Filed 6/18/13 P. v. Rosas CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ABEL ROSAS, Defendant and Appellant.	B238092 (Los Angeles County Super. Ct. No. BA355199)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed.

Pensanti & Associates and Louisa B. Pensanti for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

_____

Abel Rosas[1] was convicted by a jury on two counts of attempted willful, deliberate and premeditated murder with true findings on the special allegations the crimes had been committed for the benefit of a criminal street gang and a principal had used and discharged a firearm in committing the offenses proximately causing great bodily injury. On appeal Rosas argues his constitutional right to the effective assistance of counsel was violated by his lawyer's failure to move to suppress as involuntary his admissions to police officers following his arrest, to properly investigate the case and to present at trial evidence favorable to the defense. He also contends the trial court erred in denying a motion for new trial based on newly discovered evidence and an error in the verdict forms requires a retrial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Shooting and the Victims' Statements*

Brothers, German Llamas and Armando Llamas, were shot on April 8, 2009 at approximately 5:15 p.m. while walking together on Towne Avenue in South Los Angeles. Los Angeles Police Officer Michael Stewart questioned German[2] at the scene and in an ambulance taking him to the hospital. German told Stewart a red BMW with hydraulic lifts drove by with five male Hispanics inside. German recognized Rosas, who was wearing a blue Los Angeles Dodgers cap, and one of the other passengers in the back seat. German later identified the third person in the back seat as Ramon Garcia.

German said the BMW stopped in front of him, and someone in the back seat asked, "Where are you from?" German responded he was not a gang member. The individuals in the BMW then displayed Florencia 13 gang hand signs and drove off. Several minutes later the BMW came back from the other direction; a second car, a brown or gray Monte Carlo driven by Rosas, followed it. Both cars turned the corner at 84th Street, moving away from German and Armando. Garcia, now on foot, approached

---

[1] We spell Rosas's first name as he did when he testified at trial.

[2] We use the brothers' first names for convenience and clarity. (See *People v. Jones* (1996) 13 Cal.4th 535, 538, fn. 2.)

German and Armando on 84th Street and asked, "Well, who's in that car," apparently referring to the BMW. Garcia continued walking and then started shooting at German and Armando before getting into the BMW, which drove away. While at the hospital German identified Rosas as the driver of the Monte Carlo and Garcia as the shooter from several photographic lineups shown to him by Los Angeles Police Officer Kevin Currie, a member of the 77th Division's gang enforcement detail. German also identified Rosas at the preliminary hearing.

For his part, Armando reported to Los Angeles Police Officer Yolanda Mansillas, another gang detail officer who rode with him in the ambulance to the hospital, that four individuals were initially in the BMW and only two when it returned, followed by the Monte Carlo. Armando recognized Rosas as a passenger in the BMW when it first drove by and as the driver of the Monte Carlo. Following the second pass by the BMW, a male Hispanic wearing a blue-and-white collared shirt who had previously been in the BMW approached Armando and German on foot. He asked Armando, "Hey, who were those guys?" and then shot Armando and ran away. The evening of the incident, after returning home from the hospital, Armando identified Rosas and Garcia from the multiple photographic lineups shown to him by Officer Currie.

At trial German testified he could not identify Rosas or the person who shot him and did not remember telling the police what had happened. He acknowledged he was afraid of the Florencia 13 gang. Similarly, Armando denied seeing a car and testified he had not seen Rosas prior to trial. He could not remember what he had told police officers the day of the shooting. Both men admitted they did not want to be witnesses.

German suffered multiple gunshot wounds to his thighs and back. He was hospitalized for six days. Armando received a single gunshot wound to his thigh.

2. *Rosas's Arrest and His Police Interviews*

Responding to a call about the shooting, Los Angeles Police Officer Arnold Porter and his partner saw a red BMW with hydraulic lifts parked on 69th Street, slightly more than a mile from the scene of the shooting at 84th Street and Towne Avenue. A brownish

Monte Carlo was also parked close by. After additional units arrived, the officers arrested Rosas and four other men who were standing near the cars; three of the men, including Rosas, were wearing clothes consistent with the description of the suspects. Rosas was taken to the 77th Street police station.

