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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. DANIEL MENCHACA, Defendant and Appellant.	B236698 (Los Angeles County Super. Ct. No. VA113040)

Appeal from a judgment of the Superior Court of Los Angeles County, Margaret M. Bernal, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Daniel Menchaca, appeals from the judgment entered following his plea of no contest to attempted murder (Pen. Code, §§ 664/187),[1] during which he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). The trial court sentenced Menchaca to 25 years in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

At approximately 7:45 p.m. on October 16, 2009, Wilson Guzman, accompanied by his cousin, Samuel Rivera and three young women, Melissa Morales, Angela Covarubias and Janna Olson, was walking down Eucalyptus Avenue in Bellflower on his way to the liquor store. As the group approached the store, a blue Dodge Neon, with Menchaca and two other men inside, pulled up next to Guzman and his friends. Guzman's friend Melissa approached the car and, after a moment, returned to the group. Guzman had ignored the car and kept walking.

As the group got to the middle of the block, in front of some apartments, an individual who Guzman believed was Daniel Menchaca's brother, approached Guzman and began "hitting [him] up, saying he's from [the] Swan Bloods, popping his collar" and making other gestures. Menchaca's brother then asked Guzman if he was "banging" and "if [he] was trying to get at his brother's girlfriend." At that point, Guzman stopped and indicated that he had "no idea what [Menchaca's brother] was talking about," that he was not with a gang and did not "do any of that stuff."

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

Guzman indicated that he "just wanted to . . . go to the store. At that point [Menchaca's brother] paused and . . . call[ed] [Guzman] out for a plain out fight[.]" Guzman took off his shirt and "began to approach [Menchaca's brother] to begin the fight." However, Guzman noticed that Menchaca's brother "kept backing away and looking across the street." Guzman began to get suspicious and wondered what was going on. It "just didn't seem right to [him]." In addition, he noticed that his friend, Melissa, seemed "worried and scared" and kept looking across the street.

Melissa told Guzman and the others that they had "better go." Guzman, who had already been thinking the same thing, grabbed his cousin Rivera's hand and pulled him along as he began to walk. Guzman was approximately five feet from Menchaca's brother, when the brother made a comment about the fact that Guzman was simply walking away from the situation. Guzman turned around to tell Menchaca's brother that he was "not walking away from nothing." However, before he could finish making his comment, Menchaca appeared with a black gun. Guzman started to run and Menchaca followed. Menchaca was approximately 10 feet from Guzman when he started shooting. Although Guzman continued to run, his cousin, Rivera, stopped, faced the shooter and "pleaded for his life." Menchaca simply ran past Rivera and continued to follow Guzman. Rivera then, too, began to run. Menchaca shot at Guzman approximately five times. Although Menchaca did not hit Guzman, Guzman's cousin, Rivera, suffered gunshot wounds to the back of his knee and his stomach. Rivera was later taken to the hospital where he was required to have surgery on his knee.

Rivera testified that, while he, his cousin, Guzman, and three girls were walking to the store, Menchaca or his brother began to argue with Guzman. After one of the Menchaca brothers yelled out a gang name, the "Swan Blood," Guzman told the Menchaca brothers that he was simply walking to the store with Melissa Morales. As Guzman and Rivera began to walk away, Rivera "saw someone running and [he] heard gunshots." He turned around for a moment and saw Daniel Menchaca shooting at him.

Guzman had started running as soon as he heard the gunshots. Rivera, too, ran when the gunshots started. After he heard two or three shots, there was a break and he looked back to see who was firing the weapon. He screamed out to Menchaca that he had not done anything, then almost immediately, the shooting began again. Menchaca fired two or three more shots.

When the gunshots started, Guzman's and Rivera's friend, Melissa, "was right there . . . telling them to stop . . . . She was . . . in the back where [Daniel Menchaca's] brother was." The other two girls were with Melissa, standing approximately "two-and-a-half to three feet" from each other. Rivera glanced back, but he had not paid much attention to where the girls were standing since he was "scared" and "running away to save [his] life."

