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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GILDARDO SALAZAR,

Defendant and Appellant.

B285318

(Los Angeles County
Super. Ct. No. KA110465)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Judgment of conviction affirmed; sentence vacated and remanded for further proceedings.

Law Offices of Allen G. Weinberg and Allen G. Weinberg, 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, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gildardo Salazar was convicted of second degree murder with a firearm enhancement, and sentenced to 40 years to life in prison. He contends the trial court erred by admitting evidence, and the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements pursuant to Penal Code section 12022.53, subdivision (h).¹ We affirm Salazar's conviction, but vacate his sentence and remand the matter to allow the trial court to exercise its discretion and consider whether to strike or dismiss the firearm enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

In March 2015, Jennifer Villareal, her daughter Jessica Hernandez, and Hernandez's two young sons lived in a residence in Pomona. Hernandez and the boys slept in the property's converted garage. Villareal's bedroom was upstairs in the house. Housemate Cynthia Ayon slept in the upstairs bedroom next to Villareal's. Downstairs was another bedroom that had belonged to Villareal's son, Jasper Jauregui, until Jauregui was incarcerated. Appellant Salazar, who was known by the nicknames "Stomper" or "Stomp," had recently begun a casual sexual relationship with Hernandez.² The victim, Ricardo Munoz, was Villareal's boyfriend and was known as "Rider."

¹ All further undesignated statutory references are to the Penal Code.

² City of Pomona detectives interviewed Hernandez, Villareal, Ayon, and Salazar, and a child advocacy specialist interviewed Hernandez's young son, J. All the interviews were recorded. Detectives testified regarding the witnesses' statements made in the interviews. Salazar's and Hernandez's

On March 15, 2015, Hernandez saw a .22 revolver in Salazar's waistband or pocket.

That day, Salazar and Ayon spent time together and Hernandez believed they engaged in a sexual encounter.

That evening, Villareal and Munoz argued. Munoz accused her of cheating on him with Salazar. Munoz was also upset because he thought Salazar was acting like the "man of the house." Villareal told Munoz to leave, but he did not do so.

When Hernandez fell asleep, Ayon, Munoz, and Salazar were all in the house.

a. *The murder*

At approximately 1:00 a.m. on March 16, 2015, Hernandez was asleep in her bedroom in the converted garage. Her eight-year-old son, J., and her younger son were watching a movie in the room.

In Jauregui's former room, Ayon and Salazar were sitting on the bed while Munoz stood near the door and yelled at Ayon. According to Ayon, Munoz called her a bitch, told her she needed to pay rent, and accused her of disrespecting the household. Munoz did not appear to have a weapon, did not threaten Ayon or Salazar, did not physically attack them, and did not prevent them from leaving. Munoz continued "talking crap" to Salazar and Ayon. When Munoz backed up as if leaving the room, Salazar pulled a gun from his waistband and shot Munoz repeatedly. Ayon identified Salazar in a six-pack photographic lineup as the shooter.

interviews were played for the jury. At trial, Villareal, Hernandez, J., and Ayon did not recall, denied making, or contradicted, some of the statements made during their interviews.

J. heard the shots, and Hernandez was awakened by them. Munoz made his way to Hernandez's room, tumbled down the two stairs leading into the room, and fell through the doorway. He was struggling to breathe. Villareal came into the garage and attempted CPR. After a delay of several minutes, during which Hernandez threw bongos and other items in the trash, Villareal called 911. Videotape from a neighbor's surveillance camera showed Ayon and a man leaving the house shortly after the shooting. Salazar fled to Mexico. Munoz died of his wounds.

b. The investigation

An autopsy revealed that Munoz had been shot six times. Three of the shots were to his back, and three were to his chest, abdomen, or side; four were fatal wounds. Based on the bullet trajectories, it appeared that Munoz had been turning when the bullets hit him. He also had multiple contusions, consistent with his falling down the stairs.

