

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL DWAYNE PALMER,

Defendant and Appellant.

2d Crim. No. B289617
(Super. Ct. No. MA071018)
(Los Angeles County)

Samuel Dwayne Palmer appeals after a jury convicted him of attempted willful, deliberate and premeditated murder (Pen. Code,¹ §§ 187, subd. (a), 664; count 1), shooting at an inhabited dwelling (§ 246; count 2), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3), and unlawful possession of ammunition (§ 30305, subd. (a)(1); count 4). The jury also found true an allegation that appellant personally used and discharged a firearm in committing the attempted murder (§ 12022.53,

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

subds. (b), (c)).² In a bifurcated proceeding, appellant admitted a prior strike and serious felony conviction (§§ 667, subds. (a)(1), (b)-(j), 1170.12, subds. (a)-(d)). The trial court sentenced him to 14 years to life plus 25 years in state prison. Appellant contends his conviction must be reversed due to evidentiary error. He also claims the matter must be remanded for the court to consider whether to strike the five-year prior serious felony enhancement pursuant to Senate Bill 1393, which went into effect after he was sentenced. We agree with the latter claim and shall remand the matter accordingly. Otherwise, we affirm.

STATEMENT OF FACTS

On the night of April 14, 2017, Gregory Robinson's family held a going away party for him at the Palmdale home of his girlfriend Andrea Burton. Appellant, a member of the Harlem Crip Rolling 30's gang, came to the party uninvited along with his adult son Samuaje. Appellant was in the front yard drinking alcohol when his girlfriend Moneak Johnson arrived. As soon as Johnson entered the front yard, appellant began hitting her in the face and chest.

Burton asked appellant to leave but he refused. Appellant continued to hit Johnson and eventually knocked her to the ground. Robinson's brother-in-law David tried to help Johnson up and appellant swung at him. Robinson pushed appellant and told him to "take that back around the corner." Appellant became aggressive toward Robinson and Robinson hit him, causing him to fall. Samuaje intervened and hit Robinson in the eye.

² Gang enhancement allegations (§ 186.22, subd. (b)) attendant to counts 3 and 4 were found not true.

Appellant said that he was going to get a gun and run away. As Robinson was telling Samuaje to follow appellant and stop him from returning, a gunshot rang out. Samuaje said, "Oh, that's my dad" and took off running. Robinson saw appellant coming around the corner with a gun and told everyone to go in the house and get on the ground. Robinson retrieved his gun and ammunition from the house, went back outside, knelt behind a tree, and saw appellant crawling on the ground toward a truck parked across the street. Appellant got behind the truck, pointed his gun toward Burton's house, and asked, "Where you at?" Robinson replied, "I'm right here. There's kids in the house." Appellant started shooting and Robinson fired one shot in return. When police sirens could be heard approaching, appellant stopped firing his weapon and ran away.

Eight .40-caliber casings were recovered from the scene of the shooting and bullet strikes were found on Burton's fence, the stucco near the front door, and two vehicles parked in front of the residence. Appellant's jacket, bandana, and cell phone were found on a wall in the yard.

Johnson told the police appellant was staying at her residence about two blocks away and had recently brought a .40-caliber Glock into the house. Johnson did not want the gun in her house so appellant put it in his car. In searching Johnson's house the morning after the shooting, the police found five .40-caliber rounds of ammunition that matched the spent casings found at the scene of the shooting. Appellant was arrested that same day and gunshot residue was found on both of his hands.

DISCUSSION

Evidence of Prior Incident

Appellant contends the court erred in allowing Robinson to testify regarding a prior incident involving appellant and appellant's brother. We conclude the trial court did not err in finding the evidence relevant in supporting Robinson's credibility.

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351) "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The concept of relevance is very broad" (*People v. Salcido* (2008) 44 Cal.4th 93, 147.) The determination of whether evidence is relevant is reviewed for abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 474.) A trial court's evidentiary ruling will not be disturbed, and reversal of a judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

On cross-examination, defense counsel asked Robinson if he had seen appellant earlier on the day of the shooting. Robinson replied that he had seen him when he drove past Burton's house and briefly stopped. Robinson further testified that Burton's ex-boyfriend was named Brian Brown but everyone called him "Twin." Defense counsel asked Robinson if he knew Twin was appellant's brother and he replied that he did not. Counsel then asked Robinson if he "had any type of disagreement with"

appellant prior to the shooting. After appellant answered in the affirmative, defense counsel asked “[a]nd was that in relation to your problems with Twin?” Appellant replied, “Yes, sir.”

On redirect examination, the prosecutor asked Robinson about his prior disagreement with appellant regarding Twin and asked, “At any point were you threatened with violence by [appellant]?” Robinson replied in the affirmative and the prosecutor asked him to “[p]lease describe that to the jury.” Defense counsel objected on grounds of relevance and the court overruled the objection.

Robinson testified that sometime in 2015, he was at Burton’s house when appellant and Twin drove past. Twin waved at Robinson from the front passenger seat and appellant was driving. After the car passed out of sight, Robinson saw Twin “coming down the street with a gun. He jumped out of [appellant’s] car and [was] coming down the street with a gun.”

The court did not abuse its discretion in overruling appellant’s relevancy objection. Defense counsel “opened the door” to the challenged testimony by asking Robinson if he knew who Twin was and if Robinson had a prior “disagreement” with appellant that involved Twin. Robinson’s credibility was of paramount importance to the prosecution’s case. Defense counsel’s line of questioning suggested that Robinson was lying about the shooting because of preexisting animosity toward appellant as the result of an unspecified prior “disagreement.” The court thus acted well within its discretion in allowing Robinson to testify to the details of that disagreement.