A little past midnight on April 9, 2009, Rosas was interviewed by Los Angeles Police Detective Leanne Hoffman and her partner Detective Cleary. Rosas was advised of his right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].) Rosas denied any involvement in the shooting and said he had been at the address on 69th Street where the red BMW was found because he was helping a friend paint his fence. He explained he had interrupted the task and left to retrieve some tools, which is why German and Armando had seen him around the time of the shooting. The detectives told Rosas the two victims and a third witness had indicated Rosas was involved in the incident. Hoffman said, "So like I have said, like I told you in the car, when I talked to you when we walked up the stairs and when I talked to you right now, I am giving you the opportunity to be honest because your involvement is less than the other person's involvement, but it's your opportunity to not be a part of it." Throughout this initial interview Rosas repeatedly denied his involvement in the shooting,[3] even as the detectives continued to insist they knew he was not telling the truth and told him it would be better if he did.[4] Rosas also denied he was a member of or associated in any way with the Florencia 13 criminal street gang.

---

[3] At one point early in the interview Rosas said, "But I'm not a part of it, that's the crazy thing about it. It's just happened to be bad luck for me."

[4] For example, Detective Cleary said, "Did you not listen to the whole scenario we just played for you? It's not a matter of whether or not your hand was on that gun and your finger was the one that pulled that trigger. That does not matter. If you come clean, we can help you because like we said, we don't think you are the one that decided—hey, let's go bang these fools." Rosas responded, "No, I did not. I don't have time for that."

Rosas was booked after the conclusion of the initial interview. According to Detective Hoffman, Officer Currie told her Rosas had asked during that process whether it would help him if he "came clean." That comment led Hoffman to believe it would be helpful to interview Rosas again. She decided to wait a day to do so, explaining, "It seemed like he thought it was a joke. So I felt that maybe if he spent time in the jail, there would be an understanding that this—we are not playing games here. It is not a joke."

Detective Hoffman and her partner that day, Officer Williams, interviewed Rosas a second time on April 10, 2009 at 4:50 p.m. Hoffman asked Rosas if he wanted to discuss what had happened the day of the shooting, and Rosas said "Okay." Hoffman did not advise Rosas of his *Miranda* rights again prior to continuing with the interview.

During the second interview Rosas said he was at his house collecting tools to continue painting a fence at the home of his friend Everardo Santana (Everardo) on 69th Street. Jose Luis Santana (Jose), known to Rosas as Nadar, drove up in a red BMW. A man Rosas believed to be Garcia was in the front seat. Rosas and Garcia lived on the same block, and Rosas also knew him from school. Three other men Rosas did not know, but who appeared to him to be gang members, were in the backseat of the car. Jose invited Rosas to "go mobbing" or tagging with them—writing graffiti on walls—and asked Rosas to follow in his Monte Carlo and to be on the lookout for police. As Rosas drove by 84th Street and Towne Avenue in his Monte Carlo, he said hello to German and Armando. The men in the red BMW and German and Armando, however, yelled at each other; and Rosas left because he feared there was going to be a fight. Back at Everardo's house at 69th Street, Rosas saw the three gang members get out of the red BMW, enter a white van and drive off.

As the interview continued, Rosas's story changed significantly. First, he acknowledged, rather than tagging, the men in the BMW "had a beef with some Bloods," specifically the Eastside Swans and German, in particular, because German had shot at them before and beat up "one of their little homies." They intended to fight the Bloods:

"They said they were gonna get down, they said if they could shoot them, they were going to shoot them." However, Rosas insisted he did not actually see a gun. Rosas also admitted he had been inside the red BMW when it first drove passed German and Armando and gang signs were displayed and shouts exchanged. They then drove to Everardo's house, where he was asked to follow in his Monte Carlo as backup and lookout.

3. *The Charges*

Rosas and Garcia were jointly charged with two counts of attempted willful, deliberate and premeditated murder. (Pen. Code, §§ 664, 187, subd. (a).) As to both counts it was alleged the crimes had been committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)) and a principal had used and discharged a firearm causing great bodily injury in committing the offenses. (Pen. Code, § 12022.53, subds. (b)-(e).) Rosas pleaded not guilty and denied the special allegations. Garcia's case was severed from Rosas's prior to trial.[5]

3. *The Evidence at Trial*

The People presented evidence of German's and Armando's statements to police officers in the aftermath of the shooting and their identification of Rosas as a passenger in the BMW and the driver of the Monte Carlo, as well as Rosas's post-arrest statements, which were admitted into evidence without objection.[6] In addition, Huntington Park Police Detective Gerardo Prado, testifying as a gang expert, described the area where the shooting occurred—Towne Avenue near 84th Street in South Los Angeles—as within the territory of the Florencia 13 street gang, a predominantly Hispanic gang. According to

---

[5] The jury at Garcia's first trial was unable to reach a verdict, and a mistrial was declared. At a second jury trial Garcia was convicted on two counts of attempted premeditated murder with true findings on criminal street gang and firearm-use enhancements. In his separate appeal Garcia raises only a sentencing issue. (See *People v. Garcia* (June 18, 2013, B240815 [nonpub. opn.].)

