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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE RIVERA, Defendant and Appellant.	B250039 (Los Angeles County Super. Ct. No. BA284089)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Donald R. Tickle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose Rivera appeals from the judgment entered following his conviction by jury of first degree murder with personal and intentional discharge of a firearm causing death (Pen. Code, §§ 187, 12022.53, subd. (d).) The court sentenced appellant to prison for 50 years to life. We affirm.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that in May 2005, Lucia Contreras (Lucia) lived at 1825 South Longwood. On May 8, 2005, Mother's Day, Leon Felipe (the decedent) was shot and killed.

On May 9, 2005, Lucia told police the following during a recorded interview. Prior to the shooting, Lucia knew appellant because he used to work with her brother. Lucia lived two houses from the location of the shooting. Lucia saw appellant on her street during the morning of May 8, 2005. Later that day, Lucia was at her gate when she saw a person named Ricky walking with Leon, who had a bicycle. Eric Felipe (Eric), Leon's brother, looked towards Leon and said, "hey, hey, hey." Lucia heard three gunshots.

Lucia also told police the following. Lucia did not see the shooting but saw appellant running on Longwood toward Highland, and she got a good look at him.[1] While appellant was running, he moved his right hand as if he was putting something in his pocket or waistband. Appellant was the only person running from the scene. Lucia identified appellant to police from a photographic lineup, and wrote that she had seen appellant running after the shooting.

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[1] Lucia testified at trial that when she walked out her door, she looked to the left and saw appellant running. Appellant was perhaps a block or so down the street, and Lucia guessed appellant was about seven houses from her. Appellant was running away from Lucia and she saw just his back.

Noel Contreras (Noel), Lucia's brother, testified that in May 2005, he lived at 1827 South Longwood. Noel knew appellant because they had worked together. On May 8, 2005, prior to the shooting, Noel drove by appellant and a person named Carlos, and they waved at Noel. The shooting occurred perhaps one or two hours later. A commotion occurred outside Noel's house. He went outside, saw Leon lying on the ground, and saw appellant running northbound on Longwood.[2] Noel identified appellant at trial.

Eric testified as follows. Eric and appellant had been friends, but after Eric's mother died in 2004, Eric and appellant fought in Leon's presence. After the fight, Eric and Leon no longer socialized with appellant. About 4:00 p.m. on May 8, 2005, Eric was at home when Leon came home and told Eric that appellant and Carlos were "talking trash" to Leon. (Appellant concedes Carlos was Carlos Gonzalez (hereafter, Gonzalez).) Eric told Leon, "Let's go" and the two left to fight appellant and Gonzalez. Leon rode his bicycle towards Longwood with Eric running behind him.

When Eric arrived on Longwood, he saw Leon standing five feet from appellant and appellant pulling out a gun. Appellant and Leon were in front of Gonzalez's house. Leon was no longer on his bicycle but was holding it. Leon was in the street, appellant was on the sidewalk, and Gonzalez was standing next to appellant. Appellant shot Leon, who fell. Appellant took a step forward and shot Leon again. Appellant fled on Longwood. Eric ran to Leon, and Gonzalez stood behind Eric. Leon had no weapon. Eric identified appellant to police from a photographic lineup, and wrote that appellant was the person who shot Leon. Eric identified appellant at trial as the shooter.

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[2] Noel also testified that perhaps three minutes after he heard the commotion, he came outside. Noel saw Leon lying in the street, about 100 to 120 feet north of Noel, i.e., about four houses north of Noel and near Carlos's house. Noel then saw appellant. Noel did not see appellant's face but saw only his back. Appellant was a little more than 120 feet north of Leon, i.e., at least five houses north of Leon. Noel testified he identified appellant because Noel had seen appellant earlier in the day.

Los Angeles Police Sergeant Augusto Mariano testified that at 4:30 p.m. on May 8, 2005, he arrived at the scene and saw a shooting victim on the ground. Mariano found no weapons. On the above date, Los Angeles Police Detective Ronald Cade went to the scene and determined appellant was a suspect. He went to appellant's house on Highland, which was about a block and a half away, but appellant was not there. A deputy medical examiner opined Leon died from multiple gunshot wounds. Leon was shot twice in his torso and once in his right arm. Los Angeles Police Detective John Shafia testified at trial on March 11, 2013, that on July 23, 2010, he took appellant into custody in Houston and extradited him. Appellant had arrived in Houston from El Salvador.

