. As they left, defendant said he was carrying a knife; he

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[2] A "crew" is a group of people who hang out, use nicknames and attend parties together.

had given the gun to his brother and told him to break the gun apart and where to put the pieces.

Defendant questioned Avendano about what she had seen relating to the shooting. She responded that he knew what she had seen, and he asked her again. She then stated, "Nothing. I guess I didn't see anything." Defendant said, "Okay, well now you know what to say when they ask you."

Sometime after the shooting, Gonzales called Blanca Alfaro (Alfaro) and told her she had received a call from Gerson, who told her not to testify against defendant. She did not agree because Real had been her friend.

Larios also received a call from Gerson, who told him not to say defendant was the person who shot him. He refused to agree to the request. Medina also received a similar call. Medina indicated that he had not seen the shooting and did not know who the shooter was.

Real died from the gunshot wound to his chest. A .22 caliber cartridge casing found in defendant and Gerson's home was fired from the same gun as the .22 caliber cartridge casings recovered from the scene of the shooting.

After defendant was arrested, his conversations from jail were monitored during November and December 2008. During several recorded calls with Gerson, they discussed locating various witnesses and hoping they would not testify that defendant did the shooting.

DISCUSSION

Defendant raises several contentions relating to the conspiracy claim, including admission of Gerson's statements and failure to instruct the jury with CALCRIM No. 418 concerning the limitation of statements of a coconspirator. Finally, defendant alleges he received ineffective assistance of counsel relating to the conspiracy charge, including failure to object to admission of Gerson's statements and failure to request CALCRIM

No. 418. Defendant was acquitted of the offense of conspiracy to commit perjury, and he is unable to show any prejudice.

A. *Evidence of Defendant's Jail-recorded Conversations with Gerson*

Hearsay evidence is generally inadmissible. (Evid. Code, § 1200, subd. (b).) However, a hearsay statement is admissible against a party if (a) the statement was made while the declarant was participating in a conspiracy to commit a crime, (b) the statements were made prior to, or during the time the party was participating in the conspiracy, and (c) the evidence was offered after the admission of evidence sufficient to sustain a finding of facts in (a) and (b) above. (*Id.*, § 1223.)

To show a conspiracy, the evidence must show that the conspirators "had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy. [Citations.]" (*People v. Morante* (1999) 20 Cal.4th 403, 416, fn. omitted; accord, *People v. Swain* (1996) 12 Cal.4th 593, 600.) Due to the secrecy usually involved in a conspiracy, the People need not provide direct evidence that the conspirators met and came to an express or formal agreement to commit the target crime. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1606, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.) "The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.)

For a hearsay statement "to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility . . . under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that

the conspiracy existed at the time the statement was made." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 63; accord, *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1402 ["Only prima facie evidence of a conspiracy is required to permit the trial court to admit evidence under the coconspirator's exception. This fact need not be established beyond a reasonable doubt, or even by a preponderance of the evidence."].)

The jury heard nine telephone conversations between defendant and Gerson. While defendant was acquitted of the conspiracy to commit perjury charge, there was sufficient prima facie evidence of a conspiracy to admit his jail-recorded conversations with Gerson.

Specifically, defendant and Gerson had a conversation regarding getting Gonzales to testify that defendant did not do the shooting:

"[Defendant]: Man you gotta go get, fool, [Gonzales], fool because she's the one that[. . . .]

"Gerson: Naw, I heard it was um, supposedly Janet the one saying stuff but I don't know . . . like I'm gonna go talk to them and um[. . . .]

"[Defendant]: Yeah but you gotta get . . . you gotta go get um um [Gonzales] though cause [Gonzales] was the main witness fool, if she could say that I didn't do it then it's all good[.]

"Gerson: Yeah, I know. I know I'm trying my best fool, don't worry about it. We are trying our best right here . . . ."

Defendant and Gerson had a similar conversation regarding Larios:

"Gerson: I just need him to go with me, fool. But, you know, the 8th is next Monday already, that's too soon, you know?

"[Defendant]: You need him to go with you? Fool, if he says it wasn't me, dog, that's it, dog, I'm out.

"Gerson: I know, I know, I know. And that's what I'm doing, fool. That's what I'm doing. I'm trying to get him, but it's hard to get in contact with him, fool.

"[Defendant]: Yeah.

"Gerson: But you know?

"[Defendant]: Fool, I know that fool will do it. That's my homey, you know?

"Gerson: I know he will, fool. I know he will, they already told me that he's saying that it wasn't you, fool, you know?"

In addition, although Gonzales denied that she had received a phone call from Gerson telling her not to testify that defendant was the shooter, Alfaro testified that Gonzales admitted she had received such a phone call from Gerson. Larios also testified that he had received a call from Gerson instructing him not to testify that defendant had shot him and Real.

