Filed 1/11/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PAUL GUERRERO RAMIREZ, Defendant and Appellant.	B144510 (Los Angeles County Super. Ct. No. BA190437)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen E. O'Neil, Judge. Modified and affirmed with directions.

_____

Jill M. Bojarski, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Marc E. Turchin and Pamela C. Hamanaka, Assistant Attorneys General, William T. Harter, Linda C. Johnson, and Jeffrey A. Hoskinson, Deputy Attorneys General, for Plaintiff and Respondent.

_____

Paul Ramirez appeals from the judgment entered after his conviction by jury of attempted premeditated murder of Carlos Pedroza (count 1), two counts of driving a vehicle from which he permitted someone to discharge a firearm (lesser crimes of attempted murders charged as counts 2 and 3, of which defendant was acquitted, and referred to below as counts 2 and 3), shooting at an occupied vehicle (count 4), assault with a semiautomatic firearm on Pedroza (count 5), and unlawfully driving a vehicle (count 6). (Pen. Code, §§ 664/187, subd. (a), 664, subd. (a); 12034, subd. (b); 246; 245, subd. (b); Veh. Code, § 10851, subd. (a); all further undesignated section references are to the Penal Code.) The jury also found true three street gang enhancements, and three enhancements that a principal used and discharged a firearm, on counts 1, 4, and 5.[1] (§§ 186.22, subd. (b)(1); 12022, subd. (b)(1), 12022.53, subds. (b), (c) & (e)(1).) The jury found not true allegations that the discharge of the firearm caused Pedroza great bodily injury and that defendant personally inflicted great bodily injury on Pedroza. (§§ 12022.53, subds. (d) & (e)(1), 12022.7, subd. (a).)

Defendant received an aggregate 32 years-to-life sentence. The court imposed an indeterminate life term on count 1, plus a 20-year section 12022.53 enhancement. The court imposed a 9-year upper term, plus a consecutive 1-year principal armed enhancement, on count 5, deemed the base determinate term. The court imposed consecutive 8-month (one-third of the 24 month middle term) sentences on counts 2, 3, and 6. The court stayed sentence on count 4 under section 654.

Defendant contends the trial court erred in (I) excluding evidence of third-party culpability, and (II) imposing consecutive sentences for his convictions on counts 5 and 6 in violation of section 654, and (via a supplemental brief) imposing the section 12022.53 enhancement although the jury did not convict the actual shooter of the underlying attempted murder.

---

[1] The trial court struck the section 12022.53, subdivisions (b), (c) and (e) enhancements for counts 4 and 5.

We reject defendant's first contention and his claim that he cannot be separately sentenced on count 6. However, we agree with his other sentencing error claims. We modify the judgment to strike the section 12022.53 enhancement from count 1, vacate the sentence, and remand for resentencing. In all other respects, we affirm.

FACTS

In 1999, Pedroza lived in a neighborhood claimed by the Locke Street gang (Locke). Pedroza was friendly with several Locke members but was not himself a member.

On the afternoon of March 31, 1999, Pedroza and two of his cousins, one of whom was a Locke member, were walking on the street. A Honda Accord drove past them and someone inside the car yelled "'Lowell.'" The Accord, which Pedroza described as the color of a "goldfish," made a U-turn. Because of recent violent encounters between Locke and their neighboring rival, Lowell Street gang (Lowell), Pedroza and his cousins fled.

The following afternoon, April 1, Pedroza stood on the street outside of his home and talked to a friend, Seidah Rouse, and her cousin, Leana Machado. The women were inside of Rouse's car. Pedroza glanced up and saw a Honda. Then a barrage of gunshots was fired. Rouse and Machado ducked down in Rouse's car. Pedroza was struck in the arm by one of the bullets. In all, 10 spent nine-millimeter bullet casings were found at the scene of the shooting.

Pedroza ran to his house. His sister's mother-in-law, Linda Maldonaldo, came outside, helped him in and immediately telephoned 911. The record shows that Maldonaldo's call was made at approximately 2:49 p.m.

After the shooting had stopped, Rouse looked up and saw a Honda driving away. Two bald male occupants were inside the Honda. Too scared to get out of her car, Rouse drove for a short while and then parked her car about a block from Pedroza's home. Bullets had shattered the rear window of her car, and a bullet had entered the car's left rear passenger door and exited through the front passenger window.

