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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. ALFRED RODRIGUEZ et al., Defendants and Appellants.	B235693 (Los Angeles County Super. Ct. No. BA358454)

APPEAL from judgments of the Superior Court of Los Angeles County. Drew E. Edwards, Judge. Affirmed with directions.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant Alfred Rodriguez.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant Israel Lopez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Israel Lopez and co-defendant Alfred Rodriguez of first degree murder and found firearm and gang allegations true as to both defendants. On appeal, each defendant raises evidentiary and sentencing errors and Rodriguez challenges the amount of his custody credits. We affirm Lopez's conviction. We affirm Rodriguez's conviction and remand his case for correction of his custody credits.[1]

FACTS AND PROCEEDINGS BELOW

Victor Moreno, a member of the 38th Street gang, was gunned down on Thursday, May 14, 2009, at approximately 4:30 in the afternoon. There were two witnesses to the shooting: Isaac Alvarez and Ruben Zuniga.

Alvarez, a 38th Street member, testified that on the day of the murder he was standing at the corner of Vernon and Lima Avenues, in 38th Street's territory, when a brown Expedition drove by and one of the occupants flashed the sign of a rival gang, the Florencia 13.

A short time later Alvarez was standing on Vernon Avenue near the intersection with Long Beach Avenue, still in 38th Street's territory, talking to fellow gang members Moreno and Israel Medina. The same brown Expedition and a "white car," he had not seen before, came "creeping" northbound on Long Beach Avenue toward Alvarez, Moreno and Medina. Occupants in both cars fired shots into the group. When Alvarez heard the first shot fired from the Expedition he immediately ran across Vernon toward the plaza on the other side of that street. When he reached the other side of Vernon, he caught a three or four second glimpse of the passenger in the white car who was shooting at Moreno. The white car made a right turn onto Vernon and drove away.

When interviewed by the police the next day, Alvarez described the person shooting from the Expedition as bald-headed, chubby, with a mustache and the letter "F" on his shooting arm. (Rodriguez has a large "F" tattooed on his right arm.) He did not give the police a description of the shooter in the white car. Later, in photographic

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[1] Respondent agrees that Rodriguez's custody credits should be changed from 790 days to 791 days.

lineups and at trial, Alvarez identified defendant Rodriguez as the shooter in the Expedition and defendant Lopez as the shooter in the white car.

On cross-examination, Alvarez conceded that he had to look past the driver of the white car in order to see the passenger. He also admitted that when interviewed by the police the day after the shooting he did not give a description of the physical appearance of the shooter in the white car despite his contention that he "got to see a clear shot of him" from where he was standing across the street. Alvarez estimated that he was 10 to 15 feet from the white car when he saw its passenger shooting at Moreno. Alvarez further admitted that he lied at the preliminary hearing and to federal officers when he stated he did not witness the shooting.

Zuniga testified that he was driving north on Long Beach Boulevard when an Expedition swerved in front of him at the intersection of Long Beach Boulevard and Vernon Avenue. He heard shots coming from the Expedition and saw a large letter "F" tattooed on the arm of the shooter. When shown a photograph of an Expedition belonging to defendant Rodriguez's grandmother, Zuniga testified that the car looked "very similar" to the Expedition involved in the shooting. Zuniga did not see the face of the shooter in the Expedition nor did he see a white car involved in the shooting.

The police arrested and interviewed Rodriguez a month after the shooting. The prosecution read his interview to the jury. In his statement Rodriguez denied involvement in the shooting but admitted that his grandmother's Expedition had been used in the crime. Rodriguez told police that on the day of the shooting he drove the Expedition to the home of a Florencia gang member named Huerro and some other "homies." He left the keys in the car. At some point while he was "just chillin" in the backyard he heard the Expedition start up and drive away. Rodriguez stood in the alley behind his grandmother's house waiting for her car to return. After approximately 30 minutes Huerro arrived driving the Expedition. He told Rodriguez he "smoked a tramp," meaning he shot a 38th Street gang member. Huerro does not have a letter "F" tattooed on his arm.