For the first time on appeal, appellant contends that Robinson’s testimony regarding the prior incident was erroneously admitted as evidence of a prior “bad act” under

Evidence Code section 1101.³ Defense counsel did not object to Robinson’s testimony on this ground at trial, so the contention is forfeited. (*People v. Valdez* (2012) 55 Cal.4th 82, 130 [recognizing that a relevance objection is insufficient to preserve an appellate claim that evidence is inadmissible under Evidence Code section 1101].) Appellant’s contention that the evidence should have been excluded under Evidence Code section 352⁴ is similarly forfeited. (*People v. Clark* (2011) 52 Cal.4th 856, 893, fn. 8.)

Moreover, the challenged testimony was not offered as proof of appellant’s propensity to commit crimes, nor was it offered for any of the purposes set forth in Evidence Code section 1101. The statute, by its express terms, does not affect the admissibility of evidence offered to support a witness’s credibility. (Evid. Code, § 1101, subd. (c).)

³ Evidence Code section 1101 provides in relevant part: “(a) . . . [E]vidence of a person’s character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.”

⁴ Evidence Code section 352 provides that “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

Snapchat Video

Appellant claims the court also prejudicially erred in admitting a Snapchat video that Robinson received after he testified at appellant's preliminary hearing. We disagree.

Prior to trial, the trial court conducted an Evidence Code section 402 hearing regarding the admissibility of an eight-second Snapchat video of Robinson testifying at the preliminary hearing. The video, which was taken by someone sitting in the courtroom audience, included a caption stating "Get this snitch ass nigga a red lobster plate." Defense counsel objected to the video on grounds of relevance, and the court overruled the objection. The court reasoned "the fact that Mr. Robinson received such a video of his prior testimony and the video makes reference to him being a snitch, certainly I think the jury would be entitled to consider his testimony whether he ultimately testifies in favor of the defendant or unfavorably toward the defendant. Either way the jury is entitled to consider that for purposes of evaluating his credibility."

On direct examination, Robinson testified that "one of my people[] tried to pick [Johnson] up" after appellant knocked her to the ground. On cross-examination, Robinson acknowledged for the first time that his brother-in-law David was the person who helped Johnson. On redirect examination, Robinson admitted he had previously identified his brother-in-law as Joe rather than David "because my family don't [*sic*] want to get involved because of the threats." After Robinson alluded to the Snapchat video, defense counsel objected to the video on relevance grounds and added "it's highly inflammatory because . . . whether or not [appellant] had anything to do with that is speculation." The court overruled the objection and allowed the prosecution to play

the video, which had been forwarded to Robinson by an out-of-state family member who had seen it on Snapchat.

The court did not abuse its discretion in admitting the video. Appellant's claims that the video was admitted in violation of Evidence Code sections 1101 and 352 were not raised below so they are forfeited. Moreover, the video was relevant to Robinson's credibility because it helped explain why he had given a false name for his brother-in-law.

Appellant argues that the video "was inadmissible as irrelevant" because "Robinson had already testified that threats to his life and concern for family members justified an inconsistency in his testimony at the preliminary hearing and trial regarding the name of a person which related to a minor collateral matter." But there had been no evidence of such threats. The video was relevant and admissible to support Robinson's credibility.

Moreover, any error in admitting the video was harmless. As the People aptly put it, "[a]ppellant did not suddenly pull out a gun and start shooting in the heat of the moment without forming the decision to kill. Rather, the evidence shows appellant's conduct was premeditated and deliberate." Moreover, the fact that the charged gang enhancement allegations were found not true strongly suggests that the jury did not attribute the video to appellant or to anyone acting at his direction. It is thus not reasonably probable that the result would have been different had the video been excluded. (*People v. Partida, supra*, 37 Cal.4th at p. 439; *People v. Watson, supra*, 46 Cal.2d at pp. 836-837.)

Senate Bill 1393

When appellant was sentenced, imposition of a section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (Former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) Senate Bill 1393, which went into effect while the appeal was pending, deletes the provision of section 1385 that makes imposition of a section 667 prior serious felony conviction enhancement mandatory (and related language in section 667 itself), thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.)

The parties agree that this change in law applies retroactively here. Appellant contends the matter must be remanded so the trial court may consider whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement it imposed as part of appellant’s sentence. The People respond that a remand is unnecessary because “the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110, [addressing amendments to firearm enhancement statutes effected by Senate Bill 620].) The People assert that such a clear indication exists here because the trial court denied appellant’s *Romero*⁵ motion and in doing so referred to appellant’s “lengthy criminal history and the extraordinarily serious nature” of the current offenses.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

We are not persuaded. Although the trial court denied the *Romero* motion, it declined the People's request to impose consecutive rather than concurrent sentences on counts 3 and 4. Moreover, "speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza, supra*, 24 Cal.App.5th at pp. 1110-1111.) Because the record does not clearly indicate the court would have declined to strike the prior serious felony enhancement had it known it had the discretion to do so, remand is warranted.

DISPOSITION

The judgment is affirmed. The case is remanded with directions to the superior court to decide whether to exercise its discretion to strike the prior serious felony enhancement under Penal Code sections 667, subdivision (a) and 1385.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

TANGEMAN, J.

Shannon L. Knight, Judge
Superior Court County of Los Angeles

Adrian K. Panton, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Steven D. Matthews and Heidi Salerno,
Deputy Attorneys General, for Plaintiff and Respondent.