2. *Defense Evidence.*

Appellant presented an alibi defense that he was in Mexico when Leon was killed. Augustine Castaneda testified he used to associate with Leon and Eric. At some point Castenada and Gonzalez stopped speaking with Leon and Eric, but appellant continued speaking with Leon and Eric. Castenada was unaware of any problem between, on the one hand, appellant, and, on the other, Leon and Eric.

On May 6, 2005, Castenada drove appellant to Riverside to meet girls. Castenada and appellant were in Riverside for perhaps 30 minutes but did not meet girls. Instead, during the evening, Castenada and appellant decided to go to Tijuana. Appellant and Castenada stayed in a hotel that night but Castenada did not think the hotel had a name. On the morning of May 7, 2005, Castenada and appellant had breakfast and went to a bar. That evening, Castaneda returned to the United States, but appellant remained in Mexico. Two weeks later, appellant called Castaneda and told him appellant was in El Salvador.[3]

[3] After Leon's death, Castenada tried to locate Gonzalez. Randall Petee, a defense investigator, testified he interviewed Castenada and asked him to help find Gonzalez. Petee searched for information about Gonzalez's whereabouts on databases and talked to neighbors, but Petee was unable to locate him.

Appellant testified he was born in El Salvador and, in 2005, he lived at 1641 South Highland in Los Angeles. According to appellant, in 2002 or 2003, appellant and Eric fought and their friendship subsequently ended. The fight resulted from Eric's unsuccessful efforts to have appellant join the 18th Street gang. After that incident, appellant had no contact with Eric or Leon. Appellant and Gonzalez were friends. Appellant became friends with Luis Inocente, whom appellant met through Gonzalez.

According to appellant, in May 2005, some girls lived in Riverside and appellant and Castaneda went to Riverside to meet the girls. Appellant and Castenada were in Riverside less than an hour. Appellant tried calling the girls, but they did not answer. He had their address but did not go to their house. Appellant and Castenada decided to drive to Tijuana. Appellant had no dispute with Leon, was not upset with him, and had no reason to shoot him, before appellant went to Mexico.

Appellant and Castenada drove to the border, left the car in the United States, and walked into Tijuana. Appellant had a large sum of money because he was planning to go to El Salvador. Appellant had no belongings with him. Appellant, who was 18 or 19 years old, and Castenada went to strip clubs after arriving in Tijuana. They stayed that night at a hotel, but appellant could not remember its name. The next morning, Castenada and appellant walked to Castaneda's car. Appellant did not have breakfast with Castaneda. Castaneda entered his car, but appellant returned to Mexico. Appellant took a bus to El Salvador, where he stayed about five years, then returned to the United States. Appellant returned to the United States by flying from El Salvador to Houston. He was planning to go to New York where a friend, Jason, had offered him a job. Appellant did not know Jason's last name.

3. *Rebuttal Evidence.*

In rebuttal, Detective Shafia testified without pertinent objection as follows. On July 23, 2010, Shafia took appellant into custody in Houston and took him to the airport.

After appellant was advised of his *Miranda*[4] rights, appellant spoke with Shafia in the car. Shafia placed a recorder in the car but it did not record appellant's statements.

Appellant told Detective Shafia that appellant knew about the murder and the victim, but appellant denied involvement. Appellant asked when the murder occurred. Shafia told appellant the murder occurred on Mother's Day in 2005. Appellant expressed relief and told Shafia that appellant was with his mother all day that day, except for 10 minutes when appellant had to go buy her a present. Appellant also told Shafia that appellant had traveled from El Salvador to the United States several times, appellant would repeatedly fly to Houston, then New York, and appellant also traveled to Colorado and Los Angeles.

Detective Shafia testified he examined appellant's passport. It had only been stamped once, i.e., for appellant's most recent trip to Houston. The passport did not reflect appellant had taken any trips in and out of El Salvador, and the passport appeared to have been issued on July 7, 2010. Shafia asked appellant why, if appellant had traveled often, the passport was stamped only once. Appellant said he had lost his original passport.[5]

We will present below additional facts where pertinent.