A crime scene investigator found blood drops or stains in the living room, converted garage, hallway, stairwell wall, on the kitchen floor, and at the base of the stairs. The house was searched pursuant to a warrant. Investigating personnel did not find a gun, bullets, or expended shell casings. A revolver does not expel bullet casings.

When interviewed, Villareal told a detective, in a whisper, that Salazar had committed the shooting.

During her interview, Hernandez opined that Munoz "had a problem" with Salazar. She thought Salazar must have been the shooter because he had a gun, and no one else in the house did. She thought Munoz probably "started something" with Salazar due to Munoz's jealousy. When asked who saw the

shooting, Hernandez stated that it “had to have been only [Ayon]” because no one else was in the room.

J. told the interviewer that shortly before the shooting, he heard Munoz ask Salazar to leave.

Approximately 14 months after the shooting, Salazar was located in Mexico. In an interview with a detective, Salazar admitted he had been at Villareal’s residence with a girl on the night of the shooting, and heard Munoz and Villareal arguing. Munoz had asked Salazar to come outside, and they went to the front porch. A car pulled up. The occupants asked Munoz and Salazar where they were from, and began firing shots at them. Salazar ran back inside. Munoz was behind him, and ran upstairs. Salazar did not know Munoz had been shot. Salazar and the girl he had been with left the house. Salazar denied committing the shooting, and said he did not have a gun. He had gone to Mexico to visit his family and to see his grandmother, who was ill. He did not testify at trial.

c. Villareal’s telephone call with Jauregui

A few days after the murder, Villareal spoke to her son, Jauregui, who was incarcerated. The call was recorded and played for the jury. Villareal informed Jauregui that Rider had been shot in the house. When Jauregui asked who shot him and queried, “[h]ow’d that happen,” Villareal stated, “I don’t know, I guess they, um, stomped him out” and “Stomps” was the shooter. She explained, “I — he was — he found him in Jessica’s [Hernandez’s] room. He fell through the — they shot him once in the chest and they shot him four times in the back.” She then reiterated that Munoz was shot “[o]nce in the chest I guess and I guess he turned around whatever happened and they shot him four times in the back.” The boys saw “him fall through the

door.” When Jauregui asked, “Whoever jumped him?” Villareal replied, “No, they just shot him.” When he queried, “So he ran in the house that way?” Villareal answered, “Um – no.”

2. Procedure

The jury acquitted Salazar of first degree murder but found him guilty of the second degree murder of Munoz. (§ 187, subd. (a).) It found Salazar personally and intentionally used and discharged a firearm, proximately causing Munoz’s death. (§ 12022.53, subds. (b), (c), (d).) The trial court sentenced Salazar to 40 years to life in prison. It ordered him to pay victim restitution of \$7,500 and imposed a restitution fine, a suspended parole revocation restitution fine, a court operations fee, and a criminal conviction assessment.³ Salazar appeals.

DISCUSSION

1. The trial court did not err by admitting Villarreal’s recorded telephone call

a. Additional facts

At trial, Villareal testified that she had been upstairs in her bedroom when the shooting occurred; did not see the shooting; and never told anyone that she had. Prior to seeing Munoz on the floor, she had “no clue” what was going on and thought Munoz had left the house. When she saw Munoz on the garage floor, she had “no idea what happened to him other than he had been shot.”

J. told the interviewer that Villareal told him Salazar had a gun in his back pocket and shot Munoz in Jauregui’s room.

³ The information alleged Salazar had served two prior prison terms within the meaning of section 667.5, subdivision (b). Salazar waived his right to a jury trial on those allegations, which were subsequently stricken on the prosecutor’s motion.