Some of the recorded telephone conversations certainly were not prima facie evidence of conspiracy to commit perjury, including a conversation when Gerson tells defendant that the truth will be out soon and defendant will be free, and defendant contends that he did not shoot his "homie." The conversations nonetheless provided prima facie evidence of a conspiracy, making the statements admissible. (*People v. Herrera*, *supra*, 83 Cal.App.4th at p. 63; *People v. Olivencia*, *supra*, 204 Cal.App.3d at p. 1402.)

Moreover, defendant was acquitted of the conspiracy, as well as the two counts of attempted murder. Defendant clearly was not prejudiced by the admission of the evidence of his conversations with Gerson. (*People v. Chatman* (2006) 38 Cal.4th 344, 370.)

B. *Trial Court Instruction with CALCRIM No. 371*

Defendant contends the trial court erred in instructing the jury with CALCRIM No. 371 on the suppression or fabrication of evidence indicating consciousness of guilt. We disagree.

Defendant argues that the "instruction suggests the possibility that [he] had a consciousness of guilt which caused him to tamper with, or hide evidence. The conversations [with Gerson] themselves, and the jury instruction were extremely prejudicial and denied a fair trial to [him]." Defendant acknowledges that he was acquitted on the conspiracy charge but suggests that the details of the conversations were

so prejudicial that they caused the jury to see him "in a negative light" and thereby convict him of murder despite the weak evidence against him.

First, defendant's and Gerson's efforts to convince witnesses to commit perjury warranted the instruction given by the trial court. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224-1225 [the defendant's attempt to construct an alibi when first questioned by police was deemed an attempt to fabricate evidence].) Second, defendant's acquittal of conspiracy and attempted murder demonstrates the lack of prejudice from the admission of the evidence of the conversations. Moreover, evidence of defendant's attempts to get witnesses not to testify against him is nowhere near as prejudicial as the evidence of defendant's actions leading up to, and including, the murder. There was no error in instructing the jury with CALCRIM No. 371.

C. *Failure to Instruct With CALCRIM No. 418*[3]

Defendant contends that the trial court erred by not instructing with CALCRIM No. 418 on statements of coconspirators. We disagree.

Assuming arguendo that the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 418 (see *People v. Prieto* (2003) 30 Cal.4th 226, 251; *People v. Sully* (1991) 53 Cal.3d 1195, 1231), any error in failing to give the instruction was harmless. Not only was defendant acquitted of the conspiracy to commit perjury charge,

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3 CALCRIM No. 418 states as follows:

"In deciding whether the People have proved that (the defendant[s]/Defendant[s] _____ <*insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants; see Bench Notes*>) committed [any of] the crime[s] charged, you may not consider any statement made out of court by _____ <*insert name[s] of coconspirator[s]*> unless the People have proved by a preponderance of the evidence that:

"1. Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;

"2. _____ <*insert name[s] of coconspirator[s]*> (was/were) members of and participating in the conspiracy when (he/she/they) made the statement;

"3. _____ <*insert name[s] of coconspirator[s]*> made the statement in order to further the goal of the conspiracy;

"AND

"4. The statement was made before or during the time that (the defendant[s]/Defendant[s] _____ <*insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants*>) (was/were) participating in the conspiracy.

"A *statement* means an oral or written expression, or nonverbal conduct intended to be a substitute for an oral or written expression.

"*Proof by a preponderance of the evidence* is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"[You may not consider statements made by a person who was not a member of the conspiracy even if the statements helped accomplish the goal of the conspiracy.]

"[You may not consider statements made after the goal of the conspiracy had been accomplished.]"

there is no reasonable probability he would have been acquitted of murder had the instruction been given. (*Prieto*, *supra*, at pp. 251-252; *Sully*, *supra*, at pp. 1231-1232.)

The independent evidence of guilt of second degree murder was overwhelming. Two individuals who had known defendant for years, Larios and Avendano, identified him as the shooter. Several other individuals, including Alfaro, Garcia, and Marlyn Zendejas, identified defendant based on his clothing and indicated that he had approached and confronted Real about his brother, Gerson. In addition, Juan Perez heard Gonzales, who had been standing near Real when he was shot, yell that she could not believe defendant shot Real. In light of this evidence, any error in failing to instruct the jury pursuant to CALCRIM No. 418 was harmless.

D. *Ineffective Assistance of Counsel*

When a defendant raises a claim of ineffectiveness of counsel, he must establish that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) """The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."""" (*In re Cudjo*, *supra*, at p. 687; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

Defendant contends that his counsel provided ineffective assistance when he failed to object to the admission of the coconspirator's statements and failed to insist on the jury instruction relating to coconspirator's statements. Since the statements were not admitted in error, and any error relating to the jury instructions was harmless, in part because of the overwhelming evidence against defendant, defendant was not denied the effective

assistance of counsel. (*In re Cudjo*, *supra*, 20 Cal.4th at p. 687; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)[4]

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.

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[4] In light of the foregoing conclusions, we need not address defendant's claim of cumulative error.