People v. Lewis

2010 | Cited 0 times | California Court of Appeal | November 17, 2010

NOT TO BE PUBLISHED

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A jury found defendant Armondo Lewis guilty of attempting to murder Tomazena Higgins and Adrina Hall (Pen. Code, §§ 187, subd. (a), 664; counts 1 and 2),[1] assaulting Higgins and Hall with a firearm (§ 245, subd. (a)(2); counts 3 and 4), and discharging a firearm at an occupied vehicle (§ 246; count 5). The jury also found true allegations defendant used and intentionally and personally discharged a firearm in the commission of counts 1 and 2 (§ 12022.53, subd. (c)) and personally used a firearm in the commission of counts 3 and 4 (§ 12022.5, subd. (a)(1)). The jury found not true allegations defendant acted willfully, deliberately, and with premeditation in the commission of counts 1 and 2.

The trial court sentenced defendant to an aggregate term of 34 years in state prison, consisting of five years (the low term) on count 1, plus a consecutive 20 years for the firearm enhancement; and a consecutive two years and four months (one-third the middle term) on count 2, plus a consecutive six years and eight months (one-third the middle term) for the firearm enhancement.[2]

Defendant appeals, contending the trial court erred in failing to instruct the jury on assault with a firearm and attempted voluntary manslaughter as lesser included offenses of attempted murder as charged in counts 1 and 2. He also contends that the trial court's use of CALCRIM No. 318 violated his federal constitutional rights to a jury trial and due process, and that he received ineffective assistance of counsel when his trial counsel failed to exercise due diligence in procuring a witness at trial.

We shall conclude that the trial court did not err in failing to instruct the jury on assault with a firearm or attempted voluntary manslaughter, and that it properly instructed the jury with CALCRIM No. 318. We shall also conclude that there is no reasonable probability the jury would have reached a different verdict had the missing witness testified at trial. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Prosecution

On March 10, 2008, Higgins and Hall attended a birthday party for Gina Oakley, the girlfriend of Higgins's friend Michael Motley. The party was at the home of Oakley's aunt Mildred Dossman and defendant. Defendant and Dossman had been in a long term relationship, and Oakley considered defendant her uncle. Defendant and Dossman lived at 6612 Burdett Way in Sacramento.

Defendant was at the party. He stuck out because he was "big, like a linebacker almost." No one else at the party was close to defendant's stature. The party was a "predominantly female event." In addition to defendant, the only men at the party were Dossman's three sons, Motley, and Motley's friend, Joshua Johnson.

Higgins and Hall arrived at the party at approximately 10:00 p.m. that evening. Higgins drove herself and Hall to the party in Higgins's Buick. Among the cars parked outside the party was a white Chevy Tahoe. While they were at the party, Higgins, Hall, Motley, Oakley, and others went outside to smoke some marijuana. Motley and Oakley got into a "heated" argument because Oakley, who was three months pregnant with Motley's child, was drinking. Motley began "screaming and hollering" at Oakley, hit her, and pushed her on the ground.[3]

At that point, Higgins and Hall decided it was time to leave. They, along with Motley's friend Johnson, left in Higgins's car. After leaving the party, Higgins turned down a couple of streets before making her way onto 47th Avenue. While they were stopped at the intersection of 47th Avenue and Martin Luther King Jr. Boulevard, the Chevy Tahoe that had been parked outside the party "came diagonal toward" Higgins's car, drove "over [an] island," and stopped in front of Higgins's car such that Higgins's "headlights [were] on his side on his door...." The driver of the Tahoe rolled down his window, stuck out his right arm, pointed a gun at Higgins's car, and began shooting. He fired 10 or 11 shots. Thereafter, the Tahoe sped away, and Higgins drove toward a nearby light rail station. Higgins's car broke down on the way, and Higgins and Hall took off running, while Johnson "disappeared."

Higgins's car had three bullet holes in the hood, one in the left headlight, one in the bumper, one in the grill, and two in the front passenger door.

