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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

MIGUEL ALBERTO SALAZAR,

Defendant and Appellant.

2d Crim. No. B269531
(Super. Ct. No. GA087672)
(Los Angeles County)

Miguel Alberto Salazar (aka Monster) appeals his conviction by jury of first degree premeditated murder (Pen. Code, §§ 187, subd. (a), 189),[1] with special findings that he personally used and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) and committed the homicide for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). Appellant was sentenced to 50 years to life state prison. We affirm.

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

Facts and Procedural History

On December 22, 2013, shortly after midnight, Malcolm Mency was shot to death on Broderick Avenue in Duarte. There were two witnesses to the murder.

Cedric Brown was riding a bike on Broderick and called out to Mency, mistakenly believing he was someone else. Mency walked past a male Hispanic with a pudgy build and short hair. Brown saw the man turn, point a handgun, and fire multiple shots at Mency. Afraid, Brown rode away.

Fabiola Gomez stopped at the intersection of Broderick and Euclid Avenues and saw a male Hispanic run up Broderick towards Euclid. The man turned the corner and jumped into the passenger side of a black or blue four-door Nissan that drove off. Mency was lying on the sidewalk and had been shot five times with a .38 caliber pistol. Gomez called 911.

Appellant, Selina Reyes, and Reyes's boyfriend, Enrique Salgado, were arrested several days after the shooting. On December 30, 2013, Sergeants Chaffey Shepherd and Howard Cooper questioned Reyes about the Mency shooting. Reyes willingly talked to the officers. She said that appellant texted her five or six hours after the shooting and showed up at her house with an object wrapped in a towel. Appellant hid the object in Reyes' bedroom closet and retrieved it later that day. When Reyes confronted appellant about the shooting, he said "this is all gang [stuff]. This is what I am, Selina." Appellant was a member of the Eastside Duarte gang.

After Reyes learned that appellant was the shooter, appellant warned her, "[d]on't tell no one. You're going to get me into some shit." Appellant felt remorse and said "if I [hadn't] shot him [i.e., Mency], Chris Rossi would have still been alive." Rossi,

an Eastside Duarte gang member, was shot the day after Mency was murdered. Reyes knew appellant and was mad about the shooting. She confronted him and asked, "What the hell is wrong with you?" Reyes's boyfriend, Salgado, interceded and told Reyes, "Just don't tell anyone he did it."

At the preliminary hearing, Reyes recanted and denied knowing that appellant, her best friend, went by the name "Monster." It received a recording of Reyes's police interview. Appellant's brother, Francisco Salazar, spoke to appellant the day after Mency was murdered. During the telephone call, Francisco asked if appellant "went fishing solo" and "caught one." Appellant said that he "swung the bat solo" and complained that there were "[t]oo many people talking." Francisco warned appellant "to stay low" and "don't get shot fool. Be careful."

Homicide investigators took photographs of appellant's hands to make him believe they had video surveillance of the shooting. A ruse lineup was conducted to trick appellant into believing that a witness saw him shoot Mency.

After the lineup, appellant was placed in a jail cell with two undercover deputies posing as inmates. Appellant said that his name was Monster and that "I'm fucked. Homicide." "I don't have anything to say to 'em, [they] gotta prove me guilty." An undercover deputy asked if they had video on him. Appellant said, "It was in the dark" and the school cameras "can't see shit." The shooting took place a block away from Maxwell Elementary School. Appellant said it was "[o]ne o'clock in the morning, [and] you wouldn't have been able to see nothing."

The undercover deputy asked if appellant was ready to do time for the crime. Appellant replied, "I'm not gonna fuckin' be a bitch [i.e., snitch]" and that he was ready to take a deal for

15 or 20 years state prison. "Basically I am ready to do the time because basically I did the crime." The jailhouse conversation was recorded and played to the jury.

Detective Ulysses Urbina, a gang expert, testified that appellant was a member of the Eastside Duarte gang and that the shooting was committed for the benefit of a criminal street gang.

Third Party Exculpatory Evidence

Appellant argues that the trial court erred in excluding Javier Navarro's pretrial statement that Andrew Goto (aka "Danger") shot the victim. Goto was acquainted with Navarro's sister and, like appellant, was a member of the Eastside Duarte gang.

Navarro told Sergeant Howard Cooper that Goto came to his house at 2:00 a.m. on December 22, 2013. Goto was "'spooked'" and said, "'I just rolled up on some dude and shot him to death.'" Navarro claimed that Goto carried a .38 caliber revolver and handed off the revolver to appellant after the shooting. According to Navarro, Goto was "tight with Monster" and drove a 2011 four-door black Nissan Altima with tinted windows. [2]

Goto and appellant were initially charged with murder but the charges against Goto were dismissed when the prosecution could not locate and subpoena Navarro. (§ 1382.) Navarro had disappeared. The prosecution decided not to use

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[2] Six days after Mency's murder, Goto tried to flee from the police in a black Nissan and assaulted officers with a machine gun.

Navarro's statement and believed that Goto drove the Nissan the night of the shooting but was not the actual shooter.

