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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH STANLEY DURAN, III,

Defendant and Appellant.

A130262

(Solano County
Super. Ct. No. FCR244559)

A drive-by shooting led to a jury finding defendant Joseph Stanley Duran, III guilty as charged of murder, attempted murder, four counts of assault with a firearm, shooting at an occupied vehicle, and numerous enhancements. For these offenses defendant was sentenced a determinate term of 19 years and four months, consecutive to a term of 25 years to life, and those terms to be consecutive to two indeterminate life terms, one with the possibility of parole and one without.

On this timely appeal from the judgment of conviction, defendant contends that reversal is required by reason of evidentiary and instructional error. He further contends that he did not receive the effective assistance of counsel because his trial attorney failed to object to the testimony of two witnesses. We conclude: (1) the trial court did not abuse its discretion by excluding evidence that the murder weapon was subsequently used in another crime; (2) the trial court did not prejudicially err in not instructing the jury on accomplice liability and credibility; and (3) defendant has not established that his trial counsel was constitutionally incompetent. In light of these conclusions, we affirm.

BACKGROUND

It is not necessary to recount every detail of the trial record because much of it is repetitive, cumulative, or not particularly germane to the contentions defendant advances on his appeal. The Attorney General commences her brief with an admirably concise thumbnail précis of this case: “On June 20, 2007, appellant, a passenger in a van, discharged a firearm at a parked Cadillac as he drove by. Two bullets struck and killed Angelo Hurst, who was standing next to the Cadillac. The prosecution theory was that appellant intended to kill Brandon Boyd, who was a passenger in the Cadillac, in retaliation for Boyd’s attack on him earlier that day. The defense claimed mistaken identity . . . that Tereau Berry, the driver of the van, committed the shooting.”

This is one of those cases where just about everyone knows everybody else. Defendant knew Boyd, and they had been friends. Defendant was also a friend of Maria and Xavier Montano, Kevin Davis, and James Ayres. Defendant knew Tereau Berry and his sister Tecora.

But by the date of the killing, June 20, defendant’s friendship with Boyd was a thing of the past. That day, they had a brief fight. There were no serious injuries, but defendant got the worst of it, and he wanted a rematch. Boyd learned of defendant’s desire but had no intention of indulging it.

It was apparently still up in the air whether there would be a Round Two between defendant and Boyd when the Montanos picked up Boyd and Ayers in their Cadillac. Boyd sat behind Xavier, who was driving. They parked on Cambridge Drive in Vacaville. At approximately 9:45 p.m., Hurst and Davis were standing next to the vehicle, conversing with the four occupants, when a dark-colored van approached. A fusillade of shots was fired from the van.

The van belonged to Tereau Berry’s mother. Tereau had picked up his sister Tecora at her place of work, together with Sontoya Hawkins, a coworker who needed a ride home. Then they picked up defendant. Tecora (who was chastised by the trial court as “the most contemptuous witness I’ve ever seen in 32 years . . . in the legal profession”) testified in effect that “[w]e was driving around Vacaville,” past “a car with some people

standing outside” when defendant started shooting, but otherwise “I don’t remember all the details [as] to what happened that night” except that the next thing she knew they were dropping off Hawkins. It appears Hawkins went into hysterics when the shooting began, so she was similarly unforthcoming with details. However, during a subsequent police interview, Hawkins identified Terraun’s “friend,” who “they call Joe” and who was sitting in the front passenger seat, as the person who fired the shots.

As for Tereaun Berry (who was even more recalcitrant than his sister and was actually held in contempt after being warned against lying),¹ he testified that defendant called and asked for a ride. When defendant got in the van, his face was bruised and he told Tereaun he had been in a fight with Boyd. Tereaun himself had “no beef” with either Boyd or Davis. He did not know that defendant was armed.²

To hear Tereaun tell it, he was simply driving along when the firing suddenly started. Asked if he saw defendant “put his arm out of the window and start shooting,” Tereaun replied “[i]t might have happened.” Tereaun grudgingly testified that the firing was directed at a group, some of whom he recognized. After the shooting, Tereaun dropped off Hawkins in Suisun and defendant in Fairfield. Defendant took the gun with him. Defendant told Tereaun that “those people they deserved it,” but he was sorry to have used “your mom’s car.”³ “Maybe” defendant called afterwards and asked Tereaun “not to tell.” Thereafter Tereaun did receive threats, although he did not know if they

¹ At the start of the defense’s cross-examination, Tereaun announced: “I don’t want to be here. I told them people . . . that I am a schizophrenic [*sic*]. I am bipolar. My doctor wrote them a—a statement. I ain’t credible, I can’t testify, and they still went ahead and do what they want to do to me [¶] I ain’t took my medication in hella long because I ran out, and I ain’t be going back and see my doctor in like two or three months, but my letter I got, it’s like four months out, but it’s good.”