The police also arrested and interviewed Lopez and his statement too was read to the jury. Lopez told the police that on the afternoon of the shooting he was riding in a white car driven by his friend "Stomper" looking for a girl Lopez had met earlier in the day. Lopez saw the girl and had Stomper drop him off. We cannot determine from Lopez's statement the location where he claims Stomper dropped him off but it was close enough to the corner of Long Beach and Vernon that Lopez claims he could hear the shots fired at Moreno. After Lopez got out of Stomper's car, Stomper drove away joined by an SUV.

The jury found Lopez and Rodriguez guilty of the first degree murder of Moreno and found true various gun enhancement allegations and the allegation that the murder was committed for the benefit of a criminal street gang.[2] The court sentenced each defendant to 25-years-to-life on the murder conviction plus a consecutive 25-years-to-life for the personal and intentional discharge of a firearm proximately causing great bodily injury or death. (Pen. Code, § 12022.53, subd. (d).) Sentences on the remaining gun enhancements and street gang enhancement were stayed. Defendants filed timely appeals.

DISCUSSION

I. THE DEFENDANTS' STATEMENTS TO THE POLICE DID NOT IMPLICATE EACH OTHER IN THE MURDER.

Each defendant contends his constitutional right to confront the witnesses against him was violated by the court admitting evidence of his co-defendant's statements to the police. (See *Crawford v. Washington* (2004) 541 U.S. 36; *Bruton v. United States* (1968) 391 U.S. 123; *People v. Aranda* (1965) 63 Cal.2d 518.) We disagree. No violation of the confrontation clause occurs when neither defendant makes statements connecting the other with the murder. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1231.) Rodriguez

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[2] A prosecution gang expert testified that in his opinion Moreno's murder was committed for the benefit of Florencia 13, a criminal street gang. Because the defendants do not challenge the gang enhancement, we need not discuss the evidence supporting the jury's finding.

implicated himself by revealing that his grandmother's Expedition was used in the drive-by shooting. He never mentioned a second car being involved in the crime and never placed Lopez anywhere near the scene of the crime much less as a passenger in the "white car." Lopez stated that after he got out of Stomper's car that car was joined by an SUV and the two cars drove off together. Lopez did not mention the color of the SUV and nothing in his statement implicated Rodriguez in the murder.

II. THE COURT ERRED IN ADMITTING AN UNREDACTED RECORDING OF RODRIGUEZ'S INTERVIEW BY POLICE DETECTIVES IN WHICH THE DETECTIVES EXPRESSED THEIR BELIEF THAT RODRIGUEZ WAS LYING WHEN HE DENIED INVOLVEMENT IN THE MURDER. THE ERROR WAS HARMLESS.

After Rodriguez's arrest, two detectives interviewed him together and, over his objection, the unedited recording of that interview was played for the jury. Rodriguez contends the trial court erred by not redacting the portions of the recording containing the detectives' opinions about Rodriguez's truthfulness and guilt. We agree that the court erred in not redacting the detectives' statements of opinion but we conclude the error was harmless.

Rodriguez objected to the following statements by the detectives.

"To sit here and tell that crazy story that you stood in an alley for a half hour, even you started thinking, sounds kind of fishy, right?"

"It's a lie . . . it's all a lie."

"I know what people are saying Alfred did in that truck."

The detectives' statements accusing Rodriguez of lying about his involvement in the murder constituted inadmissible opinion evidence. In *People v. Torres* (1995) 33 Cal.App.4th 37, 46, the court cited a "consistent line of authority in California as well as other jurisdictions" holding that a witness cannot express an opinion concerning the guilt or innocence of a defendant. It is also well-established that opinions about the falseness of another's statements are inadmissible. (*People v. Melton* (1988) 44 Cal.3d

713, 744 ("Lay opinion about the veracity of particular statements by another is inadmissible on that issue"].)

Respondent argues that the detectives' statements could be played to the jury because the statements were not "evidence" but even if they were evidence they were relevant "to give context and provide meaning with respect to the suspect's responses." We disagree with both of these arguments.