[6] A DVD of the April 9, 2009 interview and an audio recording of the April 10, 2009 interview were played for the jury. In addition, the jurors were given transcripts of the two interviews, which were also received into evidence.

Prado, Florencia 13 gang members commonly wore clothing with the color blue. The gang's enemies included the Swans, a primarily African-American Blood gang.

After describing aspects of gang culture—the importance of "respect"; the process of being "jumped in"—and identifying the primary criminal activities of Florencia 13, Detective Prado opined, based on a hypothetical derived from the evidence in this case, the shootings were committed for the benefit of the gang to earn respect from the community and rival gangs. He also opined the crimes were committed in association with the gang because more than one person affiliated with the gang had participated in them.

4. *The Defense Evidence*

Testifying on his own behalf, Rosas stated his friend Everardo had asked him to help paint a fence at his house on April 8, 2009. He drove to the house on 69th Street around 4:00 p.m. and worked on the fence with Everardo's father while seven or eight other men were socializing on the property. Around 4:30 p.m. Rosas left in his Monte Carlo to go to a friend's house to pick up additional painting materials. He drove past the intersection of 84th Street and Towne Avenue on his way back to Everardo's house but did not see German or Armando.

According to Rosas, Everardo's cousin Jose lived at the house with Everardo. Rosas claimed he barely knew Jose, who owned a red BMW. When Rosas returned to the house to continue the painting job, he did not see the red BMW. Rosas worked on the fence for another 45 minutes and then went inside to eat. Jose entered the house and said "It all went bad" between Jose and German and then left when someone called for him. Rosas went outside and again worked on the fence. At this point police officers arrived, handcuffed five men including Rosas and took Rosas to the police station.

Rosas described his interviews with the police, acknowledged he had lied to them at various points because he "felt something was going on bad" and insisted the version of events he testified to at trial was true. Rosas acknowledged he knew German and

Armando and said he did not have any problem with them. He also admitted he had friends who were members of Florencia 13.

The defense presented several character witnesses who testified Rosas was not violent and did not associate with gang members. Professor Mark Costanza from the University of California Santa Cruz testified regarding the circumstances that may lead to a false confession.

5. *The Verdict*

The jury found Rosas guilty on both counts of attempted willful, deliberate and premeditated murder and found true the criminal street gang and firearm-use enhancement allegations. After reading the verdicts, the court asked the jurors, collectively and individually, whether those were their verdicts. The jurors collectively and then individually stated they were.

Several days after the jury was discharged, the court reported that the clerk had found signed not guilty verdict forms among the materials that had been collected from the jury room, specifically in a binder containing the master set of jury instructions. The court, although "concerned and slightly embarrassed" by this discovery, stated it believed there was a true verdict because the jurors had orally attested to their verdicts.[7] The court observed, "I believe the jurors clearly misunderstood what they were supposed to have done [with the not guilty verdict forms]. If I had caught it, I would have sent the jurors back, and I would have said there is a contradiction here."

---

[7] The court explained, "[T]he rendering of a verdict occurs when there is a verbal pronouncement in open court and the jurors attest to the verdict. Actually, one does not even need a written verdict form. That is not a requirement, I believe, of a true verdict. A true verdict is rendered when the verdict is announced in court in the presence of the jurors and the jurors either attest or don't attest to it. In this case, we had an attestation by the jurors as a whole to each verdict including all the findings. We had a polling of the jurors as a group, and we had a polling of each individual juror. I believe under existing law that that is the rendering of the verdict."

6. *Rosas's Motion for a New Trial and Sentencing*

Rosas moved for a new trial on the grounds of ineffective assistance of trial counsel, newly discovered (alibi) evidence and defective jury verdicts. The court denied the motion.