² There was a gun in the van, put there by a family member Tereaun refused to name, but it may not have been the gun defendant used in the shooting, or the one defendant took with him afterwards.

³ The apology may have been motivated by Hawkins reproaching defendant for possibly endangering Tereaun’s and Tecora’s mother if “these people” connected her vehicle to the shooting.

originated with defendant.

It was not until the very end of Tereaun's cross-examination that a very salient detail emerged, namely, that the van did not arrive at the shooting scene by happenstance, but Tereaun intentionally drove there at defendant's direction so that defendant could "do a drug deal."

Three days after the shooting, Tereaun was voluntarily interviewed by Vacaville Detective Kellis and identified defendant as the shooter. According to Detective Kellis, Tereaun had no difficulty in recounting a version more detailed than his trial testimony. After being picked up, defendant directed Tereaun to the location where defendant "was going to do a . . . drug deal." As his van approached the Montanos' Cadillac, Tereaun recognized the victim, Angelo Hurst, Boyd, and Kevin Davis. Defendant "made a statement to the effect of there they are," followed by cocking his firearm. Defendant then said "Fuck that shit," and began firing. While being driven back to Fairfield, defendant told Tereaun "they deserved what they got." Tereaun recounted that the day after the shooting he received the first "threat towards his family" from defendant.

The same thing occurred with respect to Tecora. Vacaville Police Officer Carey interviewed Tecora on the night of the shooting, at which time she told him what happened with "great detail." She corroborated the essence of the version Tereaun gave to Detective Kellis about defendant's "there they are" statement, followed by the cocking of the gun, the "fuck this" comment, and then the firing, and how "they were all upset with Joe" and "freaking out." And like Tereaun, Tecora identified defendant in a photographic line-up.

Hurst was hit in the back. Montano inside his car was hit in the leg. Defendant immediately fled to Mexico, where he was arrested and returned for trial in 2008.

Defendant did not testify. The sole witness on his behalf was Tereaun's psychiatrist, who testified that she diagnosed Tereaun as having "schizophrenia—paranoid type" and "impulse control disorder," and that he had "these mental health issues . . . in June of 2007." Tereaun also suffers from delusions. On cross-examination,

the doctor further testified in effect that Tereaun wanted to avoid testifying because he feared for his life.

REVIEW

There Was No Evidentiary Error

The prosecution presented a “Motion In Limine To Exclude Third Party Culpability.” The trial court used Evidence Code section 352 to preclude the defense from introducing evidence that in January 2009, while defendant was in jail awaiting trial, the weapon used to kill Angelo Hurst and wound Brandon Boyd was used in a shooting in San Francisco. The court ruled that the proposed evidence would necessitate “an undue consumption of time, and . . . a substantial danger that the jurors would be confused or potentially misled, . . . and . . . the probative value is so weak.” The same grounds were cited to exclude evidence that several months after the shooting “a search warrant was being served at the house of the driver [i.e., Tereaun], showing another gun and drug sales.⁴ Again . . . I can’t wrap my mind around [how] that evidence would provide substantial proof of the probability that the driver was the shooter.”

Defendant attacks the first ruling as erroneous because the subsequent use of the murder weapon linked Tereaun to the Hurst killing and thus could raise reasonable doubt as to defendant’s guilt. We consider this contention according to well-established principles.

“ ‘We repeatedly have indicated that, to be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to

⁴ The prosecution stated the matter a bit more clearly in the written motion: “Tereaun Berry’s residence was searched in October 2007 which was unrelated to the case at bar. During the search, a .40 caliber firearm was located and confiscated by the police. The firearm was determined to NOT be the weapon used by the defendant in this case in June 2007.”

defendant's guilt’ [Citations.] [¶] In *People v. Hall* (1986) 41 Cal.3d 826, we held that ‘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.’ [Citation.] ‘Our holding [in *Hall*] did not, however, require the indiscriminate admission of any evidence offered to prove third-party culpability. The evidence must meet minimum standards of relevance: “evidence 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.” [Citation.] We also reaffirmed that such evidence is subject to exclusion under Evidence Code section 352. [Citation.]’ [Citation.]” (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368.)