The prosecutor moved to admit Villarreal's recorded phone conversation with Jauregui under the prior inconsistent statement exception to the hearsay rule (Evid. Code, § 1235). The prosecutor argued that Villarreal's trial testimony was inconsistent with her statements about the shooting in the phone call. Defense counsel objected that there was no foundation for the conclusion the statements were inconsistent, because there was no evidence Villarreal actually witnessed the shooting. In the phone call, defense counsel argued, Villarreal stated that "Stomps *did it*," not that she witnessed the shooting. (Italics added.) The court overruled the objection, concluding that the jury would have to determine whether Villarreal's statements in the phone call were based on her own observations or on what others told her. Salazar argues this was prejudicial error. We disagree.

b. *Discussion*

We review the trial court's rulings on the admissibility of evidence for abuse of discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 956; *People v. Cowan* (2010) 50 Cal.4th 401, 462.) We discern no abuse of discretion here.

Hearsay is an out-of-court statement offered for the truth of its content, and is inadmissible under state law⁴ unless it falls

⁴ Appellant points out that the Sixth Amendment "bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*People v. Lopez* (2012) 55 Cal.4th 569, 580–581; *Crawford v. Washington* (2004) 541 U.S. 36, 68.) We do not understand Salazar to raise a confrontation claim, however. Because Villarreal testified at trial and Salazar had the opportunity to confront her, the statements in the phone

under an exception to the hearsay rule. (*People v. Sanchez* (2016) 63 Cal.4th 665, 674–675; Evid. Code, § 1200, subds. (a), (b).) Evidence Code section 1235 provides a hearsay exception for prior inconsistent statements. “ ‘ “A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.” [Citation.] “The ‘fundamental requirement’ of section 1235 is that the statement in fact be *inconsistent* with the witness’s trial testimony.” [Citation.] “ ‘Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness’[s] prior statement’ ” [Citation.]’ ” (*People v. Homick* (2012) 55 Cal.4th 816, 859; *People v. Cowan*, *supra*, 50 Cal.4th at p. 462.)⁵

call were admissible for their truth (*People v. Rices* (2017) 4 Cal.5th 49, 85; *People v. Cowan*, *supra*, 50 Cal.4th at p. 463), and in any event Villareal’s statements to her son were not testimonial (see *People v. Edwards* (2013) 57 Cal.4th 658, 705; *People v. Leon* (2015) 61 Cal.4th 569, 603).

⁵ Evidence Code section 1235 provides: “Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.”

Evidence Code section 770 provides: “Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action.” Villareal was not questioned about the Jauregui

Villareal's phone call statements were inconsistent with her trial testimony — and admissible as prior inconsistent statements under Evidence Code section 1235 — only if they were based on her own personal knowledge or observations. At trial, Villareal testified that she was upstairs when she heard the shots, did not observe the shooting, thought Munoz had left the house, had “no clue” what had happened until she saw him wounded on the floor, and did not tell anyone she saw the shooting. In the phone call, Villareal stated Munoz was shot in the chest, turned around, was shot four times in the back, and Salazar was the shooter. Villareal did not expressly state, in the phone call, that she observed the shooting. If the evidence indicated she had personally observed the shooting, the phone call statements were inconsistent with her trial testimony. On the other hand, as Salazar argues, if Villareal merely repeated in the phone call information she had learned second-hand, there was no inconsistency between her trial testimony that she did not witness the shooting and her phone call statements describing events.

Thus, the People established inconsistency only if the phone call statements were based on Villareal's personal knowledge. The question of whether a witness has personal knowledge concerning the subject matter of his or her testimony is a preliminary fact listed in Evidence Code section 403,

phone call, but she was not excused from giving testimony in the case. There is no dispute Evidence Code section 770's requirements were met here.

