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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS ORTIZ, Defendant and Appellant.	2d Crim. No. B282953 (Super. Ct. No. 2012016762) (Ventura County)

Jose Luis Ortiz appeals his conviction, by jury, of attempted murder (Pen. Code, §§ 187, subd. (a), 664)[1], assault with a firearm upon a peace officer (§ 245, subd. (d)(1)), second degree robbery (§ 211), and possession of a firearm by a felon. (§ 29800, subd. (a)(1).) The jury found that appellant knew or should have known the victim was a peace officer (§§ 190.2, subd. (a)(7), 664, subd. (e)), that appellant personally and intentionally discharged a firearm, that appellant personally used a firearm.

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

(§ 12022.53, subds. (b), (c).) The trial court found that appellant had served four prior prison terms. The trial court sentenced appellant to a total term in state prison of 15 years to life, plus 36 years.

Appellant contends the trial court prejudicially erred in two evidentiary rulings. First, immediately before his arrest, appellant told Oxnard police officer Scott Coe, "Just fucking kill me." The trial court excluded this statement as hearsay. Second, after Officer Coe testified he could not remember seeing appellant actually fire the gun, the trial court admitted into evidence as a prior inconsistent statement, an audiotape of the statement Coe gave two hours after the incident. In that statement, Coe said he saw appellant firing the gun. Appellant further contends the matter should be remanded, so the trial court may determine whether to exercise its discretion to strike the firearm enhancements. (§ 12022.53, subd. (h).) We conclude appellant is entitled to a remand for that limited purpose. (*Ibid.*, § 1385.) In all other respects, we affirm.

Facts

On May 5, 2012 at about 8:30 p.m., appellant entered a liquor store, went to the cash register, pointed a handgun at the clerk and said, "Give me all your fuckin' money." The clerk complied. He called 911 after appellant left the store. Surveillance video of the robbery was shown at trial.

Officer Scott Coe received a call reporting the incident and drove toward it in his marked "K-9" patrol car. Coe decided to check the surrounding area because other officers had already arrived at the store. He drove slowly down Cortez Street, which had no working street lights, and noticed a Ford pickup truck parked on the opposite side of the street. Coe illuminated

the area with his spotlight and saw appellant standing near the truck. Appellant was holding a revolver with the barrel pointed toward his own chin.

Officer Coe drove forward to put distance between himself and appellant. As he drove, he heard gunshots. Coe looked in the side mirror and saw appellant standing in the middle of the street, still holding the gun. After completing a u-turn, Coe stopped his patrol car and ordered his police dog, Jake, to apprehend appellant. At the preliminary hearing, Coe testified that, as he exited the patrol car and deployed Jake, he heard appellant yell, "Just fucking kill me." Appellant dropped the gun, without raising it toward Coe, and turned as if to run away. Jake successfully took appellant down to the pavement. Other officers arrived to take appellant in to custody.

About two hours after appellant's arrest, Officer Coe gave a statement to a senior Oxnard police officer, Det. Therrien. Coe told Therrien that, as he accelerated away from appellant before making his u-turn, he glanced into the side mirror and "could see [appellant] out in the street holding the gun towards me and – and still firing." Coe stated that he heard four or five shots fired, but did not remember if he saw muzzle flashes.

At the preliminary hearing, Officer Coe testified that he heard several shots fired and, through his side mirror, could see appellant standing in the street. Coe could not see through the mirror whether appellant was still holding the gun. At trial, Coe testified that he did not remember seeing appellant fire the gun. He also testified that his statement to Det. Therrien was truthful.

At the time of his arrest, appellant was carrying $875 in cash, in his jacket. The clerk from the liquor store identified

him at the scene as the robber. Appellant's shoes matched impressions taken from behind the pickup truck where Officer Coe had first seen appellant. There was gunshot residue on both of appellant's hands.

Appellant's gun was recovered from the middle of the street. It was a six-shot .38 caliber Smith and Wesson revolver and contained six expended shell casings. Officer Coe's left rear tire had a bullet hole in it. A bullet fragment was recovered from near the front bumper of a car parked "'in the middle of th[e] crime scene.'" Another bullet fragment was recovered from the road near where Officer Coe stopped his patrol car to deploy Jake.

Contentions

Appellant contends the trial court erred when it excluded on hearsay grounds his statement, "Just fucking kill me." He further contends the trial court erred when it admitted into evidence as a prior inconsistent statement Officer Coe's statement to Det. Therrien. Finally, appellant contends he is entitled to a remand so the trial court can reconsider the firearm sentencing enhancements it imposed.