That day, October 16, 2009, Los Angeles Deputy Sheriff Carmen Zamudio was on patrol, working out of the Lakewood Station. She and her partner, Deputy Rios, responded to a call directing them to 16141 Eucalyptus Avenue in Bellflower. During their investigation, another deputy, Hernandez, advised Zamudio that she had found two

.25 caliber shell casings "on the street directly across from the . . . residence." Zamudio "recovered the evidence and booked it at the Lakewood Sheriff's Station."

Mark Brooks is a detective for the Los Angeles County Sheriff's Department. On November 17, 2009, he went to 16428 Cornuta Avenue, Apartment 30. From one of the bedrooms, he recovered a wood plaque with swans on it, photographs and both .45 and .25 caliber ammunition. Brooks took the plaque because he believed it might be gang paraphernalia.

Detective Esteban Soliz is a deputy sheriff assigned to Lakewood "Operation Safe Streets." On October 17, 2009, the detective obtained a warrant to search Daniel Menchaca's apartment. During the search, the detective recovered "seven live .45 caliber rounds[,] one live .25 caliber round and some clothing." When the detective compared the .25 caliber round found at Menchaca's apartment with the .25 caliber casing found at the scene of the shooting, he determined "[t]hat they matched the exact make."

Earlier, Detective Soliz had spoken with Wilson Guzman. When Soliz had asked Guzman to look at a six-pack, or group of six photographs, Guzman circled a photograph of Daniel Menchaca's brother, Jonathan Moore. When Soliz had executed a search warrant at Menchaca's apartment, Menchaca's mother had informed him that Jonathan Moore was Menchaca's brother and that Moore belonged to the Swan Bloods gang. The gang's primary activities "range[d] from the minimum, . . . hand-in-hand assaults, to robberies . . . to the most serious [crime which] would be murder." Soliz was familiar with at least two cases where members of the Swan Bloods had committed attempted murder "for the benefit of or at the direction of the Swan Blood gang[.]"

When Soliz went to Apartment 30 at 16428 Cornuta Avenue in Bellflower, the defendant, Daniel Menchaca, and a Mr. Johnson were both present. In addition, Tiffanie Menchaca was seen leaving the apartment. As Tiffanie Menchaca left, Soliz instructed patrol units to "conduct a . . . stop on her vehicle." Soliz then "contacted [Tiffanie] Menchaca in the back of a black and white." She told the detective that she was coming from her house, which is on Eucalyptus one block west of Cornuta Avenue, and that she had not seen her brother, Daniel Menchaca, for quite some time. Daniel Menchaca was, however, later detained at the Cornuta Avenue address. When Daniel Menchaca was taken into custody, officers recovered a .30 caliber carbine rifle from one of the bedrooms in his apartment.

When Menchaca was detained at the apartment, others, such as Dwayne Johnson, were also found in the house. Dwayne Johnson "admitted that he is [a] Swan Blood from the 84th Street" and that he went by the "nickname of G-Wayne."

As Deputy Soliz took Daniel Menchaca into custody, the deputy was of the opinion that the two attempted murders had been "committed by Mr. Menchaca for the benefit of, or in association with, or at the direction of [the] Swan Blood Gang[.]" Soliz's opinion was based on "where [Menchaca] was taken into custody, [that] he was in the [company] of a Swan Blood who was documented and self-admitted" and that his brother had thrown out the Swan Blood sign, indicating that these were gang-related crimes. With regard to the type of weapon used to commit the attempted murders, Soliz believed it was a semi-automatic. A "[s]emi-auto [has] a straight L shaped type frame" and "the casing [from the ammunition] is ejected."

2. *Procedural history*.

In an information filed on January 19, 2010, Daniel Menchaca was charged with two counts of attempted murder (§§ 664/187, subd. (a)), during each of which he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and each of which was committed for the benefit of, at the direction of or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). It was further alleged that he committed three counts of assault on the person of another with a semiautomatic firearm (§§ 245, subd. (b), 12022.5, subd. (a)) during one of which the gun was fired from a car (§ 12022.5, subds. (a) & (d)). Each count was alleged to be a serious felony within the meaning of section1192.7, subdivision (c) and, as to the attempted murders alleged in counts 1 and 2, it was asserted Menchaca committed violent felonies within the meaning of section 667.5, subdivision (c).