Appellant moved to introduce Goto's confession even though Navarro could not be found. Defense counsel argued that Navarro's statement to the police was a statement against interest and satisfied the "ability to survive" hearsay exception. Rejecting the argument, the trial court ruled that Navarro's statement was hearsay and unreliable, and did not satisfy the excited utterance or spontaneous statement exception to the hearsay rule.

We review for abuse of discretion. (*People v. Elliot* (2012) 53 Cal.4th 535, 581.) Where third party exculpatory evidence consists of multiple hearsay, each level of hearsay must satisfy a hearsay exception. (*People v. Williams* (1997) 16 Cal.4th 153, 199, fn. 3.) The trial court questioned whether Goto's statement to Navarro, the first level of hearsay, was trustworthy because there were many reasons for "Goto [to tell] his buddy" that he did the shooting, "especially when you're a gang member." The trial court concluded that Goto's statement would "probably come in under the first level [of hearsay]" as a statement against penal interest. The trial court, however, found that Navarro's statement to the police, the second level of hearsay, was not an excited utterance or statement against interest.

Appellant contends that Navarro's statement was admissible under the "against social interest" hearsay exception (Evid. Code, § 1230)[3] and was excited utterance even though

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[3] California adopted the social interest hearsay exception in 1965 as an integral part of the Evidence Code. (Evid. Code, § 1230, Stats. 1965, ch. 299, § 2, p. 1340; *People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1427.) "Even in jurisdictions that permit

Navarro talked to the police five days after the murder. Navarro was concerned about his safety and the safety of his family because rival gang members drove past his house after Mency was murdered. Sergeant Cooper testified that Navarro was very forthcoming, knew that the interview was being recorded, and provided Goto's phone number.

There is no evidence that Navarro's statement was made under the stress of excitement or was trustworthy. (See, e.g., *People v. Washington* (1969) 71 Cal.2d 1170, 1176 [excited statement must be spontaneous and without reflection]; *People v. Geier* (2007) 41 Cal.4th 555, 583 [declarations against penal interest not admissible under Evidence Code section 1230 unless trustworthy].) "[I]n order for a declaration to be against the declarant's social interest to such an extent that it becomes admissible under section 1230 of the Evidence Code, both the content of the statement and the fact that the statement was made must be against the declarant's social interest. Otherwise, each time a witness broke a confidence, he could claim that his revelations were against social interest, because by betraying the trust placed in him, he had incurred social opprobrium." (*In re Weber* (1974) 11 Cal.3d 703, 722 (*Weber*).)

Navarro related Goto's confession to the police five days after the shooting. "Nothing in the content of [Navarro's] statement reflects adversely on his character in such a way as to guarantee that it is reliable." (*Weber*, *supra*, at p. 721.) Although Navarro's statement reflected adversely on Goto and may have

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admission of statements against social interest, 'litigants and judges rarely invoke that theory as a basis for admitting hearsay testimony.' [Citation.]" (*Ibid.*)

caused Navarro to incur Goto's hatred, the statement also benefited Navarro and was self-serving. (*Id.*, at p. 722.) Navarro did not feel safe and was given money and bus tickets to relocate. The trial court reasonably concluded that the police interview, in which Navarro volunteered information about Goto's confession, was not a statement against a social interest.

Harmless Error

The alleged error, if any, in excluding Navarro's statement was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant's conduct and statements to Reyes were strong evidence of guilt. Appellant visited Reyes hours after the shooting and hid what Reyes believed was the murder weapon in her closet. Reyes had a "gut feeling" that appellant was the shooter and confronted him about the murder. Although appellant did not outright confess, his admissions confirmed what Reyes had already deduced -- that appellant shot and killed Mency.

Reyes's statement to the police was corroborated by appellant's phone call to his brother, Francisco Salazar and the bicyclist Brown, who saw the shooter run to a black Nissan, jump in the passenger seat, and escape. Reyes told the police that appellant did not know how to drive and did not have a car. The day after the shooting, appellant told his brother that he "swung the bat solo" and that the victim did not "reply" (i.e., shoot back). Appellant was arrested, was identified in a fake lineup as the shooter, and told undercover deputies posing as cellmates that "I'm fucked. Homicide." Appellant said that he was "ready to do the time because basically I did the crime," and described the time, location, and lighting conditions of the murder, something only the shooter would know.

Citing *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*), appellant claims that the exclusion of Goto's confession violated his federal due process rights. In *Chambers* defendant sought to present evidence that a third party, McDonald, confessed to several friends that he had committed the crime (murdering a peace officer) of which the defendant was accused. When defendant called McDonald as a witness, he repudiated his earlier confession and Mississippi's rules of evidence precluded defendant from cross-examining McDonald about the confession or presenting witnesses who would have discredited McDonald's repudiation. (*Id.*, at pp. 291-294.) The United States Supreme Court held that due process requires state courts to admit evidence that is critical to the defense in criminal cases where the evidence bears persuasive assurances of trustworthiness. (*Id.*, at p. 302.)