After denying the new trial motion the court sentenced Rosas on count 1 to an indeterminate life term with the possibility of parole for attempted murder plus 25 years to life for the firearm-use enhancement and on count 2 to a consecutive indeterminate life term with the possibility of parole for attempted murder plus 25 years for the firearm-use enhancement.[8] The court explained it was ordering consecutive sentences on the two counts "because they are completely separate acts of violence against separate alleged victims in this case."

DISCUSSION

1. *Rosas's Trial Counsel Did Not Provide Ineffective Assistance*

a. *Legal standard*

"'To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.'" (*In re Roberts* (2003) 29 Cal.4th 726, 744-745; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a

---

[8] The court noted it was not imposing an additional or alternate penalty for the criminal street gang enhancement pursuant to *People v. Brookfield* (2009) 47 Cal.4th 583 because there was no finding Rosas had personally discharged a firearm in committing the offenses and the court had used the gang finding as a basis for imposing the principal-use firearm enhancement under Penal Code section 12022.53, subdivision (e)(1).

presumption the challenged action "'might be considered sound trial strategy'" under the circumstances. (*Strickland*, at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.)

b. *Failure to move to suppress Rosas's statements to Detective Hoffman*

Rosas's appointed trial counsel did not move to suppress Rosas's post-arrest statements to Detective Hoffman and her partners. After substituting new retained counsel,[9] Rosas asserted in a new trial motion, as he does again on appeal, those statements were the involuntary product of coercion (use of threats and promises of leniency) and the failure to move to suppress them was ineffective assistance of counsel.

Because Rosas's statements were admissible and any objection would have been unsuccessful, the failure to move to suppress them does not constitute ineffective assistance: "The Sixth Amendment does not require counsel to raise futile motions." (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24; accord, *People v. Memro* (1995) 11 Cal.4th 786, 834 ["[t]he Sixth Amendment does not require counsel '"to waste the court's time with futile or frivolous motions"'"]; see *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836, [failure to make a futile or unmeritorious motion is not ineffective assistance].)

A defendant's confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercion or, more generally, "overreaching." (*People v. Tully* (2012) 54 Cal.4th 952, 992, fn. 13; *People v. Williams* (1997) 16 Cal.4th 635, 659 (*Williams*).) "[I]nvoluntariness requires coercive activity on the part of the state or its agents; and such activity must be, as it were, the 'proximate cause' of the statement in question, and not merely a cause in fact." (*People v. Mickey* (1991) 54 Cal.3d 612, 648; accord, *Tully*, at p. 992, fn. 13.) In deciding the question of voluntariness both the United States and California Supreme Courts require courts to apply a "totality of the

---

[9] Rosas was originally represented by a deputy public defender. A conflict of interest was declared during pretrial proceedings, and a bar panel attorney was appointed to represent Rosas. Following his conviction, Rosas replaced his appointed counsel with a privately retained attorney, who also represents him in this appeal.

circumstances" test. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [113 S.Ct. 1745, 1754, 123 L.Ed.2d 407]; *People v. Massie* (1998) 19 Cal.4th 550, 576; *Williams*, at p. 660.) "Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.'" (*Williams*, at p. 660.)

Evidence a defendant's admissions were preceded by express or implied promises of leniency is significant in evaluating whether the statements were voluntary. (*People v. Neal* (2003) 31 Cal.4th 63, 84 ["[p]romises and threats traditionally have been recognized as corrosive of voluntariness"]; *People v. Boyette* (2002) 29 Cal.4th 381, 412 ["[a] promise to an accused that he will enjoy leniency should he confess obviously implicates the voluntariness of any resulting confession"].) The presence of such a threat or promise, however, is not necessarily determinative: "[U]nder current law, no single factor is dispositive in determining voluntariness . . . ." (*Williams, supra*, 16 Cal.4th at p. 661; see *People v. Massie*, *supra*, 19 Cal.4th at p. 576 ["[i]n determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne'"].) Moreover, """"[w]hen the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made."""" (*People v. Tully, supra*, 54 Cal.4th at p. 993.)