Bail was set at $1,250,000.

At proceedings held on March 10, 2010, Menchaca made a *Pitchess*[2] motion. After reading the motion and the opposition, the trial court determined the two documented complaints did not involve any "fabrication" and that "there [were] no discoverable items."

Menchaca's counsel then asserted that, "[r]egarding the []relevance of the fabrication of Detective Soliz with respect to the gang affiliation of Jonathan Moore[,]" she wished "to point out that the gang allegation against Mr. Menchaca [was] entirely

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

piggy-backed upon or dependent upon the allegation that he acted in association with Jonathan Moore." And "that [was] the only basis for the . . . allegation against Mr. Menchaca[.]"

At proceedings held on April 30, 2010, Menchaca's counsel made a motion to set aside the information (§ 995) with regard to counts 3, 4, and 5, each of which alleged Menchaca committed assault with a semiautomatic firearm (§ 245, subd. (b)), and the attempted murders charged in counts 1 and 2, including the allegations that the offenses were committed for the benefit of, at the direction of and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). After hearing argument by both parties, the trial court indicated it believed "that the People's point [was] well taken. The kill zone would encompass all the potential victims in close proximity of where the gun was being sprayed and [so the 995 was denied] as to counts 1 through 5." The court continued, "As far as the gang allegation is concerned, . . . [the] court has read and considered [the] preliminary hearing . . . as well as the motion. [¶] . . . [The] allegation is . . . perhaps a little bit weaker . . . than the other [allegations], but certainly sufficient for purposes of [the] preliminary hearing, so . . . the court is going to deny the 995" "[i]n its entirety."

On May 31, 2011, Menchaca decided to enter a plea and take the People's offer of 25 years in prison. The prosecutor addressed Menchaca and stated: "As alleged in the second amended information VA113040, you are charged in count 1 with a violation of . . . section[s] 664/187, attempted murder. There's another allegation that during the course of that crime, you discharged a firearm. [¶] . . . The maximum time you could do in this case is 29 years." The prosecutor continued, "My understanding is you are going

to enter a no contest plea, take the People's offer, plead to count 1, and admit the discharge of the gun allegation for 25 years, a determinant sentence." When the prosecutor asked Menchaca if that was his understanding of what would take place, Menchaca responded, "Yes."

Although he was pleading no contest only to count 1, Menchaca agreed to pay restitution on all of the counts alleged. He then waived his right to a jury trial, his right to confront and cross examine any witnesses testifying against him, his right to use the subpoena power of the court to call witnesses in his defense and his right against self-incrimination. The prosecutor informed Menchaca that he would be required to pay the state restitution fund an amount ranging from $200 to $10,000 and that he was pleading to a "strike." The prosecutor explained, "That means in the future if you do pick up any additional felonies, this plea may be used to enhance those future sentences."

Menchaca pleaded no contest to count 1, that he committed the crime of attempted murder, a violation of sections 664 and 187 subdivision (a), a felony, on Samuel Rivera, and admitted that, during the course of the attempted murder, he personally and intentionally discharged a firearm, to wit, a handgun, in violation of section 12022.53, subdivisions (c) and (e)(1).

The trial court found that Menchaca had made "knowing and intelligent waivers" and accepted the plea and admission. The court found Menchaca guilty and the allegations to be true.

At proceedings held on July 11, 2011, counsel for Menchaca stated that he was ready to be sentenced. Menchaca, however, indicated that he wished to address the court.

He stated: "Basically, I want to withdraw my plea and [make a] *Marsden*[3] [motion] to fire [my counsel]. I want to go to trial. [¶] She didn't want to assist me in trial, so that is [the] reason why she forced me to take a deal. I don't really understand everything, but I don't want to take that deal."

After the prosecutor left the courtroom, Menchaca indicated that he had not known what he was doing when he entered the plea and that he had wanted to go to trial. His counsel, however, had indicated that she would not assist him during a trial in part because she did not want a loss on her record. In addition, Menchaca had been led to believe that, if he had gone to trial, he would be sentenced to life in prison. Under the circumstances, he had taken "the deal."

