Filed 12/23/16 P. v. Rodriguez CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALEJANDRO RODRIGUEZ,<br><br>Defendant and Appellant. | B260840<br><br>(Los Angeles County<br>Super. Ct. No. BA410621) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald H. Rose, Judge. Affirmed.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Alejandro Rodriguez appeals from the judgment entered following his conviction by jury of first degree murder. The jury also found that appellant personally and intentionally discharged a firearm causing great bodily injury and death; a principal personally and intentionally discharged a firearm causing great bodily injury and death; and appellant committed the offense for the benefit of, at the direction of, or in association with, a criminal street gang. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (b)(1), 12022.53, subds. (d) & (e)(1).) We affirm.

***FACTUAL SUMMARY***

On November 5, 2012, appellant was a member of the Rockwood Street gang (Rockwood). Around 9:00 p.m., appellant and fellow gang members were walking past an apartment complex in territory claimed by the rival 18th Street gang. Luis Gonzalez (the decedent), a member of the 18th Street gang, was sitting with his girlfriend, Luisa Navarro, on the steps of one of the apartments as appellant's group approached.

As they neared Gonzalez and Navarro, appellant's group stopped except for appellant, who approached Gonzalez. Appellant asked Gonzalez where he was from and appeared to be struggling to take something from his waistband. Gonzalez stood as soon as appellant asked the question and the two began fighting and wrestling. They also appeared to be struggling over something. The fighting stopped when gunshots rang out. Gonzalez was shot -- three times in the stomach in rapid succession, once near the heart, and once in the neck when appellant pointed the gun directly at the back of Gonzalez's head. Navarro identified appellant as the shooter. A gang expert opined at trial that the crime was committed for the benefit of, and in association with, Rockwood.

Besides Navarro, two witnesses testified they were present during the shooting. Cesar Cortes was standing outside his residence in the complex that night when appellant and his companions walked past. They asked if he had seen any 18th Street gang members. He said he did not know anyone. Cortes saw Gonzalez and Navarro sitting on the steps. As Cortes walked into his residence, he heard gunshots. He saw people he did not know running up the street. Police showed a six-pack photo lineup to Cortes. He recognized persons in the six-pack as individuals implicated in an incident one year

before where one person threw a sweatshirt at another. Although he earlier told police he could not identify appellant as involved in the shooting, Cortes testified at trial he recognized appellant as one of the persons walking by the complex on the night of the murder.

The second witness to the events was Ruben Martinez, a very reluctant witness. Right before the shooting, Martinez, holding his baby, had arrived at the complex to visit Cortes. When Martinez arrived, he saw Gonzalez, Navarro, and two other young men on the steps. Martinez knew the young men and went over to chat with them. He had his back to the street. He had not been there two minutes when he noticed that Gonzalez was fighting a Hispanic male who had just arrived. Both were throwing punches. Martinez was six to eight feet from the fighters. The Hispanic male pulled a gun from his waist and shot Gonzalez, who fell. The shooter walked by, then shot Gonzalez in the head from one foot away. The shooter, with two other persons, fled.

At trial, Martinez testified that he was afraid that the gang might retaliate against him and his family because of his testimony. According to Martinez, he and the shooter got a good look at each other. The shooter also, while Martinez was holding the baby, pointed the gun at Martinez but did not shoot. Martinez acknowledged that when he testified at the preliminary hearing, he did not identify appellant as the shooter. Martinez failed to identify him not only because appellant had gestured with his finger in Martinez's direction for Martinez to zip his mouth shut, but because appellant had placed appellant's fist against appellant's chest, near his heart, with his thumb and forefinger up. These gestures frightened Martinez so he did not identify appellant as the shooter. After the preliminary hearing, Martinez told the investigating officer that Martinez had lied about the shooter not being present at the preliminary hearing.

At trial, Martinez testified he was not sure, but appellant looked like the shooter. Nevertheless, Martinez admitted at trial he had told the investigating officer after the preliminary hearing that appellant was, without a doubt, the shooter. Appellant presented no witnesses.

## *ISSUES*

Appellant claims the trial court erred by admitting evidence of appellant's hand gestures during the preliminary hearing as evidence he attempted to threaten a witness. Appellant also claims the trial court erred by giving CALCRIM No. 371.

