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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RAYMUNDO SANCHEZ CELIS, Defendant and Appellant.	2d Crim. No. B186270 (Super. Ct. No. 2003004496) (Ventura County)

Raymundo Sanchez Celis appeals from the judgment entered after a jury convicted him of first degree murder (Pen. Code, §§ 187, subd. (a), 189)[1] with findings that he was armed (§ 12022.5, subd. (a)(1)) and personally and intentionally discharged a firearm (§12022.53, subd. (d)). On counts 2 and 3, the jury convicted appellant of transportation of cocaine and cocaine base (Health & Saf. Code, § 11352, subd. (a)) and returned a true finding on a firearm enhancement (§ 12022, subd. (c)).

Appellant argues that the trial court erred in staying the section 12022.5 firearm enhancement on count one for murder. We agree and strike the section 12022.5 enhancement. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 712-713, fn. 5.) The judgment, as modified, is affirmed. The total aggregate sentence remains the same: 58 years to life.

[1] Unless otherwise stated, all statutory references are to the Penal Code.

Facts

This is a parking lot rage case in which appellant shot and killed Miguel Solis after appellant was asked to move his car.

On January 18, 2003, Alejandro Solis (Alejandro) tried to park his ice cream truck at an Oxnard warehouse but appellant's Chevrolet Beretta was blocking the way. Alejandro asked appellant to move the car. Appellant threw a punch at Alejandro and a fight ensued. Alejandro's brother, Miguel Solis (Miguel), tried to break up the fight and was knocked to the ground.

Appellant said "let's stop this" and retrieved a handgun from his car. Pointing the handgun at Miguel, appellant walked towards him and shot him. Alejandro heard appellant say "hit me now" as he fired at Miguel. Miguel died from a .25 caliber gunshot wound to the chest.

Appellant sped off in the Beretta, hitting an ice cream truck and a trash dumpster. After appellant abandoned the Beretta, he fled to Mexico.

That evening, the police found the Beretta parked about a mile from the shooting. A drop of appellant's blood was on the steering wheel and two rounds of .25 caliber ammunition were in the car. The police found .93 grams of cocaine in the center console. A shooting target poster, cash, 53.8 grams of packaged cocaine base, and 54.6 grams of packaged cocaine powder were in the trunk. The cocaine had a street value of $4,000. Two photo identification cards were in the car bearing appellant's photo and alias: Joel Perez Betancourt.

Appellant was extradited from Mexico on March 4, 2004.

Appellant testified that Alejandro started the fight and that Miguel hit him with a pipe, seriously injuring his head and causing him to bleed. Appellant said that he tried to scare them with the handgun and that it accidentally fired. He claimed that he had never fired a gun before and denied that the shooting target in the car was his. Appellant admitted that he was selling drugs to support his family and claimed that a stranger loaned him the narcotics found in the car.

In rebuttal, a detective testified that no pipe or spattered blood was found in the parking lot. A narcotics expert opined that it was implausible that a stranger would loan appellant drugs to sell.

Unavailable Witness

Appellant argues the trial court erred in not admitting Rita Alvarado's preliminary hearing testimony. Alvarado testified at the preliminary hearing that she saw two men punch and choke appellant. Alvarado heard a gunshot and saw appellant leave in the car.

Appellant argued that Alvarado could not be located and was an unavailable witness. Defense counsel hired an investigator after the trial started but could not locate her. The investigator checked Alvarado's last known address, a bar frequented by her husband, and a store where Alvarado bought money orders.

A secretary who worked for defense counsel declared that Alvarado had complained about threats from the victim's daughter. Alvarado allegedly told the secretary that investigators in the district attorney's office had offered her money to keep quiet and had threatened deportation. Defense counsel conceded that "[h]er idea . . . that the investigators are offering her money -- of course it's ridiculous -- any more than they threatened to deport her . . . ."

The trial court found that appellant had not exercised due diligence in locating Alvarado and excluded the preliminary hearing testimony. After the case was submitted to the jury, counsel stated that Alvarado was willing to testify. The trial court denied the motion to reopen.