ISSUES

Appellant claims the trial court erred by (1) failing to instruct the jury that the People had to prove by a preponderance of the evidence that appellant made pretrial statements and (2) denying a defense continuance motion.

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[4] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

[5] In surrebuttal, Inocente testified he was a friend of appellant and Castaneda. In July 2005, Inocente asked Castaneda if appellant could help Inocente move. Castaneda told Inocente that Castenada and appellant earlier had gone to Riverside where they were stood up by girls, Castenada and appellant then decided to drive to Tijuana, and appellant was in Mexico.

DISCUSSION

1. *No Instructional Error Occurred.*

The court's written instructions to the jury included CALCRIM No. 358, pertaining to evidence of appellant's statements. The written instruction stated, inter alia, "You have heard evidence that the defendant made an oral or written statement before the trial. You must decide whether the defendant made any such statement in whole or in part." The full instruction as orally given was substantially the same as the written instruction, except the court stated the following between the above quoted first and second sentences: "In this case it was an oral statement."

Appellant claims the trial court erroneously failed to instruct that the People had to prove to a preponderance of the evidence appellant made the pretrial statements. We conclude otherwise. Evidence Code section 502, states, "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." As indicated, appellant concedes the People had the burden to prove by a preponderance of the evidence appellant made the pretrial statements at issue in CALCRIM No. 358. We accept the concession. (Evid. Code, § 115 ["[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].)

We assume the trial court was required to instruct the jury the People had the burden to prove by a preponderance of the evidence appellant made the pretrial statements at issue in CALCRIM No. 358. Moreover, there is no dispute the pretrial statements at issue are those that, during rebuttal, Detective Shafia testified appellant made en route to the airport. However, even if the trial court erroneously failed to instruct on said burden and standard of proof, we conclude, for the four reasons below, we need not reverse the judgment.

First, the court, using CALCRIM No. 301, instructed the jury, inter alia, the testimony of only one witness could prove any fact, and there is no dispute that that instruction correctly stated the law. Detective Shafia testified as a rebuttal witness and without pertinent objection that appellant made the pretrial statements at issue. Moreover, Shafia testified most or all of the conversation he had with appellant was in the car as they were en route to the airport. During cross-examination of Shafia, appellant asked if anyone was in the car other than Shafia and appellant, and Shafia replied his partner was. Although appellant was entitled to not present any defense evidence, he did present defense evidence and, we note, appellant never called Shafia's partner, a logical witness, to testify appellant did not make the statements. (See *People v. Hovey* (1988) 44 Cal.3d 543, 572.) Shafia's testimony concerning the pretrial statements was not contradicted by any testimony from his partner.

Further, two pertinent issues were (1) did a person make the pretrial statements and (2) was appellant that person. Appellant concedes the latter issue; he states in his reply brief "there was no dispute as to appellant's identity at the time that Detective Shafia transported appellant to the airport and claimed that appellant made the unrecorded statements."

Second, there was ample evidence of appellant's guilt. In particular, there is no real dispute Leon was shot and killed; the issue is identity. At trial, Eric testified appellant was the shooter, and Eric, Lucia, and Noel each testified appellant was running from the scene after the shooting.

Indeed, Eric testified appellant was talking trash to Eric prior to the shooting. Lucia testified she saw appellant on the morning of May 8, 2005, i.e., earlier during the day of the shooting. Noel testified he saw appellant one or two hours prior to the shooting. The testimony of Eric, Lucia, and Noel that they saw appellant prior to the shooting provided ample evidence he was in the neighborhood on May 8, 2005, contrary to his alibi testimony he was in Mexico. The jury reasonably could have concluded portions of the alibi testimony of appellant and Castaneda were so unreasonable that the alibi defense was fabricated.

Third, the court gave CALCRIM No. 220 on the People's burden of proof beyond a reasonable doubt, and the court additionally instructed on that standard in various specific contexts.[6] In determining whether error has been committed in giving or not giving jury instructions, an appellate court must consider the instructions as a whole and assume jurors are intelligent persons capable of understanding and correlating all given instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) Moreover, " '[i]nstructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ibid.*) The ultimate question is whether there is a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220.)