After the trial court indicated that "the part about [him] facing life [was] correct[,]" Menchaca stated that he would still "rather take it to trial" and that he and his family were attempting to obtain an attorney who would represent him.

Menchaca's counsel indicated that she had spent the better part of a day explaining to Menchaca the advantages of entering a plea rather than going to trial. Moreover, she had been successful in getting the prosecutor to reduce the original offer of 30 years to 25 years in prison. Counsel indicated that "at the end of the day, it wasn't going to get any better," so she had advised Menchaca to take the offer. Counsel "didn't say that [she] would quote 'refuse' to help [Menchaca]."

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

Menchaca disagreed. He indicated that his counsel had told him that she was not going to help him at trial. "So, [Menchaca] started crying and took the . . . deal." Menchaca stated that counsel was "yelling at [him,]" telling him that this was the best deal he was going to get.

Menchaca's counsel indicated that she and Menchaca could go back and forth all day with Mr. Menchaca "alleging things and [counsel] denying them." Finally, counsel stated that she had not been contacted by any other attorney who wished to represent Menchaca.

The trial court denied Menchaca's *Marsden* motion. The court indicated that it was not going to appoint a different attorney, but that if Mechanca wished to hire one, he was free to do so.

After the *Marsden* hearing, the trial court continued Menchaca's sentencing to August 18, 2011. The court stated: "I want to make sure that you are advised completely; but keep in mind, when you [were] made an offer, that you were facing not only life, but 25-to-life, plus 20 years on the personal use of the gun allegation, plus an additional ten years on [the] gang allegation." The trial court continued: "I am not making any comment about your request to withdraw your plea because I don't have any basis for it at this point. [¶] But since you do want to talk to another attorney and you think that your family may be able to . . . swing it for you, then I will allow you an opportunity to do so."

At proceedings held on August 18, 2011, Menchaca indicated that he had been unable to find alternative counsel. Instead, he indicated that he wished to represent

himself and he made a *Faretta*[4] motion. The trial court asked Menchaca if he understood "the dangers and disadvantages [of] representing [himself.] [A]mong those [dangers were] being that the court would assume that [he] would understand all the technical rules of substantive law, criminal procedure and evidence and treat [him] as if [he] were a lawyer, not giving [him] any special consideration because of the fact [he] wish[ed] to represent [himself.]" After Menchaca indicated that he understood, the trial court asked him, "Are you still requesting that this court relieve your counsel and that you represent yourself for the purposes of filing a motion to withdraw your plea?" Menchaca stated that he was and the court then indicated that it would relieve Menchaca's counsel.

The trial court recognized that Menchaca had "handed to [the court that] morning a handwritten notice of [a] motion to set aside [his] plea." The court, however was "going to put it over to allow [Menchaca] to give [the court] a more detailed motion."

With regard to discovery, the trial court indicated that it was not going to turn it over. The court determined it was not necessary unless Menchaca decided to proceed with trial. If he wished his plea to "stay," the matter would be continued for sentencing.

On September 28, 2011, Menchaca presented to the trial court an "application to withdraw [his] plea under section . . . 1018." In the motion, Menchaca discussed his *Marsden* hearing. The trial court noted that counsel indicated "that she was denying what [Menchaca was] alleging, except for the fact . . . that she had yelled at [him] and that she

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[4] *Faretta v. California* (1975) 422 U.S. 806.

had worked really hard to get [Menchaca] the deal [he] had because of evidentiary issues that were problems in the case, on [Menchaca's] side."

In addition to discussing his *Marsden* hearing, Menchaca wished to read into the record his reasons for moving to withdraw his plea. He stated: "[T]he defendant on May 31st, 2011 was coerced by counsel to take [the] deal [the] People offered defendant. [¶] Defendant insisted [o]n going to trial, but counsel refused to listen . . . and compelled defendant into taking the deal. [¶] Therefore, the defendant is before this Honorable Court to withdraw his guilty plea as he would otherwise be [entering an] unintelligent plea."