Standard of Review

"We review for abuse of discretion rulings by the trial court on the admissibility of evidence . . . ." (*People v. Hamilton* (2009) 45 Cal.4th 863, 930.) The trial court excluded appellant's statement on the ground that it was hearsay. ""'Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' [Citation.] 'Except as provided by law, hearsay evidence is inadmissible.' [Citation.] 'We review claims regarding a trial court's ruling on the

admissibility of evidence for abuse of discretion.' [Citation.]" (*People v. Henriquez* (2017) 4 Cal.5th 1, 31.)

Appellant's Statement

Appellant contends his statement, "Just fucking kill me," was incorrectly excluded as hearsay because it is circumstantial evidence of his state of mind and therefore not hearsay. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) Respondent contends the argument has been forfeited because appellant did not raise it in the trial court. We agree.

Appellant's trial counsel contended in the trial court that the statement was admissible as a declaration against interest (Evid. Code, § 1230), or a spontaneous statement. (Evid. Code, § 1240.) Counsel did not argue the statement was admissible as evidence of appellant's state of mind. As a result, the contention is forfeited on appeal. (*People v. Ervine* (2009) 47 Cal.4th 745, 779; *People v. Luo* (2017) 16 Cal.App.5th 663, 677-678.)

Had the contention not been forfeited, appellant would still not prevail on this appeal because there is no reasonable probability appellant would have achieved a more favorable result had his statement been admitted. (*People v. Page* (2008) 44 Cal.4th 1, 41-42; *People v. Duarte* (2000) 24 Cal.4th 603, 618-619.) First, the evidence was overwhelming appellant intended to kill Officer Coe. As Coe drove his patrol car past appellant, appellant moved to middle of the street and fired several shots toward it, one of which punctured a tire. Second, even without the statement, the jury heard evidence and argument related to the defense's "'suicide by cop'" theory. For example, the jury learned that, when Officer Cox first saw him, appellant was pointing his handgun toward his own chin.

Defense counsel relied on this evidence to argue in closing that appellant intended to be killed, rather than to kill Officer Coe. Moreover, the two intentions are not mutually exclusive. Even if jurors believed appellant wanted Coe to kill him, it is reasonably probable the jurors would find, based on appellant's conduct in shooting at Coe, that appellant also intended to kill the officer.

Officer Coe's Statement

At trial, Officer Coe testified that, as he drove away from appellant to a position of greater safety, he heard gunshots and used his side mirror to see appellant standing in the middle of the street, holding a handgun. Coe testified that he did not remember seeing appellant fire the gun. Shortly after appellant's arrest, however, Coe told Det. Therrien that, when he looked through the side mirror, he could see appellant standing in the street, "holding the gun towards me and – still firing." Coe also told Det. Therrien that he "felt" appellant was firing at him. Coe said, "in my mind, I was definitely getting shot at." He further stated, "So my thinking is that he's trying to kill me."

The trial court admitted an audiotape and transcript of Officer Coe's statement to Det. Therrien as a prior inconsistent statement. Appellant contends the trial court erred because the prior statement was not sufficiently inconsistent with Coe's testimony and was more prejudicial than probative. (Evid. Code, § 352.) We conclude the trial court did not abuse its broad discretion and that any error in admitting the statement was harmless.

Inconsistency. Appellant contends Officer Coe's statement was not a prior inconsistent statement because the failure to remember an event is not inconsistent with a prior statement describing that event. (*People v. Fierro* (1991) 1

Cal.4th 173, 221-222.) We conclude the trial court did not abuse its discretion. (*People v. Chism* (2014) 58 Cal.4th 1266, 1295.)

As our Supreme Court has explained, "'Generally it is true that the testimony of a witness indicating that he or she does not remember an event is not inconsistent with a prior statement describing the event. [Citation.] "But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement [citation], and the same principle governs the case of the forgetful witness."' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1008-1009 (*Hovarter*); see also *In re Bell* (2017) 2 Cal.5th 1300, 1307.)

In *Hovarter, supra*, 44 Cal.4th 983, the victim told a detective that, during his crime spree, the defendant told her, "'that this was not the first time that he had done this and that he knew what to do.'" (*Id.* at p. 1007.) At trial, the victim testified the defendant "'said that he knew what he was doing. I remember that. I don't remember if he said specifically that he had done it before.'" (*Ibid.,* italics omitted.) Our Supreme Court concluded the victim's statement to the detective was admissible as a prior inconsistent statement.

By contrast, in *In re Bell*, *supra*, 2 Cal.5th 1300, a juror provided a declaration for a petition for writ of habeas corpus in which she stated that she did not discuss the trial with her husband prior to the verdict. At a hearing on the petition, the same juror testified she did not remember discussing the trial with her husband. Our Supreme Court concluded the two statements were not inconsistent "in effect," because in both, the juror denied discussing the trial. (*Id.* at pp. 1306-1307.)