Unlike *Chambers*, Goto's confession was second-hand hearsay and came from a source (Navarro) that was untrustworthy. "[N]either due process nor *Chambers v. Mississippi* has led the high court to 'question[ ] the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted.' [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 141–142.)

"Ordinarily a criminal defendant's attempt 'to inflate garden-variety evidentiary objections into constitutional ones [will prove] unpersuasive.'" (*People v. Thornton* (2007) 41 Cal.4th 391, 443.) That is the case here. It is settled that ordinary rules of evidence, including Evidence Code section 352, do not infringe on a defendant's due process right to present a defense. (*People*

v. Hall (1986) 41 Cal.3d 826, 834-835 [referring to third party culpability evidence].) We reject the argument that the exclusion of Navarro's statement violated appellant's due process rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1243.) "*Chambers* therefore does not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." (*United States v. Scheffer* (1998) 523 U.S. 303, 316.)

Extrajudicial Statement by Reyes's Boyfriend

Appellant claims that the trial court erred in not redacting Reyes's statement that her boyfriend, Enrique Salgado, told her that appellant shot Mency. Reyes was mad about the shooting and chastised appellant. Salgado, an Eastside Duarte gang member, interceded and told Reyes to "leave it alone." Reyes explained: "[M]y boyfriend told me like, 'Hey don't tell no one that Monster shot, um - that Monster shot Malcolm.' And I was just like, 'I know. I'm not going to tell anyone.'"

The prosecutor argued that Salgado's statement was admissible to show Reyes's reluctance to testify (i.e., state of mind) and to show why Reyes recanted. "Reyes isn't receiving information about the identity of the shooter through her boyfriend because prior to that actual statement, she had already disclosed to investigators that she knew that the defendant was the shooter. [¶] [T]he statement that is at issue, is one in which Ms. Reyes' boyfriend, Salgado is admonishing the witness to not tell anyone that the defendant had done the shooting. [¶] And that statement is important because it explains why Ms. Reyes testified the way she did at the preliminary hearing. The entirety of her preliminary [hearing] testimony was a recantation of the contents of the interview with Investigator Chaffey."

The court ruled that Salgado's statement was being admitted to show Reyes's state of mind and to explain why she recanted at the preliminary hearing. Defense counsel replied "Okay," forfeiting the argument that Salgado's statement was hearsay. On the merits, Evidence Code section 780, subdivision (f) provides that, in determining the credibility of a witness, the jury may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including the existence or nonexistence of bias, interest, or other motive. Evidence that Salgado told Reyes not to tell anyone that appellant committed the murder was properly admitted to show why Reyes recanted, which is not uncommon in a gang case. The gang expert explained that "ratting or snitching" on a gang member is "a bad thing" and that snitches "get hurt" if they testify against a gang member. "'[T]he trial court did not abuse its discretion in determining that evidence of [Reyes's] fear in testifying was relevant to the jury's assessment of her credibility.' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1292.) The jury was instructed that, in judging the credibility of a witness, it may consider the witness's prior consistent or inconsistent statements and whether the witness's testimony was influenced by bias or prejudice, or a personal relationship with someone involved in the case. (CALCRIM No. 226.)

Appellant argues that admission of Salgado's statement violated his due process right to confront witnesses. Appellant forfeited the claim by not objecting on that ground. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [confrontation clause error forfeited by not objecting at trial]; *Melendez-Diaz v. Massachuesetts* (2009) 557 U.S. 305, 313-314, fn. 3 [claim of error

forfeited by failure to object at trial based on Confrontation Clause]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 779-780 [Confrontation Clause analysis is "distinctly different than that of a generalized hearsay problem"; issue forfeited].) On the merits, there was no error. Salgado's statement was not admitted for its truth but to assist the jury in assessing Reyes's credibility. The jury was so instructed. (CALCRIM No. 319; see *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389 [limiting instruction required where statement is used as circumstantial evidence of declarant's mental state].)[4] Appellant's statements to Reyes, to his brother, and to the undercover deputies was compelling evidence. Assuming, arguendo, that the admission of Salgado statement impacted appellant's constitutional right to confront witnesses, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Jenkins* (2010) 50 Cal.4th 616, 651-652.)

Alleged Cumulative Error

Appellant contends that the cumulative effect of the alleged evidentiary errors denied him a fair trial. As our Supreme Court has said on several occasions, a "defendant is entitled to a fair trial but not a perfect one." (*People v. Marshall* (1990) 50 Cal.3d 907, 945, internal quotes omitted.) Our review

[4] The jury received a CALCRIM No. 319 instruction that Reyes's prior statements may only be considered in a limited way: "You may only use them in deciding whether to believe the testimony of Selina Reyes that was read here at trial. You may not use those other statements as proof that the information contained in them is true, nor may you use them for any other reason." It is presumed that the jury understood and followed the instruction. (*People v. Jablonski* (2006) 37 Cal.4th 774, 834.)

of the record discloses that none of the purported errors identified on appeal, either singularly or cumulatively, were sufficient to deny appellant a fair trial.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Cathryn F. Brougham, Judge

Superior Court County of Los Angeles

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

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