## *DISCUSSION*

*1. The Trial Court Properly Admitted Evidence of Appellant's Hand Gestures.*

During a break in the People's direct examination of Martinez, appellant's counsel[1] advised the court that he believed the People might try to elicit testimony from Martinez that, during the preliminary hearing, Martinez saw appellant "making some signs which Mr. Martinez interprets as threats." Appellant's counsel stated he was "objecting to [Martinez's] interpretation of them as conclusions," but stated, "[i]f the court's going to allow it, I think the jury should be admonished that it's only . . . evidence of Mr. Martinez's state of mind, not as a fact of what actually occurred in the courtroom."

The court stated, "And in regards to your objection of the witness'[s] description of what the defendant did at the preliminary hearing, it is admissible to show the witness'[s] state of mind. It will be admitted for that limited purpose only."

At a later sidebar during Martinez's testimony, the prosecutor asked if he could ask Martinez why he was afraid. The trial court told the prosecutor he could ask Martinez what happened and "then ask . . . him for a state of mind." The trial court then stated, "And what actually happened in the courtroom is not going to be limited for the witness'[s] state of mind."

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[1] Although the reporter's transcript indicates the court made the statements and objection subsequently referred to in the above paragraph of text, it is clear from the context that appellant's counsel made them. Appellant, in his opening brief, notes without objection that he, not the trial court, posed the objection later referred to in the above paragraph of text. We assume appellant's counsel made the statements and objection. (See *People v. Velazquez* (2011) 201 Cal.App.4th 219, 226, fn. 6.)

After Martinez's testimony, the trial court made sure the record was clear, stating, "While Mr. Martinez was testifying, we had a [sidebar] conference [that] had to do with the signs and signals and things that the defendant did at the preliminary hearing, and I'd indicated it would be admitted only for the purpose of the witness'[s] state of mind. [¶] . . . I want to make it clear for the record that I would not limit that evidence for that purpose based upon his testimony in the courtroom in that it also goes to the defendant's state of mind, and there is a specific jury instruction on point. [¶] So it is and has been admitted for all purposes. I just wanted to clarify that for the record."

Appellant claims the trial court erred when it admitted evidence of his hand gestures as evidence he attempted to threaten a witness. He argues, "the trial court erred in admitting the evidence of appellant's hand gestures,[2] [and] in admitting Martinez's interpretation of them as threats." We reject appellant's claim.

As to the hand gestures, Martinez testified that, during the preliminary hearing, appellant gestured with his finger in Martinez's direction for Martinez to zip his mouth shut. It is not a leap for a trier of fact to conclude appellant was signaling Martinez should be silent, i.e., not testify. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1232 ["[d]efendant put a finger to his lips, motioning [a person] to be quiet"]; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 432 ["Jason put his finger to his lips as a signal that she should keep quiet"]; *People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 216 [trial court indicated placement of index finger perpendicularly across lips

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2 Notwithstanding any suggestion by appellant to the contrary, he failed to object below to evidence of the fact of "appellant's hand gestures." Fairly read, the record reflects that, outside the presence of the jury, appellant objected to Martinez's "conclusions" as to what appellant meant by those gestures. Later in open court, appellant objected when the prosecutor asked Martinez if appellant made any hand signs "directed towards" Martinez. Appellant objected the quoted phrase called for a "conclusion." Respondent does not point out appellant's failure to object to evidence of the fact of "appellant's hand gestures"; therefore, we do not decide whether appellant by that failure forfeited the issue of whether the trial court erred by admitting evidence of the fact of the hand gestures.

commonly means keep quiet].) In addition, appellant placed the forefinger and thumb of his otherwise closed hand against his chest, near his heart. It is permissible as well to infer he simulated a gun near his heart (see *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1393 [defendant simulated gun with fingers and placed it to person's head, saying, " 'This is going to be you' "].)

Martinez's trial testimony about appellant's combined hand gestures was, by itself, if believed, independent evidence that appellant threatened, or was attempting to threaten, Martinez if he testified.[3] It was also relevant, admissible evidence explaining why Martinez was afraid to identify appellant as the shooter at the preliminary hearing.