At approximately 11:45 p.m. that evening, Sacramento County Sheriffs Deputies Lizardo Guzman and Ricardo Martin received several calls regarding shots fired in the area of 47th Avenue and Martin Luther King Jr. Boulevard. One caller specified that the shooting involved a white Chevy Tahoe and a four-door vehicle. Guzman and Martin responded and found Higgins's car nearby. As they began to assess the damage to the car, Higgins and Hall ran up screaming.

Martin took a statement from Higgins, and Guzman took a statement from Hall. Higgins described the shooter as "a very large black male," 6'3" to 6'6", and 300 pounds. She identified the vehicle

involved in the shooting as a white Chevy Tahoe. She said both could be located at 6612 Burdett Way and explained that she had been at a party at that location earlier that evening.

Hall also described the shooter as a "big man," 6'5', and 300 pounds. She said she had seen him at a party earlier that night, and identified the vehicle involved in the shooting as a white Chevy Tahoe, which she also had seen at the same party. She volunteered to take Guzman back to the house where she believed the shooter lived.

Higgins and Hall accompanied the deputies to 6612 Burdett Way. A white Chevy Tahoe was parked on the lawn in front of the house. Higgins identified the Tahoe as the same car that was involved in the shooting. Defendant, who matched Higgins's and Hall's descriptions of the shooter, walked outside and was detained. At the time of the incident, defendant was 6'5" and weighed 300 pounds.

Both Higgins and Hall separately identified defendant as the shooter. Higgins was 100 percent certain of her identification.

At trial, Hall denied identifying defendant as the shooter or telling a law enforcement officer that "the big black guy from the party" was driving the Tahoe and was the shooter. She said she was unable to see inside the Tahoe and could not see who was shooting. She did state that the Tahoe parked on the lawn after the shooting was the same vehicle that was involved in the shooting.

Pheng Her was stopped next to Higgins's car at the time of the shooting and telephoned 9-1-1. During the call, he described the car involved in the shooting as a brown Ford Bronco. At trial, he said he was not sure it was a Ford Bronco and may have been some other vehicle "like a Trail Blazer." When asked about the color, he said, "[I]f I have to pick one. I know it wasn't yellow. I know it wasn't green. It was a dark color." Her saw "two African American[s]" in the car. He believed the driver had the firearm. He could not identify the driver, but said he was an African American man.

Shortly after the shooting, four.40-caliber dispensed shell casings and one "disfigured slug" were recovered at the intersection of 47th Avenue and Martin Luther King Jr. Boulevard. Two of the casings were PMC-brand and two were S&W-brand. One PMC-brand.40-caliber shell casing was also found "on the dash near the vehicle identification plate on the exterior of" the white Chevy Tahoe parked outside 6612 Burdett Way after the shooting. The PMC-brand casings found at the scene and that found on the Tahoe contained markings indicating they were fired from the same gun. It is possible that the S&W brand casings recovered at the scene were fired from the same gun as the PMC-brand casings; however, a full examination was not performed on the S&W-brand casings.

At 2:00 a.m. on March 11, 2008, approximately two hours and 15 minutes after the shooting, defendant's hands were swabbed for gunshot residue. A small amount of gunshot residue--two particles containing lead barium antimony--was found on defendant's left hand. "[T]he presence of these particles on someone's hands usually means they either fired a gun, they handled a fired gun or

fired ammunition, or they touched something that was contaminated with gunshot residue." Over 99 percent of the particles that are characteristic of gunshot residue are lost from a person's hand within four hours of firing a weapon. A person can speed up that process by using his hands, washing his hands, or sweating.

In November 2008, Hall told an investigator with the district attorney's office that "she got a good look at the shooter" and that he "was the same guy that was at the party."

II. The Defense

Defendant did not testify at trial.