Rosas points to a number of comments during his first police interview he contends were an implied threat and promises of leniency. According to Rosas, Detective Hoffman attempted to pressure him when she said he would have to spend at least eight months in jail before he could present his claim of innocence to a jury—although he fails to identify any inaccuracy in that assessment. And the officers' entreaty to Rosas "save himself"; the observation, "[i]f you come clean, we can help you"; and the statement, "you won't be looking at life; you'll be looking at much less time" if he would tell the truth, in Rosas's view, all amounted to improper promises of leniency. By the

time of this first interview, however, Rosas had been identified as an active participant in the incident by both victims. His denials of any involvement were patently false, and Hoffman and her partner appropriately advised Rosas it would be better for him to tell the truth. (See, e.g., *People v. Tully, supra,* 54 Cal.4th at p. 993; *People v. Howard* (1988) 44 Cal.3d 375, 398 [permissible for police to advise suspect of benefits that flow naturally from truthful conduct].)

In any event, Rosas continued to deny his involvement in, and any responsibility for, the shooting throughout the first interview. Ultimately, he simply told Detective Hoffman he did not want to talk further. Hoffman asked, "Are you, do you want to talk about anything or no? If not, then you are going to be brought to be booked." Rosas responded, "Yeah, I'm done man." Plainly nothing said by the officers proximately caused Rosas to make any incriminating statements through the termination of the first interview session.

With respect to the second interview, which took place more than 36 hours after the conclusion of the initial interview, Rosas contends only that "[t]he subsequent confession was not sufficiently attenuated from the improper coercion used by the officers in the first interview to break the causal chain." As discussed, there was no improper coercion in the initial interview, and no incriminating statements were produced during the first session. Accordingly, the inculpatory statements made during the second session with Detective Hoffman were necessarily admissible. (See *People v. Jones* (1998) 17 Cal.4th 279, 299 ["Defendant also contends that because his initial interrogations produced involuntary incriminating statements, his subsequent inculpatory statements were illegally obtained. [Citation.] But the initial interrogations did not produce any involuntary incriminating statements."].)

In addition, it was Rosas, not the detectives, who initiated the second interview; Detective Hoffman confirmed before proceeding that Rosas now wanted to speak about what had happened the day of the shooting. Even if improper coercive tactics had been employed in the first interview session, this intervening independent act by Rosas would

be a significant factor indicating incriminating statements made during the second interview were not obtained by exploitation of any illegality that may have occurred during the first. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 360.) Moreover, Rosas continued to be evasive during the initial phase of the second interview, providing additional support for the conclusion his will was not overborne by any alleged coercion during the first interview. Finally, in evaluating whether a motion to suppress would have been pointless, we can reasonably infer his trial counsel was aware Rosas had been advised of and waived his rights under *Miranda* before speaking to the officers and also knew Rosas had been questioned by the police in the past—both circumstances pointing toward the voluntariness of any statements he had made and the futility of any motion to suppress. (See *Williams, supra*, 16 Cal.4th at p. 660.)

In sum, under all the circumstances trial counsel's decision not to move to suppress Rosas's statements to Detective Hoffman was both reasonable and fully consistent with professional norms.

c. *Failure to investigate and subpoena potential witnesses*

Two reports from an investigator working with the deputy public defender who initially represented Rosas stated Everardo Santana and Jose Santana had corroborated Rosas's story he was painting the fence at Everardo's house on 69th Street throughout the afternoon of the shooting and identified other Santana family members (Bonificio Santana, Marcilino Santana and Mario Santana) who were present at the time and could also corroborate Rosas's alibi. Marcilino and Mario were then in Mexico, but Bonificio remained in Los Angeles. In addition, the investigator reported Jose said the police had told him what to write in the statement he had given and now claimed Rosas was never in Jose's red BMW.

During trial Rosas's defense counsel proffered testimony from an investigator that she had unsuccessfully attempted to subpoena members of the Santana family who lived at the 69th Street house. Counsel represented the investigator would testify, "they won't speak to her and won't accept anything because they don't even come out. They don't

even answer phone calls." The court excluded the testimony of the investigator as irrelevant and unduly prejudicial, indicating it would call for "bizarre speculation" as to the absent individuals' potential testimony.

According to a posttrial declaration filed by defense counsel, several days after the jury verdicts Everardo came to his office, and told him he had moved from the 69th Street house without leaving a forwarding address but said, had he been subpoenaed, he would have come to court. Marcilino and Mario were still in Mexico; Bonificio was then living in Mexico, as well.