Appellant's argument that the trial court erroneously admitted evidence of "Martinez's *interpretation* of [appellant's hand gestures] as threats" (italics added), fails. Martinez never gave an express opinion that the gestures were threats. He simply testified to what he saw and the effect of the gestures on him, i.e., that they made him feel afraid to testify. Whether appellant made those gestures and what he may have meant by them, if he did make the gestures, was left to the jury to decide.

*2. The Trial Court Did Not Err By Giving CALCRIM No. 371.*

Appellant claims the trial court erred by giving CALCRIM No. 371.[4] CALCRIM No. 371 is an instruction that permits, but does not require, the jury to draw a particular inference. "Permissive inferences violate due process only if the permissive inference is irrational." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 270.) An inference is not irrational if it can be said with " ' "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." ' " (*People v.*

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[3] Evidence Code section 225, provides, in relevant part, " 'Statement' means . . . nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."

[4] CALCRIM No. 371, states, "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

*Mendoza* (2000) 24 Cal.4th 130, 179.) Appellant makes two arguments. First, he argues, "the hand gestures were too ambiguous to support anything more than a speculative inference of his guilt" and there was no substantial evidence to support the giving of that instruction. Second, he argues the instruction violates his right to due process. Appellant failed to object to the instruction at trial, therefore, he forfeited the instructional issue. (Cf. *People v. Valdez* (2004) 32 Cal.4th 73, 137.)

Nevertheless, if appellant has not forfeited the issue, his claim lacks merit. There need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102 (*Coffman and Marlow*).) Martinez testified as a percipient witness concerning appellant's gestures. He succinctly described the hand gestures he observed. The testimony of a single witness is sufficient to support a conviction unless the testimony describes facts or events that are physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Similar reasoning applies to the sufficiency of evidence supporting an instruction. We reject appellant's first argument because Martinez's testimony was sufficient to support the giving of CALCRIM No. 371.

We also reject appellant's second argument, that, as a matter of law, CALCRIM No. 371 violates his right to due process because the instruction embodies an irrational permissive inference. Citing *Coffman and Marlow*, appellant concedes "the California Supreme Court has rejected due process challenges to instructions that permit the jury to infer the defendant had a 'consciousness of guilt' from proven facts, such as persuading a witness to testify falsely or attempting to do so, fabricating evidence or attempting to do so, and suppressing evidence or attempting to do so." However, he urges CALCRIM No. 371 is distinguishable because, instead of "advising jurors that certain conduct may be considered as indicative of consciousness of guilt," the instruction "refers to a defendant being 'aware of his guilt.' " Appellant maintains "[a] person could have a vague, generalized consciousness of guilt, akin to a guilty conscience, without having a specific awareness of his guilt in a particular matter." We reject appellant's instructional argument.

In *People v. Crandell* (1988) 46 Cal.3d 833 (*Crandell*), our Supreme Court stated, "A defendant's 'guilt' being the ultimate determination of the truth or falsity of the criminal charges, the jury might, according to defendant, view 'consciousness of guilt' as equivalent to a confession, establishing all elements of the charged murder offenses, including premeditation and deliberation, though defendant might be conscious only of having committed some form of unlawful homicide. The instructions thus permitted the jury, defendant maintains, to draw an impermissible inference, without foundation in reason or experience, concerning his mental state at the time of the homicides, thereby violating his federal due process rights. [Citations.]

"Defendant's fear that the jury might have confused the psychological and legal meanings of 'guilt' is unwarranted. A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.' The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto." (*Crandell, supra,* 46 Cal.3d at p. 871.)

By similar reasoning, *People v. Hernández Rios* (2007) 151 Cal.App.4th 1154, 1157-1159 (*Rios*), rejected an analogous challenge to the phrase "aware of his guilt" in a flight instruction (CALCRIM No. 372). Appellant concedes *Rios* rejected an argument similar to appellant's, but he "contests the reasoning" in *Rios*. *Crandell* and *Rios* apply here. A reasonable jury would have understood the phrase "aware of his guilt" in CALCRIM No. 371 was equivalent to the phrase "aware of his wrongdoing." No violation of appellant's right to due process occurred.

## *DISPOSITION*

The judgment is affirmed.

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STRATTON, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.