Absent an instruction expressly relating the People's burden of proof by a preponderance of the evidence to the issue of whether appellant made the pretrial statements, the jury reasonably would have concluded the burden and standard of proof applicable to that issue was the People's burden of proof beyond a reasonable doubt. In sum, the alleged omissive instructional error was beneficial to appellant.

Fourth, in *People v. Arriaga* (2014) 58 Cal.4th 950 (*Arriaga*), our Supreme Court stated, "The standard of proof, the United States Supreme Court has said, 'serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.' (*Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804] [*Addington*].) *At one end of the spectrum is the 'preponderance of the*

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[6] The court instructed on the People's burden of proof beyond a reasonable doubt when instructing on the sufficiency of circumstantial evidence (CALCRIM No. 224), first degree murder (CALCRIM No. 521), and the firearm enhancement (CALCRIM No. 3149). The court instructed on the slight evidence standard of the corpus delicti rule (CALCRIM No. 359) but, under that rule, that standard pertained only to the evidence required before the jury could consider appellant's extrajudicial statements. The court expressly related the standard of raising a reasonable doubt and a specific issue only when the court, using CALCRIM No. 3400, instructed on the issue of alibi, i.e., when the court instructed that if the jury had a reasonable doubt appellant was present when the crime was committed, the jury must acquit him.

evidence' standard, which apportions the risk of error among litigants in roughly equal fashion. (*Ibid*.) At the other end of the spectrum is the 'beyond a reasonable doubt' standard applied in criminal cases, in which 'our society imposes almost the entire risk of error upon itself.' [Citation.]" (*Arriaga*, at p. 961, italics added.)

Arriaga stated the preponderance of the evidence standard is at "one end" (*Arriaga, supra*, 58 Cal.4th at p. 961) of the spectrum, i.e., at the lowest end. No rational jury can be *persuaded* of the *truth* of an alleged fact unless, at the least, it is more likely than not the alleged fact is true. In sum, the jury rationally could not have "decide[d]" for purposes of CALCRIM No. 358 that appellant made the pretrial statements without the jury employing at least the preponderance of the evidence standard of proof.

In light of above four reasons, we conclude that even if the trial court erroneously failed to instruct that the People had the burden to prove by a preponderance of the evidence appellant made the pretrial statements, no violation of appellant's state and/or federal constitutional rights to due process, a fair trial, or trial by jury occurred, and the erroneous failure was harmless under any conceivable standard. (*Cf. People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)[7]

2. *The Court Did Not Erroneously Deny Appellant's Continuance Motion.*

a. *Pertinent Facts.*

On March 14, 2013, the jury convicted appellant. On May 2, 2013, the court granted appellant's request to continue the case to June 5, 2013, so appellant could explore the possibility of filing a new trial motion. On June 5, 2013, the court trailed the matter to June 11, 2013. On the latter date, the court continued the case to June 21, 2013, because the victim's family had a right to be present and was not there. The prosecutor

[7] In light of the above analysis, there is no need to reach the issue of whether appellant waived the issue of his instructional claim by failing to request modification or amplification of CALCRIM No. 358, or whether any such waiver resulted from ineffective assistance of his trial counsel.

indicated the victim's brother wished to be present. On June 21, 2013, the court continued the case to July 12, 2013.

On July 10, 2013, appellant filed an ex parte continuance motion, requesting the motion be heard on July 12, 2013. The unsigned alleged declaration (declaration) of Jonathan Mandel, appellant's trial counsel, stated that on July 2, 2013, Mandel "received a phone call from [appellant] telling me that had [*sic*] just found out that Carlos Gonzalez, a crucial witness to the murder who we had been seeking for over a year had a younger brother and sister attending Alta Loma Elementary and possibly Mt. Vernon Middle School in LA at the time of the murder but who may have moved away."

The declaration indicated Mandel asked the defense investigator to serve a subpoena duces tecum on the Los Angeles Unified School District (LAUSD) for records regarding Gonzalez and "his sister siblings" who were between the ages of four and six years old in 2005. The declaration indicated the sister siblings lived at Gonzalez's Longwood address. Also attached to the motion was a memorandum from the defense investigator to Mandel, reciting the difficulties the investigator experienced when serving the subpoena and LAUSD's ultimate refusal to produce the demanded documents on grounds related to Gonzalez's privacy.