Oakley testified defendant never left the house after she returned following the altercation with Motley. She did not recall telling an investigator from the district attorney's office she was embarrassed that Motley had dumped her out on the street in front of a bunch of people. When she went back inside after the altercation with Motley "everyone... already knew what happened outside." She then "broke the story down..." for them. On cross-examination, she acknowledged that defendant "probably was asking what happened [and was] concerned about [her] well-being...." She denied telling anyone that Motley left in Higgins's car. She admitted two prior convictions for theft related offenses in April 2007 and May 2008.

Dossman testified defendant never left the house after Oakley returned following the altercation with Motley. The white Chevy Tahoe belonged to her daughter, Kesha. Kesha drove it to the party. Dossman never saw the Tahoe leave the party that night. According to her, it would not start and "needed a jump." Kesha kept the keys to the Tahoe under the seat to avoid losing them. They were under the seat during the party.

III. Redirect

On redirect, an investigator with the district attorney's office testified that in February 2009, Oakley told her that Motley "dumped [her] on the street from a car" and that she was embarrassed by the incident. Following the altercation, she returned to the house and "and basically told everyone... she had just been in... a fight with Mr. Motley." She was upset and crying, and defendant asked her what happened. She was not sure whether defendant ever left the house that night. The last time she saw Motley, "he was in [Higgins's] car and they were leaving."

DISCUSSION

I. The Trial Court Did Not Err In Failing To Instruct The Jury On Assault With A Firearm As A Lesser Included Offense Of Attempted Murder

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Defendant first contends the trial court committed reversible error in failing sua sponte to instruct the jury on assault with a firearm as a lesser included offense of the crime of attempted murder as charged in counts 1 and 2. He claims that because the attempted murder allegations carried with them a sentence enhancement for using and intentionally and personally discharging a firearm, the attempted murders could not have been committed without also committing the crime of assault with a firearm, thus making the latter a lesser included offense of the former. We disagree. Counts 1 and 2 charged defendant with the attempted murders of Higgins and Hall, respectively. Each of the attempted murder counts alleged that defendant did unlawfully and with malice aforethought attempt to murder each of the victims. As to each of those counts, the information also alleged a sentence enhancement based on defendant's use and intentional and personal discharge of a firearm in violation of section 12022.53, subdivision (c). A trial court has a duty to instruct the jury on any offense "necessarily included" in the charged offense if substantial evidence lends support for the lesser crime's commission. (People v. Birks (1998) 19 Cal.4th 108, 112 (Birks).) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (Id. at pp. 117-118; see also People v. Sloan (2007) 42 Cal.4th 110, 117 (Sloan).) Defendant concedes that assault with a firearm is not an offense necessarily included in the crime of attempted murder. But, relying on Apprendi v. New Jersey (2000) 530 U.S. 466 [147 L.Ed.2d 435] (Apprendi), and its progeny, he argues "the trial court was required to treat the firearm enhancements as elements of the offense. As such, the use of [a] firearm was an element of the crime of attempted murder, and therefore felony assault in violation of section 245 was a lesser included offense of attempted murder." In People v. Wolcott (1983) 34 Cal.3d 92 (Wolcott), our Supreme Court held that "an allegation of firearm use under section 12022.5 should not be considered in determining [a] lesser included offense." (Id. at p. 101.) The court explained that "section 12022.5 does not prescribe a new offense but merely additional punishment for an offense in which a firearm is used." (Id. at p. 100.) "For the purpose of determining lesser included offenses, there is no reason to treat firearm enhancements alleged under section 12022.53 differently than those alleged pursuant to section 12022.5." (People v. Bragg (2008) 161 Cal.App.4th 1385, 1398 (Bragg).) Indeed, in Bragg, we held that "[t]he allegations of an enhancement must therefore be ignored in determining necessarily included offenses to a charge of attempted murder." (Ibid.) Defendant maintains that Wolcott is no longer good law in light of the United States Supreme Court's decision in Apprendi. We did not address Apprendi's impact, if any, on determining lesser included offenses in Bragg; however our Supreme Court recently rejected a similar argument in Sloan, supra, 42 Cal.4th 110.