subdivision (a)(2).⁶ When the admissibility of evidence turns on such a preliminary fact, the trial court determines whether there is sufficient evidence from which the jury could find the preliminary fact exists. (*People v. Jones, supra*, 57 Cal.4th at p. 956; *People v. Hinton* (2006) 37 Cal.4th 839, 890; Evid. Code, § 403, subd. (a)(2).) “The court should exclude the proffered evidence only if the “showing of preliminary facts is too weak to support a favorable determination by the jury.” [Citations.] The decision whether the foundational evidence is sufficiently substantial is a matter within the court’s discretion.’ [Citation.]” (*People v. Jones*, at p. 956; *People v. Lucas* (1995) 12 Cal.4th 415, 466.) “The trial court has the preliminary, but not the final, authority to determine the question of the existence of the preliminary fact. . . . ‘[T]he preliminary fact questions listed in subdivision (a) [of Evidence Code section 403] . . . are not finally decided by the judge because they have been traditionally regarded as jury questions. . . . It is the jury’s function to determine the effect and value of the evidence addressed to it. . . . [T]he judge’s function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question.’ ” (*People v. Lucas*, at pp. 466–467.)⁷

⁶ A preliminary fact is “a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence.” (Evid. Code, § 400.)

⁷ Evidence Code section 403, subdivision (c)(1), provides that the trial court may, and on request shall, instruct the jury to determine whether the preliminary fact exists and disregard the proffered evidence unless it so finds. Here, defense counsel did not request such an instruction, and Salazar does not argue failure to give such an instruction was error. (See *People v.*

Here, the trial court did not abuse its discretion by impliedly finding there was sufficient evidence to support a conclusion the phone call statements were based on Villareal's personal knowledge, and were therefore inconsistent with her trial testimony. The jury could fairly infer from Villareal's knowledge of specific facts — that Salazar had a gun in his back pocket, the shooting occurred in Jauregui's room, Munoz was shot in the chest, turned around, was shot multiple times in the back, was not “jumped,” and did not come in from outside — that she had personally observed the shooting. Her recitation of these details, though not precisely correct, suggested she was a percipient witness and had seen the shooting rather than picked up the information second hand, as Salazar suggests. Nowhere in her testimony, or during the phone call, did she explain where she learned the details of the shooting. No other evidence in the record explains the basis for her knowledge of these details. The evidence showed Ayon and Salazar left almost immediately after the shooting, making it unlikely that they discussed it with Villareal before they fled. In closing, the prosecutor argued that Villareal could have observed the shooting from a vantage point upstairs, outside her bedroom, after she heard the first shot. Because it is not clear how Villareal could have known the details of the crime, including that Munoz was shot while turning, or was shot in both the chest and the back, unless she had

Hinton, supra, 37 Cal.4th at pp. 891–892 [“A trial court has no general sua sponte duty to instruct” the jury to determine whether the preliminary fact was established and disregard the evidence if not].) The jury was instructed to consider, when evaluating witness credibility, how well the witness could see, hear, and perceive the things about which he or she testified.

witnessed the shooting, the trial court did not abuse its discretion in concluding the evidence of the preliminary fact was sufficient.

In any event, assuming *arguendo* the trial court erred by admitting the phone call evidence, Salazar has not demonstrated prejudice. The erroneous admission of evidence in violation of state law does not require reversal except where the error caused a miscarriage of justice, that is, when it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (Evid. Code, § 353; *People v. Sanchez, supra*, 63 Cal.4th at p. 685; *People v. Thomas* (2011) 52 Cal.4th 336, 356; *People v. Richardson* (2008) 43 Cal.4th 959, 1001; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

There was strong evidence establishing Salazar's guilt. Eyewitness Ayon described the circumstances of the shooting to a detective and stated that Salazar shot Munoz.⁸ Hernandez had