On July 12, 2013, the prosecutor indicated he opposed the continuance motion. The court later stated, "I don't think there is sufficient cause shown, . . . for diligence or probative value. I don't think it is established, so the motion to continue is denied." At later sidebar, Mandel stated, "This regards the problem with Carlos Gonzalez who we know was there by several accounts who may have a different version." Mandel indicated the defense was unable to find Gonzales for about a year and a half, "[a]nd then we got this information from – my client remembered it." Mandel then discussed his efforts through the defense investigator to obtain information from LAUSD.

The court indicated as follows. Mandel had been diligent but appellant personally had not been diligent. There was no indication why appellant had not made an earlier effort to find out the information about the younger brother and sister. Appellant "waited until afterwards to suddenly supply [Mandel]" with that information. Nothing indicated a

reasonable belief Gonzalez would exonerate appellant. The court again denied the motion.

Mandel stated the following. Epiphanies came at all times. Appellant "may have known it, but for some reason it percolated to surface last week. I can't justify that." Mandel was concerned about LAUSD's chaotic response to the subpoena. Mandel added, "It may be it is not him."[8] The court again denied the motion. Jaime Felipe, Leon's brother, gave a victim impact statement.

b. *Analysis.*

Appellant claims the trial court erred by denying his continuance motion. We disagree. Appellant bears the burden of establishing that denial of a continuance request was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) Only a showing of an abuse of discretion and prejudice to the defense suffices to reverse a judgment on the basis of such a denial. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

Appellant made no showing about why, after his jury conviction, he allegedly "just found out" about Gonzalez's younger brother and sister, why appellant had not found out about them earlier, or how he had learned about them. According to Mandel, either the younger brother or sister "possibly" attended a middle school; it was not clear a records search as to that sibling would have been productive. Appellant made no showing the younger brother or sister, who were allegedly attending elementary and possibly middle school at the time of the 2005 murder, knew, at the time of the 2013 motion, about the murder or about Gonzalez's whereabouts.

Appellant allegedly found about Gonzalez's younger brother and sister, but Mandel asked the defense investigator to subpoena records pertaining to appellant's "sister siblings." Appellant made no showing as to who these sisters were in relation to

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[8] Mandel added, "The other issue there is information – I did include it – from one witness that Gonzalez had witnessed it from Augustin. I did not put it in, but Gonzalez had given him a different story. I think I put that in an earlier motion." (*Sic*.) Appellant concedes in his opening brief "[t]he record does not show that defense counsel filed an earlier motion or submitted additional information to the court."

the earlier mentioned younger brother and sister, or why a continuance was needed as to the "sister siblings." Appellant also made no showing why he had not found out about the "sister siblings" earlier. Nor did he make a showing the "sister siblings," who allegedly were between four and six years old at the time of the 2005 murder, knew, at the time of the 2013 motion, about the murder or about Gonzalez's whereabouts. Appellant failed to demonstrate any likelihood Gonzalez could be produced as a witness.

Appellant also failed to show what testimony Gonzalez likely would have provided or that any such testimony likely would have been favorable to appellant. Mandel indicated Gonzalez may have had a different version, without explaining what that version might have been. Mandel suggested Gonzalez gave a "different story" (see fn. 8, *ante*), but Mandel apparently conceded he had not included this information in the motion.

Although Mandel's declaration indicated appellant told him that appellant "just found out" about Gonzalez's younger brother and sister, Mandel orally represented to the court "my client remembered it," suggesting appellant already had known about the younger brother and sister. Mandel conceded during the hearing appellant "may have known it." Mandel's unsigned declaration and the defense investigator's unsworn memorandum were hearsay. Appellant did not explain why he could not have called Ricky (who, according to Lucia's statement to police, was walking with Leon) as a witness at trial to testify concerning whatever Gonzalez might have testified. A continuance also would have been inconvenient for family member witnesses, such as Jaime Felipe. The trial court did not abuse its discretion or deny appellant's right to due process or Sixth Amendment right to present necessary defense evidence by denying appellant's continuance motion. (See *People v. Doolin* (2009) 45 Cal.4th 390, 450; *People v. Riggs* (2008) 44 Cal.4th 248, 296-297.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, Acting P. J.

We concur:

ALDRICH, J.

LAVIN, J.*

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