Bell is distinguishable. The witness there, in both her prior statement and her testimony, denied discussing the trial. Here, Officer Coe initially said he saw appellant shooting at him and later testified he could not remember seeing that happen. For that reason this case is more similar to *Hovarter*, where the witness first stated she heard the defendant make two incriminating statements and later testified she could remember hearing only one. As in *Hovarter*, Coe's prior statement is inconsistent "in effect" with his testimony. The trial court did not abuse its discretion when it concluded Coe's statement was admissible as prior inconsistent statement.

Undue Prejudice. Evidence Code section 352 grants the trial court discretion to 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." Appellant contends the probative value of Officer Coe's statement to Det. Therrien was substantially outweighed by the probability that it would mislead the jury, confuse the issues or unduly prejudice appellant.

The statement was misleading, appellant contends, because it contradicts Officer Coe's consistent testimony that he did not remember seeing appellant shooting at him. He contends Coe was speculating when he said that he "felt" appellant was shooting at him, that, "in [his] mind, [he] was definitely getting shot at[,]" and that appellant was "trying to kill [him]." Coe was also speculating, appellant contends, when he explained the contradiction between his testimony and prior statements by testifying that he had "suppressed the memory" of appellant shooting at him. Appellant further argues the prior statement

was unfairly prejudicial because the audiotape conveys Officer Coe's fear that he had narrowly escaped being shot and was therefore likely to evoke an emotional bias against appellant.

We note initially that appellant objected to the audiotape and transcript of Officer Coe's prior statement on the basis that it was unnecessary and included speculative conclusions. He did not cite Evidence Code section 352 as the basis for his objection. As a consequence, appellant has forfeited appellate review of this contention.

Had the objection been preserved, however, we would reject it because the trial court did not abuse its discretion. Appellant has not shown the audiotape created a substantial danger of confusing or misleading the jury. There is no allegation that the audiotape or transcript failed to accurately or completely convey the statements Officer Coe made to Therrien. Nor was the jury unaware of the inconsistencies between the prior statement and Coe's testimony, given that they were addressed in both the direct and cross examination of Officer Coe.

Similarly, we are not persuaded that Officer Coe's prior statement was too speculative to be relevant. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681 ["'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact'"].) Coe's statements that he felt appellant was firing at him and trying to kill him were based on Coe's first-hand observation of the incident. A witness may testify as a non-expert "'to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony. . . .'" (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1032.)

Appellant contends the recording was unfairly prejudicial because it evoked an emotional bias against him. The parties agree that the audiotape conveys Officer Coe's fear for his life during the incident. It is this fear that, appellant contends, was substantially likely to bias the jury against him. We are not persuaded. "'Evidence is prejudicial within the meaning of Evidence Code section 352 if it "'uniquely tends to evoke an emotional bias against a party as an individual'" [citation] or if it would cause the jury to "'"prejudg[e]" a person or cause on the basis of extraneous factors'" [citation.]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1331.) Here, Coe was in fear because he believed appellant was shooting at him and his life was in danger. Any bias his fear might evoke against appellant would be based on appellant's own conduct, not on an extraneous factor. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 408.)

Cumulative Error

Appellant contends the cumulative effect of these errors denied him a fair trial. "We have identified no errors. In the absence of error, there is nothing to cumulate." (*People v. Duff* (2014) 58 Cal.4th 527, 562.)

Sentencing Remand

Appellant contends the matter should be remanded for resentencing, so the trial court may consider whether to strike the firearm enhancements it originally imposed. The sentence includes enhancement terms of 10 years for appellant's personal use of a firearm (§ 12022.53, subd. (b)), and 20 years for his personal and intentional discharge of a firearm. (*Id.*, subd. (c).) At sentencing, in April 2017, the trial court had no authority to strike these enhancements. However, section 12022.53,

subdivision (h) was amended, effective January 1, 2018, to grant the trial court discretion "in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section." (*Id*., subd. (h).) Respondent correctly concedes the new law applies retroactively to defendants, like appellant, whose judgments were not final as of January 1, 2018. (*People v. Chavez* (2018) 22 Cal.App.5th 663.) We agree that remand is appropriate to allow the trial court to exercise its discretion as to whether to strike the firearm enhancement. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.)

Conclusion

We remand the matter for the limited purpose of allowing the trial court to exercise its discretion whether to strike the firearm enhancements in the interest of justice. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Roger L. Lund, Judge

Superior Court County of Ventura

Bases & Bases and Arielle Bases, under appointment by the Court of Appeal for Defendant and Appellant.

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