⁸ Salazar characterizes Ayon's testimony as unreliable. The parties stipulated that Ayon was in custody due to her reluctance to testify, and had suffered prior convictions for evading a peace officer and unlawfully driving or taking a vehicle. At trial, Ayon claimed she was not at the house when the shooting occurred, did not recall making, or did not make, statements to the detectives in the interview, and did not recall, or did not state, that she and Salazar were in the bedroom, that Salazar had a gun, and that Salazar shot Munoz. The detective who interviewed her testified that, at the beginning of the interview, she was somewhat incoherent and was apparently "coming down" from being under the influence. But the detective explained that Ayon was extremely reluctant to provide information or testify. Her initial statements appeared to be incoherent because "[i]t was almost like she would start to say something and then stop, and then start to say something else and stop, and like getting mad at herself for even uttering something." He opined she was no longer under

seen Salazar with a revolver the day before the shooting.⁹ A revolver does not expel casings, and no casings were found at the scene, suggesting the revolver was the murder weapon. Salazar had a motive for the killing: Munoz was jealous and believed Villareal was sleeping with Salazar; for this reason, Hernandez stated that the two men did not get along; and J. heard Munoz asking Salazar to leave shortly before the shooting. Salazar fled immediately after the murder, suggesting consciousness of guilt. His story that unknown persons shot Munoz in a drive-by incident was inconsistent with the evidence. The fabrication of the drive-by shooting story likewise suggested guilt. It was undisputed that the only people in the house and garage when the shooting occurred were Munoz, Salazar, Ayon, Hernandez, Hernandez's young sons, and Villareal.¹⁰ It was likewise

the influence when he spoke to her, and it had not appeared that any problems she had "coming down" from drugs affected her ability to recall. Further, the jury was not likely to view Ayon's evasiveness as a "credibility problem[]," as Salazar suggests. To the contrary, the evidence suggested Ayon, like Hernandez, was reluctant to testify based on her fear of being labeled a "snitch."

⁹ At trial, Hernandez repeatedly stated she did not wish to testify. She claimed to have forgotten much information due to her drug use, including some of what she told detectives during her interview. Among other things, she said she could not recall or did not know whether Munoz was jealous of Salazar, whether Munoz and Salazar had "any problems" with each other, whether Ayon or Salazar was at the house the night of the shooting, and whether she saw Salazar with a gun.

¹⁰ There was also testimony that Villareal cared for an elderly man who lived in a back room. There was no evidence suggesting he was the shooter.

undisputed that Hernandez was asleep and her sons were in the converted garage when Munoz was shot, and no evidence suggested Villareal was the shooter. Logically, therefore, the shooter must have been Ayon or Salazar. Indeed, the defense theory was that Ayon fired the fatal shots. But Salazar, not Ayon, was known to have a gun. Moreover, the evidence suggested Salazar and Ayon had just met, and if Ayon had been the shooter, there was no ready explanation for why Salazar would attempt to shield a person he barely knew from prosecution with the story of the drive-by shooting.

Further, the phone call evidence was not particularly damning. Similar evidence was already before the jury: Villareal had told J. that Salazar pulled a gun from his pocket and shot Munoz in Jauregui's room; and Villareal told a detective, during her interview, that Salazar was the shooter. The phone call did not disclose any additional information about the shooting that was not already in evidence. Indeed, the bulk of the phone call was devoted to Jauregui's berating his mother and sister for their behavior. Given the strong evidence and the less-than-crucial character of the phone call evidence, there is no reasonable probability the jury would have rendered a verdict more favorable for Salazar had the evidence been excluded.

2. The matter must be remanded for resentencing

When the trial court sentenced Salazar in September 2017, imposition of a section 12022.53 firearm enhancement was mandatory and the trial court lacked discretion to strike it. (See *People v. Franklin* (2016) 63 Cal.4th 261, 273.) Accordingly, the court imposed a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d).

Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike section 12022.53 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) Salazar contends his case must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements, and the People agree. The parties are correct. The amendment to section 12022.53 applies to cases, such as appellant’s, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statute. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We express no opinion about how the court’s discretion should be exercised.

DISPOSITION

Salazar's sentence is vacated and the matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53 firearm enhancements pursuant to section 12022.53, subdivision (h). The judgment of conviction is otherwise affirmed.

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EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.