Evidence Code section 1291, subdivision (a) provides that the former testimony of a witness is not admissible unless the witness is unavailable to testify. A witness is unavailable when he or she is "absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

Whether a party exercised reasonable diligence to locate a missing witness is subject to independent review. (*People v. Cromer* (2001) 24 Cal.4th 889,

903-904.) "[T]he term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations]. Relevant considerations include ' " whether the search was timely begun" ' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*Id*., at p. 904; see also *People v. Sanders* (1995) 11 Cal.4th 475, 523.)

Alvarado told defense counsel that she had been threatened and did not want to be involved. Despite this information, counsel did not subpoena Alvarado or look for her until Alvarado's phone number was disconnected. The trial court found that efforts to locate Alvarado were unreasonably delayed. We have reviewed the record and concur. Appellant did not exercise due diligence in locating and producing Alvarado as a trial witness.

Appellant's reliance on *People v. Lopez* (1998) 64 Cal.App.4th 1122 is misplaced. There, a battery victim testified at the preliminary hearing and was subpoenaed a month before trial. The prosecutor had no reason to believe the victim would not appear and testify. On the second day of trial, the prosecutor learned that the victim was in Las Vegas, spoke to the victim's family, and was unable to produce the victim at trial. We concluded that the prosecution had exercised reasonable diligence and that the trial court did not err in admitting the victim's preliminary hearing testimony as an unavailable witness. (*Id*., at p. 1128.)

Unlike *People v. Lopez, supra,* appellant did not subpoena Alvarado or maintain contact with her, even after she said that she had been threatened and did not want to testify. Following the July 28, 2004 preliminary hearing, appellant had a year to subpoena Alvarado. The trial court found that a witness like Alvarado who comes "forward with that sort of information in the first instance is a witness who is not to be trusted to come in voluntarily when really needed, somebody who needed to be monitored very closely and kept under subpoena every time the case was continued to any date certain . . . ."

More telling was the short time it took to locate Alvarado after the case was submitted to the jury. There was no evidence that Alvarado was hiding or had moved out of the area. "The burden of proof on the issue of witness unavailability rests with the proponent of the evidence, and the showing must be made by competent evidence. [Citations.]" (*People v. Strizinger* (1983) 34 Cal.3d 505, 516.)

Appellant's assertion that he was denied the constitutional right to present a an effective defense is without merit. The failure to subpoena or produce Alvarado was appellant's doing. As a general matter, the application of state rules of evidence do not infringe on the accused's right to present a defense. (*Rock v. Arkansas* (1987) 483 U.S. 44, 55 [97 L.Ed.2d 37, 49]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [35 L.Ed.2d 297, 312-313].) "[F]oundational prerequisites are fundamental to any exception to the hearsay rule. [Citations.] As a general proposition criminal defendants are not entitled to any deference in the application of these constraints but, like the prosecution, 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation.]" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57.)

The alleged error, if any in excluding Alvarado's preliminary hearing testimony was harmless beyond a reasonable doubt. Alvarado saw part of the fight and heard a gunshot, but never reported it to the police. She did not see the handgun or know if anyone was shot. Alvarado claimed she was there to ask appellant "for work."

The trial court found Alvarado's preliminary hearing testimony "dubious," and "extremely vague." The physical evidence and the testimony of those who actually saw the shooting was overwhelming. After appellant knocked the victim to the ground, appellant retrieved the handgun from his car, pointed it at the victim with an out-stretched arm, took two or three steps towards the victim, and shot the victim in the chest. Just before he fired the handgun, appellant said "hit me now." The evidence clearly showed that the shooting was not in self-defense.

Motion To Reopen

Appellant asserts that the trial court violated his due process right to a fair trial in denying his motion to reopen. Appellant waived the constitutional claim by not objecting on that ground. (See e.g., *People v. Sanders, supra*, 11 Cal.4th at p. 526, fn. 17.) The trial court found that Alvarado's sudden availability as a witness validated the court's prior "finding that the defense was negligent and exercised insufficient diligence to keep [the] witness under subpoena or even to try to locate her."

The trial court reasonably concluded that it was too late in the proceedings to reopen the trial, that appellant was not diligent in producing Alvarado, that Alvarado was not an essential witness, and that her testimony was of marginal value. (See e.g., *People v. Jones* (2003) 30 Cal.4th 1084, 1110.) In the words of the trial court, Alvarado's preliminary hearing testimony was "very, very sketchy " and "of doubtful help to the defense. . ." The record supports the finding that if appellant were permitted to reopen, it would have confused the jury, put undue emphasis on Alvarado's testimony, and prejudiced the prosecution.