Isabel Rojas lived on the same street as Pedroza. She heard gunshots and then saw a Honda Accord speed away. Pedroza telephoned 911 at approximately 2:50 p.m. She described the driver of the Accord as a light-complected Hispanic man, heavyset, wearing a green and black hat. At trial, Rojas identified defendant as the driver. She had also identified defendant before trial from a photographic lineup.

Los Angeles Police Officers Calvin Dehesa, Joe Salazar and Elvis Hernandez were in an unmarked police vehicle conducting surveillance on an unrelated matter when Officer Dehesa, but not Officers Salazar or Hernandez, heard several gunshots. Shortly thereafter, they were nearly hit by a light brown Honda Accord that was driving away from the area of the shooting. There were two men in the car. The officers followed the Accord but lost sight of it in a residential neighborhood. Officer Dehesa radioed for assistance at approximately 2:51 p.m.

Still searching for the Accord, the officers spotted Rouse's parked car. They stopped and Rouse reported that someone had shot at her friend while he stood outside her car. After a patrol car arrived, the officers left Rouse and Machado and resumed looking for the light brown Accord. Some 10 to 15 minutes after the officers had lost sight of the Accord, they found the car parked on the street a short distance from the apartment complex in which defendant resided. The Accord's hood was warm and its ignition had been "punched."

On April 6, 1999, Officers Dehesa, Salazar and Hernandez separately viewed an array of 32 photographs. Each officer identified defendant as the driver of the Accord. At trial, they each identified defendant as the driver.

The Honda Accord parked by defendant's apartment complex belonged to Erika Arredondo. On March 30, 1999, Arredondo parked her car on the street and locked it. The Accord was gone the following morning. Arredondo had not given anyone permission to take or drive the car. At trial, Rouse and Pedroza were shown photographs of Arredondo's car. Both indicated that the car looked similar to the one they had seen at the time of the shooting. Pedroza also testified that the car looked

similar to the car he had seen the day before the shooting. The parties stipulated that none of the fingerprints lifted from Arredondo's car matched defendant's prints.

Defendant was a member of Lowell. His older brother, Lawrence, had also been an active Lowell member until Locke members murdered him in 1997. Detective William Eagleson, a veteran of the Hollenbeck Division's gang unit, testified that it was essential for a gang to retaliate to acts of violence committed against its members. Several shooting incidents between Locke and Lowell occurred in the few weeks before Pedroza was shot. Evidence was also presented of two separate incidents that resulted in murder and sale of cocaine convictions for various members of Lowell.

In defense, defendant presented evidence that he was at school until 1:00 p.m. on the day of the shooting. At around 1:15 p.m., defendant's mother, Dora Guerrero, left work and picked up defendant from school. From there, Guerrero drove to her grandson Joey's day care center. Defendant went inside to get Joey. The day care center's manager testified she remembered that defendant had come in that afternoon during naptime, sometime between 2:15 p.m. and 2:30 p.m. Thereafter, Guerrero drove defendant and Joey home. At around 3:00 p.m., Guerrero drove back to work. She arrived at work at 3:30 p.m. and signed in for work at 4:00 p.m.

In rebuttal, a document examiner testified that Guerrero's 4:00 p.m. sign-in time on her April 1, 1999 time sheet appeared to have been written with two different pens.

DISCUSSION

I

Defendant contends the court erred when it ruled that he could not present evidence of third party culpability. We disagree.

The issue of third party culpability arose before trial. Defense counsel informed the court that another Lowell member, Felix Figueroa, had confessed to defendant's mother, Dora Guerrero, that he was the driver of the Accord. In addition, Figueroa purportedly made inculpatory statements to defendant's girlfriend. Defense counsel wanted to convey the information through testimony by Guerrero and defendant's girlfriend. The prosecutor objected on hearsay grounds. The court sustained the

objection and invited defense counsel to call Figueroa as a witness. The court made it clear that the information could not come in through testimony by either Guerrero or defendant's girlfriend.

Defense counsel then reported that he had evidence that Figueroa lived in the same apartment complex as defendant, and therefore he could have just as easily abandoned the Accord as defendant. Counsel also reported that Figueroa had similar physical characteristics as defendant. The court rejected this showing and ruled that defense counsel could not mention Figueroa during the trial unless he provided evidence that connected Figueroa to the shooting. The subject came up again during trial. Out of the jury's presence, the court asked defense counsel what evidence he had that connected Figueroa to the shooting. Counsel cited Figueroa's confession to Guerrero. The court again denied the request to admit evidence of third party culpability.