Rosas contends his trial counsel was deficient in failing to conduct further pretrial investigation of the Santana family members as potential alibi witnesses. Rosas also asserts, besides corroborating his alibi, Jose could have confirmed the use of improper police interrogation practices by the detectives in this case and thereby reinforced his claim his confession was false. Thus, he argues, it was also ineffective assistance for counsel to have failed to subpoena Jose for trial. (See, e.g., *People v. Ledesma*, *supra*, 43 Cal.3d at p. 215 [adequate investigation and preparation part of criminal defense counsel's responsibilities]; *People v. Jones* (2010) 186 Cal.App.4th 216, 239 [failure to make adequate pretrial investigation may be grounds for finding ineffective assistance of counsel]; *People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212 ["standard of reasonable competence requires defense counsel to diligently investigate the case"].)

Neither Rosas's brief in this court nor the appellate record suggests any reason his counsel should have believed additional pretrial efforts were required with respect to Everardo or Jose, let alone indicates counsel reasonably suspected either man would subsequently refuse to cooperate with the defense or be difficult to contact or subpoena to appear at trial.[10] Both had cooperated with the defense investigator and appeared willing

---

[10] Rosas's assertion in his appellate brief that Jose Santana "is currently housed in the California State Prison at Lancaster, California," even if true (albeit outside the appellate record), does not support his argument it would have been relatively simple for defense counsel to arrange for Jose's testimony. Jose's custodial status as of October 2012 indicates nothing about his whereabouts 17 months earlier when the trial occurred.

to provide evidence helpful to Rosas. On the other hand, it appears Marcilino and Mario were in Mexico well before the trial began in May 2011, and nothing in the record supports an inference the initial effort to locate and interview Bonificio would have been more successful if additional attempts had been made. Under these circumstances trial counsel's performance did not fall below professional norms. (See *In re Cox* (2003) 30 Cal.4th 974, 1016 [defendant "'must demonstrate that counsel knew or should have known that further investigation was necessary'"]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1093 [defendant failed to state prima facie claim of ineffective assistance since he "failed to show the witness was available to be interviewed by his attorney"]; see also *In re Thomas* (2006) 37 Cal.4th 1249, 1264, fn. 4 [not every decision to curtail investigation in an area based on the improbability of finding evidence is ineffective assistance; generally, "it is for counsel to decide what leads are or are not worth exploring"].)

Finally, it is not reasonably probable any additional efforts defense counsel might have made in this regard would have altered the outcome of the trial. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) As discussed, the evidence of Rosas's guilt was overwhelming. Both victims' identified Rosas as a participant in the crimes, and Rosas himself admitted involvement in the shootings during his second interview with Detective Hoffman. Although Rosas returned to his just-painting-the-fence alibi at trial, and testimony from one or more of the Santana family members might have been consistent with that innocent version of events, it is not reasonably probable that such testimony would have led to a more favorable outcome. (See *In re Hardy* (2007) 41 Cal.4th 977, 1021 ["Demby's unreasonable failure to conduct a more thorough and reasonably comprehensive pretrial investigation . . . and his subsequent failure to present reasonably available evidence . . . would not require relief on the ground of ineffective assistance unless his deficient performance was prejudicial"].)

2. *The New Trial Motion Was Properly Denied*

Penal Code section 1181, subdivision 8, authorizes the court to grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328; accord, *People v. Howard* (2010) 51 Cal.4th 15, 43.)

The trial court's decision to deny a motion for a new trial based upon newly discovered evidence is reviewed for an abuse of discretion: '"'"The determination of a motion for a new trial [based on newly discovered evidence] rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (*People v. Delgado*, *supra*, 5 Cal.3d at p. 328.) '"'"[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background."'" (*Ibid.*)

Applying this highly deferential standard of review, there is plainly no merit to Rosas's contention the trial court erred in denying his motion for a new trial based on newly discovered evidence—Everardo's posttrial declaration stating he could testify Rosas was working on the fence at his house on the afternoon of April 8, 2009 from 4:00 p.m. until 5:30 p.m. First, the evidence was not newly discovered. The public defender's investigator interviewed Everardo before trial and prepared a report indicating he corroborated Rosas's fence-painting alibi. It was Everardo's apparent unavailability as a witness, not any lack of knowledge of the substance of his potential testimony, that prevented defense counsel from presenting this evidence at trial.

Moreover, as the Supreme Court has directed, "'[t]o grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308.) Here, as discussed, the evidence of Rosas's guilt was overwhelming; and, far from probable, it is highly unlikely Everardo's testimony would have made a difference in the face of Rosas's highly incriminating admissions and the victims' identifications. The trial court properly weighed the evidence at trial and concluded the additional evidence had minimal value. There was no abuse of discretion.