The denial of the motion to reopen was not an abuse of discretion. For the same reasons, we conclude that any constitutional error and was harmless beyond a reasonable doubt. (See e.g., *People v. Cuccia* (2002) 97 Cal.App.4th 785, 791-792.)

Motion to Sever

Appellant contends that the trial court abused its discretion in denying his motion to sever the drug charges. (§ 954.) Appellant argues that the murder charge was highly inflammatory and prejudiced his right to a fair trial on the drug counts. The trial court reasonably concluded that the narcotics were connected to the murder and highly probative. "Joinder is generally proper when the offenses would be cross-admissible in separate trials, since an inference of prejudice is thus dispelled. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 126.)

The prosecution theorized that narcotics may have been a motive for not moving the car, if not the fist fight. In opposing the motion to sever, the prosecutor

argued that two baggies of cocaine were on the car's center console which "leads to an inference that a deal was imminent." The prosecutor further argued that the narcotics showed consciousness of guilt by flight. After the shooting, appellant fled and abandoned the car with the thousands of dollars of narcotics in it.

Appellant makes no showing that a weak case was joined with a strong case to produce a spillover effect that unfairly strengthened a weak narcotics case. (*People v. Sully* (1991) 53 Cal.3d 1195, 1222.) The shooting and the narcotics were interconnected by the car. Appellant blocked the parking space with his car, refused to move it, instigated a fist fight, and fatally shot the victim. The car was used to transport both the handgun and the narcotics. After the shooting, appellant fled in the car and abandoned it along with identification cards, the .25 caliber ammunition, the narcotics, and cash. It was strong evidence of guilt. At trial, appellant admitted that he was selling narcotics to support his family.

The argument that joinder of the murder count with the drug charges was inflammatory and denied appellant a fair trial is without merit. (*People v. Davis* (1995) 10 Cal.4th 463, 508 [burden on defendant to show substantial danger of prejudice requiring that charges be separately tried].) A due process violation only occurs if the

" 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

Section 12022.5 Enhancement

On count one for murder, the trial court sentenced appellant to 25 years to life plus a consecutive term of 25 years to life for personally and intentionally discharging a firearm. (§ 12022.53, subd. (d).) The trial court also imposed and stayed a section 12022.5 four-year firearm enhancement.

Appellant argues, and the People agree, that the section 12022.5 firearm enhancement should be stricken. The section 12022.53 enhancement is the greater enhancement, i.e., 25 years to life. Multiple firearm enhancements are not permitted. (§ 12022.53, subd. (f); *People v. Bracamonte, supra*,106 Cal.App.4th at p. 711.) We

accordingly modify the sentence to strike the section 12022.5 firearm enhancement on the murder conviction.

Consecutive Sentence

On count 2 for transportation of cocaine and use of a firearm (§ 12022, subd. (c)), appellant was sentenced to eight years state prison, to be served consecutive to the 50-years-to-life sentence on the murder count. Appellant argues that the eight-year consecutive sentence was based on sentencing factors that were not tried by a jury in violation of his Sixth and Fourteenth Amendment right to jury trial. (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531].) Appellant did not object at the sentencing hearing and is precluded from arguing the issue on appeal. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.)

Waiver aside, our Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 held that "the judicial fact finding that occurs when a judge exercises discretion to impose . . . consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*., at p. 1244.) *People v. Black* controls. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Imposition of the upper term does not violate appellant's constitutional right to jury trial or due process.[2]

We modify the judgment to strike the section 12022.5 firearm enhancement erroneously imposed on count one for murder. (*People v. Bracamonte, supra,* 106 Cal.App.4th at pp. 712-713, fn. 5.) The aggregate sentence remains the same: 58 years to life. The trial court is directed to issue an amended abstract of judgment reflecting the modification and to send a certified copy to the Department of Corrections.

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[2] The United States Supreme Court has granted certiorari in *Cunningham v. California* (Feb. 21, 2006, No. 05-6551), ___ U.S. ___ [126 S.Ct. 1329] on the effect of *Blakely v. Washington, supra,* 542 U.S. 796 and *United States v. Booker* (2005) 543 U.S. 220, on California's determinate sentencing law.

The judgment, as modified, is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Ronald R. Purnell, Judge

Superior Court County of Los Angeles

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

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