"To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, [it is not required] that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

Third party culpability evidence should not be excluded merely because the trial court believes the evidence is "'incredible.'" Such determination "'is properly the province of the jury.' [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 610.) A trial court's error in excluding evidence of third party culpability is reviewed under the test set out in *People* v. *Watson* (1956) 46 Cal.2d 818, 836. (*People v. Cudjo, supra,* 6 Cal.4th at p. 612.)

The court did not err in precluding the evidence. Defendant intended to use Figueroa's confession to Guerrero and to defendant's girlfriend for the truth of the

matter. As such, it was inadmissible hearsay. (Evid. Code, § 1200.) And defendant had not otherwise demonstrated that the evidence was admissible under an exception to the hearsay rule. (Evid. Code, § 1201.)

Defendant argues that the evidence was admissible as a declaration against penal interest. (Evid. Code, § 1230.) But the admission of evidence of a declaration against penal interest requires a showing of the declarant's unavailability as a witness. (*Ibid*.) Nothing in the record demonstrated that Figueroa was unavailable to testify at trial.

Defendant also argues that the evidence could have been admitted as a prior inconsistent statement. (Evid. Code, § 1235.) We disagree. Evidence of a prior statement made by a witness that is inconsistent with the witness's trial testimony may be used as substantive evidence so long as the witness is afforded an opportunity at trial to explain or deny the statement. (Evid. Code, §§ 1235, 770.) Thus, evidence that Figueroa confessed to others could have been admitted as a prior inconsistent statement if Figueroa had testified to the contrary at trial. But because Figueroa did not testify at trial, the exception provided by Evidence Code section 1235 did not apply.

Notwithstanding its relevance to third party culpability, the evidence proffered by defendant is inadmissible hearsay. "' . . . *Hall*[, *supra*, 41 Cal.3d 826,] did not undertake to repeal the Evidence Code. Incompetent Hearsay is as inadmissible as it always was.' [Citation.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 746.)

The remaining evidence, that Figueroa was a member of Lowell, that he lived in the same apartment complex as defendant, and that he bore some physical resemblance to defendant showed nothing more than that Figueroa had a motive and the opportunity to commit the crimes. This evidence did not sufficiently connect Figueroa to the shooting and thus was properly excluded as inadmissible third party evidence. (See *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017–1018.)

Defendant also claims Figueroa matched the driver's general description as well as defendant. We have viewed the 32-photo spread. We do not think Figueroa matches the description any more so than do several other men shown. In any event, such a generalized similarity, even combined with the other admissible factors, does not tie

Figueroa to the crime. At most, it provides additional evidence of motive and opportunity. While Figueroa had motive and opportunity, his mere similarity to a general description is not "direct or circumstantial evidence linking [Figueroa] to the actual perpetration of the crime." (*People v. Hall, supra,* 41 Cal.3d at p. 833.) If this evidence were sufficient, then the existence of any young, similarly appearing Lowell member who lived nearby could equally justify its introduction.

We disagree with defendant's suggestion that the court's ruling denied him his constitutional right to present a defense. The court only precluded defendant from presenting inadmissible hearsay evidence. Defendant was free to convey the information to the jury through other appropriate procedures. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall, supra,* 41 Cal.3d at p. 834.) The court did not err in excluding the evidence.

II

Defendant contends that the terms imposed for count 5, assault with a semiautomatic firearm upon Pedroza, and count 6, unlawful driving of a vehicle, should have been stayed pursuant to section 654.

Section 654, subdivision (a), states in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

a. Assault with a firearm upon Pedroza

Defendant's convictions for assault with a firearm and attempted murder were based upon the same act, i.e., the shooting of Pedroza. The court sentenced defendant to a term of life plus 20 years for the attempted murder and a consecutive 10-year term for the assault with a firearm. Respondent concedes, and we agree, that defendant cannot be separately punished for counts 1 and 5. (See *People v. Parks* (1971) 4 Cal.3d 955, 961, fn. 3.)

b. Unlawful driving of a vehicle

Defendant contends that the eight-month consecutive term for count 6, unlawfully driving or taking a vehicle, should be stayed under section 654. Because there was no evidence that defendant took Arredondo's car, the jury must have based its verdict in count 6 on the theory that defendant unlawfully drove the car. Defendant argues that "there was no evidence [defendant] drove [the car] except for the purpose of committing" the drive-by shooting. We disagree.

Section 654 has been construed to prohibit double punishment for separate offenses committed during an indivisible criminal transaction. "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335; see also *People v. Bauer* (1969) 1 Cal.3d 368, 377 ["The fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction. [Citations.] And the fact that one of the crimes may have been an afterthought does not permit multiple punishment where there is an indivisible transaction."].)