In Sloan, the court held that enhancement allegations may not be considered for purposes of the rule prohibiting multiple convictions based on necessarily included offenses. (42 Cal.4th at pp. 113-114.) Citing Wolcott, the court observed: "This result is... in accord with the longstanding rule that enhancements may not be considered as part of an accusatory pleading for purposes of identifying lesser included offenses." (Id. at p. 114, citing Wolcott, supra, 34 Cal.3d at pp. 96, 100-101.)[4] With respect to the argument that a different result was compelled by Apprendi, the court stated: "[I]n

Apprendi..., the high court held that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.] The rule of Apprendi is grounded on the reasoning that '[t]he federal Constitution requires the elements of a crime to be proved beyond a reasonable doubt because they expose the defendant to punishment; likewise, the elements of a sentence enhancement must be proved beyond a reasonable doubt if there is exposure to increased punishment. [Citations.]' [Citation.] The rule is compelled by the federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment. [Citation.].... [¶] Here,... all of the enhancement allegations in question were submitted to the jury and proved true beyond a reasonable doubt. There is no Fifth or Sixth Amendment violation within the meaning of the high court's holding in Apprendi, supra, 530 U.S. 466." (Sloan, supra, 42 Cal.4th at pp. 122-123.)

More recently, in People v. Anderson (2009) 47 Cal.4th 92, the court reiterated that "sentencing enhancements or other penalty provisions need not be treated as actual elements of offenses for all conceivable state law purposes, but only where the defendant's claim implicates a federal constitutional right under the Fifth or Sixth Amendment. In California, 'sentence enhancements are not "equivalent" to, nor do they "function" as, substantive offenses.' [Citation.] Apprendi does not require or enable us to rewrite the Penal Code to convert penalty provisions... into elements of offenses." (Id. at p. 118.)

Here, the enhancement allegations at issue were submitted to the jury and proved true beyond a reasonable doubt. Under Apprendi and its progeny, defendant was entitled to no more. The trial court did not err in failing to instruct the jury on assault with a firearm as a lesser included offense of attempted murder.

II. The Trial Court Did Not Err In Failing To Instruct The Jury On Attempted Voluntary Manslaughter As A Lesser Included Offense Of Attempted Murder

Defendant next contends the trial court erred in failing to instruct the jury on attempted voluntary manslaughter as a lesser included offense of attempted murder as charged in counts 1 and 2. Again, we disagree.

As previously discussed, a trial court has a duty to instruct the jury on any offense "necessarily included" in the charged offense if substantial evidence lends support for the lesser crime's commission. (Birks, supra, 19 Cal.4th at p. 112.)

"Voluntary manslaughter is an unlawful killing without malice 'upon a sudden quarrel or heat of passion.' (§ 192, subd. (a).) 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and

from such passion rather than from judgment." [Citations.]' (Citation.) '[T]he killing must be "upon a sudden quarrel or heat of passion" (§ 192); that is, "suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has ela[ps]ed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter." [Citation.]' [Citation.]" (People v. Hach (2009) 176 Cal.App.4th 1450, 1458.)

Defendant claims "[t]he only evidence presented in this case about why the shooting occurred supported the inference that [he] was outraged by Motley's argument with, and beating of, [defendant's] pregnant niece."

Even assuming that provocation would have caused an ordinarily reasonable person to act rashly and from passion rather than judgment, defendant had ample time to deliberate and reflect prior to firing the shots. After learning of the altercation between Oakley and Motley, he obtained a loaded firearm, drove several blocks in search of Motley, whom he believed was in Higgins's car, and maneuvered his car in front of Higgins's car. Only then did he start shooting. On this record, there is no substantial evidence defendant acted in the heat of passion when he fired the shots. Accordingly, the trial court had no duty to instruct the jury on attempted voluntary manslaughter.