“An appellate court applies the abuse of discretion standard to review any ruling by a trial court on the admissibility of evidence, including a ruling on an Evidence Code section 352 objection.” (*People v. Cox* (2003) 30 Cal.4th 916, 955.) That means reversal is not appropriate unless we are compelled to conclude that that the trial court “ “exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” ’ [Citation.]” (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

Seizing upon the court’s use of the words “*substantial proof of the probability* that the third person committed the homicide herein” (italics added), defendant asserts that the court “applied [an] incorrect and unduly high standard to admissibility” and thus “failed to properly weigh the relevant factors under section 352.” By excluding this evidence, defendant also claims the trial court deprived him of his “constitutional rights to due process and to present a defense.”

The entire, if implicit, foundation of defendant’s position is that whoever had the gun in June 2007 still had possession when it was used 18 months later. But defendant will derive no benefit unless he can establish the next logical stage, which is to tie that specific gun in both instances to Tereau. This defendant cannot do. Without something

tending to show that Tereau was in San Francisco with that weapon, defendant cannot satisfy the factual predicate of “ ‘ “direct or circumstantial evidence linking the third person to the actual perpetration of the crime” ’ ” (*People v. McWhorter, supra*, 47 Cal.4th 318, 368), and therefore no abuse of the trial court’s discretion. (*People v. Williams, supra*, 43 Cal.4th 584, 634-635.) In these circumstances, the court’s unfortunate use of what is admittedly an incorrect standard may be disregarded as harmless because defendant cannot satisfy the correct standard.

Although defendant attempts to elevate the issue to one of federal constitutional dimension, this is not correct. “As a general matter, the ‘[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant’s right to present a defense.’ [Citations.] Although completely excluding defense evidence of an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused’s due process right to present a defense. [Citation.] If the trial court misstepped, ‘[t]he trial court’s ruling was an error of state law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.’ [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24).” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Application of Evidence Code section 352 is within this principle. (*People v. Brown* (2003) 31 Cal.4th 518, 545.) Moreover, we cannot go against the California Supreme Court and the United States Supreme Court, both of which have rejected identical claims. (*People v. Hall, supra*, 41 Cal.3d 826, 834-835; *Holmes v. South Carolina* (2006) 547 U.S. 319, 327-328.)

There Was No Prejudicial Instructional Error

“[Penal Code s]ection 1111 prohibits a defendant from being convicted on the uncorroborated testimony of an accomplice. Accomplice testimony must be corroborated by ‘other evidence as shall tend to connect the defendant with the commission of the

offense. . . . [¶] An accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.’ [Citation.] In other words, ‘[t]o be so chargeable, the witness must be a principal under [Penal Code] section 31. That section defines principals as “[a]ll persons concerned in the commission of a crime, whether . . . they directly commit the act constituting the offense, or aid and abet in its commission. . . .” [Citation.] An aider and abettor is one who acts with both knowledge of the perpetrator’s criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets.’ [Citation.]

“Unless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence, whether a witness is an accomplice is a question for the jury. On the other hand, the court should instruct the jury that a witness is an accomplice as a matter of law when the facts establishing the witness’s status as an accomplice are ‘ “ ‘ clear and undisputed.’ ” ’ [Citations.]” (*People v. Williams* (2008) 43 Cal.4th 584, 635-636, quoting *People v. Avila* (2006) 38 Cal.4th 491, 564-565.)

“When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles of governing the law of accomplices.” (*People v. Frye* (1998) 18 Cal.4th 894, 965-966.) “In the absence of an instruction on the legal requirement that an accomplice be corroborated, there is a risk that a jury—especially a jury instructed . . . that the testimony of a single witness whose testimony is believed is sufficient for proof of any fact—might convict the defendant without finding the corroboration Penal Code section 1111 requires. [Citation.] The corroboration requirement for accomplices thus qualifies as a general principle of law vital to the jury’s consideration of the evidence, and the jury must be so instructed even in the absence of a request.” (*People v. Najera* (2008) 43 Cal.4th 1132, 1137)

“However, a conviction will not be reversed for failure to instruct on these principles if a review of the entire record reveals sufficient evidence of corroboration.”

(*People v. Frye, supra*, 18 Cal.4th 894, 966.) “ ‘Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]’ [Citation.] The evidence ‘is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.’ [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)

Defendant argues that Tereaun was an accomplice, thus requiring the trial court to instruct on accomplice credibility, and that the court’s failure to satisfy this duty qualifies as reversible error. We do not agree.