The cases we cited above holding a witness cannot testify to an opinion about the defendant's truthfulness or guilt are inapposite, Respondent argues, because the detectives in this case were not witnesses and their statements were not testimony. In other words, respondent contends a recording in which the detectives express their opinions that Rodriguez is lying to them is admissible at trial even though the same detectives would not be permitted to offer such opinions from the witness stand. We reject this argument.

Evidence is not limited to the testimony of witnesses. It also includes "writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140.) The recorded statements of the detectives were at least "things presented to the senses [of the jurors] to prove the existence of a fact," i.e., that Rodriguez lied to the detectives when he denied involvement in Moreno's murder. More fundamentally, we see no meaningful distinction between opinions on veracity and guilt expressed in the context of an interrogation at a police station or in the context of direct testimony in open court. The end result is the same—the jurors hear the detective's opinion.

Respondent next maintains that the detectives' statements were not offered as opinions on truth or falsity or innocence or guilt. Rather, they were included in the reading of the interrogation transcript in order to give the jury context and meaning with respect to Rodriguez's responses to the detectives' questions. Evidence Code section 356 provides that if one piece of a conversation is admitted in evidence, any other conversation "which is necessary to make it understood may also be given in evidence."

A review of the detectives' statements shows why this argument fails. The detectives characterized Rodriguez's alibi for the time of the shooting as a "crazy story" that "sounds kind of fishy" and later declared his statement to them "a lie . . . it's all a lie." The detectives didn't make these statements to try to give "meaning and context" to what Rodriguez was telling them. Their statements were purely argumentative and accusatory and aimed directly at Rodriguez. The third statement, that the detectives knew "what people are saying Alfred did in that truck" may have been an interrogation ploy but could have been interpreted by the jury as meaning that the police and the prosecutor had evidence of Rodriguez's guilt unknown to the jury. (See *People v. Smith* (2003) 30 Cal.4th 581, 617.)

Furthermore, even if the detectives' accusations were properly admitted to provide context and meaning to Rodriguez's statements, the court should have given the jury a limiting instruction. The case respondent relies upon, *People v. Maury* (2003) 30 Cal.4th 342, 419-420, is not on point because it pertained to evidence of explanatory statements to the police by the defendant.

Although the court erred in not redacting the transcript of Rodriguez's interrogation, we conclude that this evidentiary error did not render his trial fundamentally unfair (*People v. Partida* (2005) 37 Cal.4th 428, 439), and it is not reasonably probable that he would have obtained a more favorable result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Rodriguez and the victim, Moreno, were members of rival gangs. The shooting took place in Moreno's gang's territory, by a member of a rival gang, Florencia 13. The two eyewitnesses to the shooting, Alvarez and Zuniga, testified that the shooter in the Expedition had the letter "F" for Florencia tattooed on his arm. Rodriguez has such a tattoo. (Rodriguez told the police that Huerro, whom he blamed for the murder, did not have an "F" tattooed on his arm.) Rodriguez admitted his grandmother's Expedition was used in the shooting. Alvarez identified Rodriguez in a photographic lineup and confirmed his identification at trial.

III. LOPEZ'S CONVICTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Lopez was convicted solely on Alvarez's uncorroborated eyewitness testimony that Lopez was the shooter in the white car. (See pp. 2-3, *ante*.) On appeal, Lopez contends that Alvarez's testimony was insufficient to convict him of murdering Moreno because uncorroborated eyewitness evidence is the least reliable of all the various kinds of evidence; Alvarez was not a credible witness because he lied to federal law enforcement officers and at the preliminary hearing when he claimed he did not witness the shooting; and it was not possible for Alvarez to reliably identify Lopez as the shooter from where Alvarez stood across the street from the murder scene.

The first two arguments can be quickly dismissed. In determining the sufficiency of the evidence supporting a conviction, "appellate courts must review 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.) "'Substantial'" evidence is evidence that is "'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) On appeal, the uncorroborated testimony of a single eyewitness is sufficient to sustain a conviction "'unless the testimony is physically impossible or inherently improbable.'" (*People v. Panah* (2005) 35 Cal.4th 395, 489.) We do not review the fact-finder's credibility determinations. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Whether Alvarez was in a position where he could indentify Lopez as the shooter in the white car presents a closer question. However, after reviewing Alvarez's testimony together with the photographic evidence of the murder scene, we conclude that a reasonable juror could find that Alvarez's view was sufficient to allow him to identify the shooter in the white car.