III. The Trial Court Properly Instructed The Jury With CALCRIM No. 318

Defendant claims "[t]he use of pattern instruction CALCRIM [No.] 318 unfairly and improperly shifted the burden of proof," thereby violating his federal constitutional rights to a jury trial and due process. Again, we disagree.

As given by the trial court, CALCRIM No. 318 instructed: "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements you may use those statements in two ways. [¶] One. To evaluate whether the witness's testimony in court is believable, and... [¶] Two. As evidence that the information in those earlier statements is true."

Defendant asserts that "[a]s worded, this instruction created an improper presumption that a witness's unsworn out-of-court statements are both true and deserving of greater belief than statements made in court under penalty of perjury."

We recently rejected an argument that CALCRIM No. 318 lessens the prosecution's standard of proof by compelling the jury to accept out-of-court statements as true. (People v. Hudson (2009) 175 Cal.App.4th 1025, 1028.) We explained: "CALCRIM No. 318 informs the jury that it may reject in-court testimony if it determines inconsistent out-of-court statements to be true. By stating that the jury 'may' use the out-of-court statements, the instruction does not require the jury to credit the earlier statements even while allowing it to do so." (Ibid.) We see no reason to revisit that decision here. Accordingly, defendant's claim that CALCRIM No. 318 violated his federal constitutional rights fails.

IV. Defendant Was Not Prejudiced By Counsel's Alleged Deficient Performance, And the Trial Court Did Not Err In Denying Defendant's Motion to Continue

Finally, defendant contends his trial counsel was ineffective in "fail[ing] to exercise due diligence in procuring Johnson's presence at trial," or alternatively, the trial court erred in denying his motion to continue the trial so that his trial counsel could attempt to locate Johnson. As we shall explain, defendant's claim that his trial counsel was ineffective fails because there is no reasonable probability he would have obtained a better result had Johnson testified. Moreover, the trial court granted defendant's request to continue the trial to allow his trial counsel additional time to attempt to locate the witness. Thus, any assertion the trial court erred in denying defendant's request to continue the trial on that basis also fails.

Trial in this matter commenced on May 19, 2009. Sometime prior to April 3, 2009, Johnson told an investigator retained by defendant's prior counsel that he was in Higgins's car at the time of the shooting, and defendant was not the shooter.[5] Defendant's trial counsel, Nolan Del Campo, first learned of the statement approximately one month before trial. Del Campo first attempted to serve Johnson on May 15, 2009, four days before trial commenced. He was not successful. Johnson did not have a home address, and the phone number listed in "the report" was disconnected. Thereafter, Del Campo entrusted Dossman to serve Johnson because the investigator previously had located Johnson through Dossman.

After the prosecution presented its case, the trial court asked whether the defense witnesses had been served, and Del Campo responded that they had. He explained that one of the witnesses, Dossman, had been personally served by him, and that the remainder had been personally served by Dossman. With the exception of the subpoena he served on Dossman, however, Del Campo did not have "any return on the subpoenas." Later that afternoon, Del Campo advised the court that he had misspoken and that all of the witnesses except Johnson had been served. He explained that Dossman previously had advised him that all the witnesses had been served. Upon discovering that Johnson had not been served, Del Campo directed an investigator to attempt to locate him.

Thereafter, Del Campo sought to have Johnson's statement to the investigator admitted. The prosecutor objected on the ground he had not had an opportunity to cross-examine Johnson. The trial court sustained the objection. Thereafter, Del Campo asked the court to continue closing arguments until the following day so that he and the prosecutor could prepare, and he could "try again tonight to find [Johnson]." The court granted the request even though, as the court observed, Del Campo had failed to establish "whether or not [Johnson's] not here because of your error."[6]

In defendant's view, Johnson's testimony that defendant was not the shooter, "combined with the defense evidence that [defendant] continuously remained in Dossman's house at the time of the shooting, Her's description of a vehicle different from the one [defendant] had access to, and Hall's trial testimony failing to identify [defendant], likely would have raised a reasonable doubt in the mind

of at least one juror."