Tereaun does not qualify as an accomplice as a matter of law, and defendant does not contend that he was. (Cf. *People v. Williams* (1997) 16 Cal.4th 635, 679 [issue of whether person is an accomplice can be decided as a matter of law only when evidence is “ ‘clear and undisputed’ ”].) For the theory that Tereaun was an accomplice based on the evidence in this case, the claim is thin. No one testified that Tereaun was the shooter, while several—and most importantly, two of the three occupants of the van—identified defendant as the shooter. Tereaun did drive defendant to the scene, but the only express evidence was that it was so that defendant could do a “drug deal.” There was a gun in the van, but no evidence that it was the one actually used. The jury might conclude that Tereaun knew that defendant was bent on wrecking vengeance for the fight with Boyd earlier that day, but there is no concrete proof that Tereaun either knew of such a plan or agreed to assist it. Tereaun had nothing to do with defendant’s fight with Boyd. On the other hand, given that the court allowed defendant to argue that Tereaun was the shooter, we will assume that the court believed there was sufficient circumstantial evidence to paint him as more than an innocent bystander.⁵

Thus, we shall further assume, solely for purposes of this argument, that there was

⁵ Although, strictly speaking, the defense theory that Tereaun was the shooter does not establish the converse of the contention defendant now presses, i.e., that defendant was an accomplice to Tereaun’s plan. Certainly the defense theory that Tereaun was acting on the basis of a delusion has no logical connection to defendant.

sufficient circumstantial evidence that Tereaun was defendant's accomplice. Indulging this assumption, accomplice instructions should have been given. The next question is whether this assumed error was prejudicial. Answering that question requires evaluating the strength of the likelihood that the jury convicted defendant solely on the basis of Tereaun's uncorroborated testimony. (See *People v. Najera*, *supra*, 43 Cal.4th 1132, 1137.) We conclude that likelihood was extremely remote because, remembering that the evidence corroborating Tereaun's testimony need only be "slight" and need not reach every detail (*People v. Lewis*, *supra*, 26 Cal.4th 334, 370), there was ample evidence. The testimony identifying defendant as the shooter, from the postshooting statements and line-up IDs by Tecora, Tereaun, and Hawkins, is alone sufficient.

**Defendant Has Failed To Establish That His Trial
Counsel Acted Incompetently**

When Detective Kellis testified about interviewing Tereaun Berry three days after the shooting, he was asked: "Now, can you describe what his demeanor was like when he was . . . asked questions about what happened on June 20?" Kellis replied: "He appeared to be nervous, kind of scared, but open, and didn't appear to be holding anything back." Defendant contends this amounted to Kellis improperly "vouching" for Berry's credibility, and that this improper use was aggravated by the prosecutor's closing argument.

But what the prosecutor did was hardly vouching, which usually involves an attempt to bolster a witness's credibility "by reference to facts *outside* the record" (*People v. Medina* (1995) 11 Cal.4th 694, 757), such as a personal opinion (*People v. Martinez* (2010) 47 Cal.4th 911, 958), or invoking the prestige, reputation, or depth of experience of the speaker or their office. (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) And while "[l]ay opinion about the veracity of particular statements by another is inadmissible" (*People v. Melton* (1988) 44 Cal.3d 714, 744), the prosecutor was not soliciting an answer about credibility. The Detective was simply being asked for his recollection of Tereaun's physical appearance or behavior, not his opinion about

whether Tereaun was telling the truth.⁶ And if the prosecutor subsequently argued from Detective Kellis’s testimony that “Tereaun [was] honest in the interview,” that characterization is not independently improper, because “[a] prosecutor may comment upon the credibility of witnesses based on facts contained in the record.” (*People v. Martinez, supra*, at p. 958.)

Lastly, defendant urges that his trial counsel should have made a hearsay objection when Montano testified that just before the shooting “a van passed, and Kevin [Ayers] was like, ‘There goes Joe right there.’ ” Hearsay it might have been, but in light of the abundant and uncontested evidence that defendant was in the van, it is inconceivable that counsel’s silence could be prejudicial.

DISPOSITION

The judgment of conviction is affirmed.

⁶ We note that the prosecutor asked numerous witnesses to describe a person’s “demeanor,” and none of these other queries drew an objection from the defense. The one time the prosecutor did ask a police witness whether the officer thought someone was “giving you straight answers or was she changing her statements,” the trial court sustained a defense objection. We further note that at a point in chambers when discussing the permissible scope of testimony from Tereaun’s psychiatrist, the court stated: “Should the doctor testify, she’s not going to opine any specifics about whether—whether or not the witness is a truth teller. *She can’t do that.* And she can’t say whether or not his testimony was dead on accurate or inaccurate. She’s not going to do that.” (Italics added.) It is hard to credit that a court obviously sensitive to the prohibition against veracity evaluations would passively allow that prohibition to be flouted in the manner defendant imagines.

Richman, J.

We concur:

Kline, P.J.

Lambden, J.