The evidence here does not suggest that defendant's driving of Arredondo's car and the drive-by shooting incident comprised an indivisible transaction. There can be no doubt that during the commission of the drive-by shooting defendant's intent and objective in driving the car was to facilitate the commission of the shooting. But defendant's driving of Arredondo's car did not cease when the drive-by shooting had been accomplished. Rather, the evidence showed that defendant continued to drive the car for at least several minutes after the shooting. At that point, it could no longer be said that defendant harbored the intent and objection to facilitate the shooting because the shooting had been completed. As relevant to section 654 analysis, the evidence demonstrated that defendant's intent and objective after the shooting was solely limited

to unlawfully driving a vehicle. Thus, section 654 does not bar a separate term for count 6.

c. Section 12022.53 enhancement on count 1

We have held that a section 12022.53/186.22 enhancement cannot be imposed on a principal where the actual shooter was not convicted of the underlying crime. (*People v. Garcia* (2001) 88 Cal.App.4th 794, rev. granted Aug. 8, 2001, S097765.) Although the Supreme Court has granted review in *Garcia*, we stand by our analysis and conclusion therein. Here, the jury's acquittal of defendant on the charged attempted murders, and its not true findings that defendant inflicted great bodily injury, demonstrate defendant was a non-shooter principal for the enhancement. The actual shooter was not tried or convicted of the attempted premeditated murder in count 1. Thus, we modify the judgment and strike the section 12022.53 enhancement from count 1.

d. The matter must be remanded for resentencing

We have stricken the 20-year section 12022.53 enhancement on count 1, and have held that section 654 bars sentence on both counts 1 and 5. Since count 5 was the base determinate term, the stricken enhancement was a major component of the aggregate sentence, and the original trial judge has died, the case must be remanded for resentencing. The sentencing court must strike the section 12022.53 enhancement from count 1, and cannot impose that enhancement when resentencing on that count. Also, the court may not impose sentences on both counts 1 and 5, since doing so would violate section 654. The new sentence may not exceed the length of the original sentence. (See *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614-615.)

DISPOSITION

We modify the judgment and strike the section 12022.53 enhancement on count 1. We vacate the sentence and remand the case for resentencing in conformance with our instructions in section II, d above. In all other respects, we affirm the judgment.

NOT TO BE PUBLISHED.

ORTEGA, Acting P. J.

I concur:

VOGEL (MIRIAM A.), J.

MALLANO, J., Dissenting.

I would reverse the judgment. Although I agree with the majority's determination that the trial court properly excluded evidence that Figueroa confessed to being the driver of the Accord, I disagree with the determination that the other evidence pertaining to Figueroa was also properly excluded. This was not a situation where the evidence merely showed motive *or* opportunity of a third party to commit the charged crime. Rather, the evidence was consistent with the prosecution's theory of the perpetrator's motive *and* opportunity to commit the crime, e.g., Figueroa's membership in Lowell and his place of residence. In addition, Figueroa matched the witnesses' description of the driver and bore a physical resemblance to defendant. (*People v. Sandoval* (1992) 4 Cal.4th 155, 176–177; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018 ["evidence of a third party's motive, without more, is inadmissible"].)

The evidence in question was probative because it tended to raise a reasonable doubt on the question of identity. In addition, the record does not indicate that admission of such evidence would have been unduly time consuming or confusing. (Evid. Code, § 352.) Thus, I conclude that the trial court erred in excluding the evidence.

I further believe that the error was prejudicial. It is unquestionable that defendant was convicted in large part upon the eyewitness identification evidence. Consequently, the outcome of the case hinged on the jury's acceptance of the eyewitness identification evidence beyond a reasonable doubt. Yet evidence existed that considerably cast doubt on that issue. The witnesses had only a fleeting glimpse of the driver as he sped by at a high rate. The circumstances under which the sightings took place were stressful. The tenor of the 911 call by Rojas and the radio call by Officer Dehesa indicated fear and anxiety. The evidence also suggested that it was either raining or drizzling.

Despite the presence of these factors and their bearing on the accuracy and reliability of the eyewitness identifications, defendant was precluded from introducing evidence of third party culpability. Given the sparse evidence of defendant's guilt, the third party evidence was capable of creating a reasonable doubt as to defendant's guilt. "An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376, overruled on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) I conclude that it was reasonably probable that the jury would have reached a result more favorable to defendant in absence of the error. Accordingly, I would reverse the judgment.

MALLANO, J.