To establish the ineffective assistance of counsel, defendant must show (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's error or omission resulted in prejudice such that there is a reasonable probability the result would have been different absent the error. (Strickland v. Washington (1984) 466 U.S. 668, 687-688, 694 [80 L.Ed.2d 674, 693-694, 698] (Strickland); People v. Boyette (2002) 29 Cal.4th 381, 430.) Where, as here, the defendant cannot establish prejudice, we need not consider whether counsel's representation was deficient. (Strickland, supra, 466 U.S. at p. 697 [80 L.Ed.2d at p. 699].)

In assessing prejudice, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (Strickland, supra, 466 U.S. at p. 695 [80 L.Ed.2d at p. 698].) "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.... [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (Id. at pp. 695-696 [at pp. 698-699].) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test...." (Id. at p. 693 [80 L.Ed.2d at p. 697].) "The test... must necessarily be based upon reasonable probabilities rather than upon mere possibilities...." (People v. Watson (1956) 46 Cal.2d 818, 837 (Watson).)

Here, although the jury could have relied on Johnson's testimony to conclude defendant was not the shooter, having considered the totality of the evidence, we conclude there is no reasonable probability that it would have done so. The evidence defendant was the shooter was overwhelming. There was evidence he had a motive to shoot Motley, whom he believed was in Higgins's car. The shooting occurred shortly after defendant learned of the altercation between Motley and Oakley, defendant's niece. The physical evidence strongly suggested the Tahoe parked at the party was involved in the shooting. In particular, evidence was introduced that the casing found on the Tahoe was fired from the same gun as were casings found at the scene. While Her testified he thought the vehicle involved in the shooting was brown, both Higgins and Hall testified it was the white Chevy Tahoe parked at 6612 Burdett Way after the shooting. Defendant had access to the Tahoe. It was parked outside the party, and the keys were underneath the seat. Gunshot residue was found on defendant's left hand roughly two hours after the shooting, indicating he had handled a discharged firearm or ammunition within the past four hours.

Having considered the totality of the evidence, we conclude there is no reasonable probability defendant would have received a better result had Johnson testified defendant was not the shooter. While it is possible the jury would have reached a different verdict had Johnson testified, a mere possibility is insufficient. (Strickland, supra, 466 U.S. at p. 693 [80 L.Ed.2d at p. 697]; Watson, supra, 46 Cal.2d at p. 837.) Accordingly, defendant was not prejudiced by attorney Del Campo's performance, and defendant's ineffective assistance claim fails.

DISPOSITION

The judgment is affirmed.[7]

We concur: NICHOLSON, J., BUTZ, J.

1. Further unspecified statutory references are to the Penal Code.

2. The trial court stayed defendant's sentence on counts 3, 4, and 5 pursuant to section 654.

3. Higgins testified Motley shoved Oakley. She denied that Motley hit Oakley or that Oakley fell on the ground.

4. Defendant acknowledges our Supreme Court affirmed its holding in Wolcott in Sloan, but states that he raises the issue here to preserve it for future federal review.

5. Defendant's initial counsel, Andrea Miles, was relieved as defendant's counsel on April 3, 2009, and Nolan Del Campo was appointed on April 8, 2009.

6. Defendant asserts the trial court "declined to continue the trial so that counsel could locate Johnson and call him as a witness." Not so. In the portion of the record cited by defendant, his trial counsel "request[ed] that we postpone the trial till I can get [Dossman] here or issue a warrant and have her brought here." (Italics added.) As discussed above, later in the proceedings, counsel asked to continue closing arguments until the following morning in part so that he could attempt to locate Johnson, and the court granted the request.

7. The recent amendments to section 4019 do not operate to modify defendant's entitlement to additional presentence custody credit, as he was committed for a serious felony. (§§ 1192.7, subd. (c)(1), 4019, former subds. (b)(2) and (c)(2)[as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50], 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)