3. *Any Procedural Irregularity in the Verdict Forms Was Harmless*

Pursuant to Penal Code section 1164, subdivision (a), a "verdict is complete" and the jury properly discharged from the case when the court receives the verdict, reads it, and inquires of the jurors whether it is their verdict.[11] The court or its clerk must ask the jurors if they all agreed upon their verdict; and, if the foreperson answers affirmatively, "they must, on being required, declare the same." (Pen. Code, § 1149.) As Rosas candidly concedes before this court, the jurors' oral declaration is the true verdict regardless of the verdict forms. (*People v. Traugott* (2010) 184 Cal.App.4th 492, 500 ["it is 'the oral declaration of the jurors, not the submission of the written verdict forms [that] constitutes the *return* of the verdict,'" quoting *People v. Green* (1995) 31 Cal.App.4th 1001, 1009]; *People v. Mestas* (1967) 253 Cal.App.2d 780, 786.) """No particular form of verdict is required, so long as it clearly indicates the intention of the jury to find the defendant guilty of the offense with which he is charged."""" (*People v. Camacho* (2009) 171 Cal.App.4th 1269, 1273; accord, *Bigelow v. Superior Court* (1989) 208 Cal.App.3d 1127, 1134-1135 [same].)

---

[11] Penal Code section 1164, subdivision (a), provides in part, "When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. . . . [I]f no disagreement is expressed, the verdict is complete and the jury shall . . . be discharged from the case."

As discussed, the court read the jury's verdicts finding Rosas guilty on both counts of attempted willful, deliberate and premeditated murder and finding true the criminal street gang and firearm-use enhancement allegations. After reading the verdicts, the court asked the jurors, collectively and individually, whether those were their verdicts; and the jurors collectively and then individually stated they were. Nothing more was required. Nonetheless, relying on the posttrial discovery of signed not guilty verdict forms, which had been left in the jury room in the instructions binder, and citing *People v. Soto* (1985) 166 Cal.App.3d 428, 438, Rosas contends the court should have granted his motion for a new trial because there was not "an unequivocal verdict on the question of his guilt."[12]

People v. Soto, supra, 166 Cal.App.3d 428 is inapposite and, if anything, illuminates the lack of merit in Rosas's challenge to the verdicts here. In *Soto* the jury returned a single form finding the defendant "not guilty of count I, murder, but also fixing the murder to be of the second degree." (*Id*. at p. 432.) In another verdict form the jury found true the special allegation the defendant had been armed with a firearm in the commission of the murder. Additional verdict forms found the defendant guilty of robbery and found true the special allegation the murder had been committed in the course of the robbery. (*Ibid*.) After the verdicts were read, the court asked the jurors if those were their verdicts; and they unanimously affirmed they were. (*Ibid*.; see also *id*. at p. 439 ["[t]here was no disagreement by the jury; they affirmed the 'not guilty of murder' verdict as read"].) There was no individual polling of the jurors. A colloquy then took place between the court and counsel to the effect the verdict was for second degree murder, and the jury was discharged. (*Id*. at pp. 432-433.) The appellate court held interpreting these forms to reflect a finding of guilt for second degree murder was impermissible: "[B]ecause the verdict from expressly found [the defendant] 'not guilty'

---

[12] Rejecting this argument as a ground for granting a new trial, the trial court noted the foreperson had brought only the guilty verdict forms into the courtroom and found "there was a clear, unequivocal, unmistakable expressed finding of guilt in this case."

of murder and did not expressly find him 'guilty' of second degree murder, we may not construe the verdict to find [him] guilty of second degree murder. To do this would be an impermissible alteration of a verdict contrary to the defendant's right to an unequivocal verdict on the question of his guilt." (*Id.* at p. 438.)

Unlike the contradictory verdict form returned in *Soto,* which was then orally affirmed by the jurors, here the only forms taken from the jury room, given to the court and read by it unequivocally found Rosas guilty of both counts of attempted willful, deliberate and premeditated murder. (See *People v. Camacho, supra,* 171 Cal.App.4th at p. 1275 [*Soto* inapplicable because no inconsistency in verdict].) Moreover, the jurors, collectively and individually, orally affirmed those consistent findings of guilt. The mistaken signing of the not guilty forms, which were then left in the jury room, was a technical error that did not in any way compromise Rosas's right to an unequivocal verdict on the question of his guilt.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.