Among the arguments made by Menchaca were that his counsel had coerced him into accepting the People's offer and that she told him "she would not proceed to trial with this case" because "the evidence on defendant was overwhelming." Counsel also apparently told Menchaca that, if they were to go to trial, she would do "nothing to aid [him] or put up an adequate defense." Menchaca "would lose and get life in prison if [he] did not agree to plea bargain." Menchaca believed that "counsel's behavior and ineffective assistance was due to [the fact she wanted] more money for the case . . . ."

Menchaca indicated that case law provided that, on the application of the defendant at any time before judgment, "the court [might,] for good cause shown, permit the plea of guilty to be withdrawn and [a] plea of not guilty substituted. . . . [¶] . . . [T]o establish good cause, it must be shown that [the] defendant was operating under mistake, ignorance or any other factor overcoming [the] exercise of his free judgment. Other factors overcoming [a] defendant's free judgment, include[d] inadvertence, fraud [and]

duress. [¶] The burden is on the defendant to present clear and convincing evidence the ends of justice would be []served by permitting a change of plea to not guilty." "Defendant was entitled to withdraw his plea due [to] [in]effective assistance of counsel [and because] whether the court had adequately advised [the] defendant . . . regarding [the] possible penalties was not relevant to whether counsel's performance was sufficient. And defendant established good cause [and] a reasonable probability that he [would] not have pleaded guilty but for counselor."

After Menchaca finished presenting his case, the trial court indicated that "[b]ased upon all the information" it had, it did not "find good cause to withdraw the plea." The court determined that counsel had not been incompetent. Accordingly, the trial court indicated it would "proceed with sentencing."

After listening to Menchaca's objections, the trial court indicated it had read the probation report and could find "no legal cause to not proceed with sentencing." The trial court then sentenced Menchaca to the low term of five years for his conviction of attempted murder in violation of sections 664 and 187, subdivision (a) as alleged in count 1 and 20 years for his intentional discharge of a firearm during the offense in violation of section 12022.53, subdivision (c), for a total term of 25 years in prison. He was awarded presentence custody credit for 681 days actually served and 102 days of good time/work time, for a total of 783 days.

The trial court ordered Menchaca to pay a $30 criminal conviction fee (Gov. Code, § 70373), a $40 court security assessment (§ 1465.8, subd. (a)(1)), a $200

restitution fine (§ 1202.4, subd. (b)), a suspended $200 parole revocation restitution fine (§ 1202.45) and actual restitution in the amount of $2,000.

Menchaca filed a timely notice of appeal on September 28, 2011. His request for a certificate of probable cause was denied that same day.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed March 9, 2012, the clerk of this court advised Menchaca to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. On March 29, 2012, Menchaca filed a supplemental brief in which he argued that his trial counsel had been ineffective for failing to find exculpatory evidence which "could have gotten [him] release[d]," that he and his trial counsel had had "[i]rreconcilable conflicts" as he had wanted to go to trial and she believed he should enter a plea, that his trial counsel had yelled at him, and that he had entered the plea under duress "and not . . . able to exercise [his] free judgment due to . . . pressure from [his trial] attorney[,] the judge" and the district attorney. Finally, he asserted his trial counsel coerced him into taking the plea.

Initially, Menchaca fails to reveal what exculpatory evidence his counsel should have found which would have exonerated him. Second, with regard to his assertion that he and his trial counsel suffered from irreconcilable differences, the trial court heard Menchaca's arguments to that effect and properly determined that they did not amount to good cause by which Menchaca could withdraw his plea. Third, review of the record

establishes that Menchaca exercised his free will when he decided to enter the plea. The trial court properly determined that the evidence does not support a finding that he pled under duress or due to "pressure" from his counsel, the court and the district attorney. Finally, although the record establishes that his counsel yelled at him, it does not indicate that counsel coerced Menchaca into entering the plea. After listening to Menchaca's objections, the trial court indicated it had read the probation report and could find "no legal cause to not proceed with sentencing."

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P. J. KITCHING, J.