Alvarez testified that immediately after hearing the first shots he ran north on Long Beach Avenue across Vernon. He stood on Vernon watching while the shooter in the passenger seat of the white car "was finishing the clip on my boy [Moreno]." From

his vantage point on the other side of Vernon, Alvarez claimed, he was able to obtain a four or five second "glimpse" of the shooter in the white car. We cannot say that Alvarez's identification testimony "'is physically impossible or inherently improbable.'" (*People v. Panah*, *supra*, 35 Cal.4th at p. 489.) The jury could find that after the shooting started Alvarez ran across Vernon Avenue and then looked back south down Long Beach Avenue to where Moreno was standing on the opposite corner of Vernon and Long Beach Avenues. Assuming this was the case, the white car would have been traveling north on Long Beach Avenue, heading toward Alvarez, and then making a right turn on Vernon. As the white car traveled north up Long Beach Avenue, the shooter would have either been looking to his right, aiming his weapon at Moreno and exposing his profile to Alvarez, or looking straight ahead exposing his full face to Alvarez. Either way the jury could reasonably find that Alvarez had a sufficient opportunity to identify Lopez as the shooter.

IV. IT IS NOT A DENIAL OF EQUAL PROTECTION TO PUNISH THOSE WHO AID AND ABET GANG-RELATED MURDERS MORE SERIOUSLY THAN THOSE WHO AID AND ABET MURDERS BY OTHER CRIMINAL ORGANIZATIONS.

The jury found true as to both defendants the firearm enhancement allegations under Penal Code section 12022.53, subdivisions (b) through (e). The court sentenced each defendant to a term of 25 years to life under subdivision (d) and stayed sentencing on the other enhancements including subdivision (e) which applies to aiders and abettors of gang-related murders.[3] Under the evidence, Rodriguez and Lopez were either the

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[3] Section 12022.53, subdivision (d) states: "Notwithstanding any other provision of law, any person who, in the commission of [murder] personally and intentionally discharges a firearm and proximately causes . . . death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Section 12022.53, subdivision (e)(1) provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: (A) The person violated subdivision (b) of Section 186.22 [i.e., committed the offense for the benefit of a

shooters or they were not involved in the crime at all. There was no evidence that they aided and abetted others in the commission of the murder. Nevertheless, the court instructed on the theory of aiding and abetting and the jury found the aiding and abetting allegation under section 12022.53, subdivision (e) to be true. Therefore we will briefly address defendants' argument that subdivision (e)(1) unconstitutionally discriminates against aiders and abettors of gang-related murders by punishing them more harshly than those who aid and abet murders by other criminal organizations such as the Medellin Cartel, Al-Qaeda or the Klu Klux Klan.

The defendants' argument has been rejected twice in this Appellate District. (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480; *People v. Gonzalez* (2001) 87 Cal.App.4th 1, 13.) Defendants have given us no reason to depart from these decisions. Their argument that *Hernandez* ignored our Supreme Court's decision in *People v. Olivas* (1976) 17 Cal.3d 236, 250-251) is mistaken. The *Hernandez* opinion discussed and distinguished *Olivas*. (*People v. Hernandez*, *supra*, 134 Cal.App.4th at p. 483.)

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criminal street gang and with the specific intent to promote, further or assist in any criminal conduct by gang members]. (B) Any principal in the offense committed any act specified in subdivision (b), (c) or (d)." Penal Code section 31 states that a "principal" includes not only those persons who directly commit the act but also those who "aid and abet in its commission."

DISPOSITION

The convictions of Israel Lopez and Alfred Rodriguez are affirmed. The trial court, if it has not already done so, is directed to correct Rodriguez's abstract of judgment to his entitlement to 791 days of presentence custody credit and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.