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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re ALEJANDRO M., a Person Coming
Under the Juvenile Court Law.

B239579
(Los Angeles County
Super. Ct. No. JJ17691)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Tamara Hall, Judge. Reversed and remanded with directions.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

Alejandro M. appeals from the order sustaining a Welfare and Institutions Code section 602 petition alleging that he discharged a firearm at an occupied vehicle in violation of Penal Code section 246 (undesigned statutory references are to the Penal Code) and possessed a weapon in violation of section 12101, subdivision (a)(1). Minor contends that the evidence was insufficient to support the juvenile court's finding that he violated section 246 and that the juvenile court failed to perform its statutory duty to declare whether the offenses were felonies or misdemeanors. We agree.

BACKGROUND

About 8:04 p.m. on June 4, 2010, shots were fired in the 6300 block of State Street in Huntington Park. Josefina Gamez testified that it was a hot night, and she and many of her neighbors were outside. Gamez was on the sidewalk near the school, "apart" from her neighbors. Cars were parked on the street. Gamez saw a man cross the street on a "rather small" bicycle about 24 to 30 feet from her, then walk or ride north toward Randolph Street. He was wearing a white T-shirt, black pants, and a baseball cap. Gamez heard two "very soft" sounds, and some of her neighbors shouted that shots had been fired. Gamez picked up the child she was caring for and ran. Her testimony on direct examination indicated she saw the man "ma[k]e a sign towards" his waist and saw a pistol before people yelled about shots. But when she was specifically asked on cross-examination whether she saw the gun "after someone yelled 'shots' or before someone yelled 'shots,'" Gamez responded, "After someone yelled." When Gamez heard the shots, "the man [was] facing" "the right side," toward the street. When asked whether there was traffic on the street at the time of the shots, Gamez testified, "I just know that there was—well, there is a lot of traffic on that street. But I think there was like a black car coming. Yeah." The man was near the rear tire of the black car at the time of the shots, but he was not facing the black car, which had driven past him. After the shots, the man continued to ride north on State Street.

Manuel Villegas had just arrived home from work and was in his driveway with his daughters when he heard a gunshot and saw a single "flash of fire" coming from

between parked cars. Villegas saw a male wearing a white short-sleeved T-shirt and a baseball cap going north on State Street on a bicycle. Villegas could not see the bicycle sticking up behind the parked cars, but he assumed the man was on a small bicycle because the man “was going fast.” Villegas viewed the man from behind and could not see the man’s hands. The “flash of fire” came “from the direction of that person.” Villegas grabbed his children and they all ran inside. Villegas may have previously said he heard two shots, but he could not remember how many shots he heard. The prosecutor asked Villegas whether there was traffic on the street at the time of the gunshots. Villegas replied, “Yes. It’s a normal kind of street. There’s a lot of traffic on that street.” When the prosecutor again asked if he “specifically recall[ed] traffic that night, that evening, at the time of the gunshot,” Villegas responded, “There’s always traffic there.” The prosecutor asked whether Villegas saw “people in cars driving on the street that evening at the time of the gunshots.” Villegas said, “I didn’t see people, but I saw cars, people were coming from work. I didn’t turn and look at the cars or anything like that. I am assuming there is somebody there because somebody is driving it.” When asked whether the gunfire was in the “direction of the cars,” Villegas testified he was unable to say.

Detective Robert Barillas testified that as he was responding to the “shots fired” call on State Street, he saw Alejandro riding a bicycle on Randolph Street just east of Newell Street and believed Alejandro fit the description of the shooting suspect. Barillas drove east on Randolph and “almost intercepted the person on the bike.” Barillas pulled to the curb, Alejandro looked toward Barillas, and Barillas got out of his car with his gun aimed at Alejandro. Alejandro got off the bicycle and ran toward the apartment building on the southeast corner of Randolph and Newell Streets, holding his waistband as he ran. Barillas pursued Alejandro, but lost sight of him briefly.

As Gabriela Galvan entered the courtyard of her apartment building at Randolph and Newell Streets, she came face-to-face with a male Hispanic who had a gun in his hand. Galvan testified the man was wearing a baseball cap, blue jeans, and a dark blue or

“grayish” shirt. Galvan was with her children and nephews, and she quickly ushered them upstairs. As she climbed the stairs, she saw the man throw the gun onto the roof of the building. About 10 to 20 seconds later, police officers ran into the courtyard and arrested the man. Galvan told one of the police officers about the man throwing the gun. She could not identify Alejandro at the adjudication.

When Barillas entered the courtyard, he saw Alejandro with his hands up, looking at Barillas. Barillas detained Alejandro and handcuffed him. Detective Giovanni Hernandez went onto the roof of the apartment building and recovered an old revolver with four live rounds and two casings in the cylinder. No one testified that anything about the gun indicated that it had been fired recently. Hernandez testified that Alejandro was wearing a light grey T-shirt that was a mix of grey and white, not a solid color.

Gamez testified that the police arrived on State Street about five minutes after the shooting. About 10 minutes later, they took Gamez and Villegas to view Alejandro in a field showup at Randolph and Newell Streets. Neither Gamez nor Villegas identified Alejandro at the showup or at the adjudication. Gamez testified that she told the officers Alejandro looked similar to the man with a gun, but she was not sure because she had not seen the man’s face and Alejandro was wearing a grey T-shirt, whereas the man with the gun had worn a white T-shirt. The prosecutor showed Gamez People’s exhibit 2-B, a photograph of “an individual standing in a hallway, cut off at the head, just depicting the clothing and the torso of that individual,” and Gamez agreed the clothing was “consistent with the clothing” she saw at an unspecified moment that night. The prosecutor asked, “How about the shirt?” Gamez responded, “White.” The prosecutor did not clarify her response. Gamez agreed that “it” was “similar to this shirt, a short-sleeved shirt.” Villegas testified that he told the police at the showup that he was not sure if Alejandro was the gunman because “he had different clothing on.” He was unable to identify Alejandro’s bicycle, either viewing it or from a photograph.

Gamez was unable to identify Alejandro’s bicycle in a photograph as the one that she saw the man with the gun riding, but the pistol depicted in a photograph of the

revolver recovered from the roof of Galvan's apartment building appeared to be the same one she saw in the man's hand.

Alejandro was transported to the police station by Officer Esteban Palacios, who also performed a gunshot residue test on Alejandro's hands at 8:55 p.m. Palacios followed the testing protocol precisely. In response to the officer's inquiry, Alejandro said he had last washed his hands at 6:00 p.m. Alejandro was not allowed to use the restroom or wash his hands between the time he was detained and the performance of the gunshot residue test.

Defense expert Marc Scott Taylor testified that he analyzed the gunshot residue testing kit performed on Alejandro and found no evidence of gunshot residue or "gunshot related particles on either hand." Taylor opined that if Alejandro had not had an opportunity to wash his hands, he had not fired a gun. Taylor further opined that the quantity of "normal," non-gunshot-residue particles found in the samples taken from Alejandro's hands indicated that Alejandro had not washed his hands recently. Gunshot residue can also be removed by wiping the hands, but "[i]t's harder to get it off that way. You have to be very thorough about doing it." Fifty minutes after firing a gun, about 80 to 90 percent of the gunshot residue would have fallen off the hands, but it takes about six hours for all gunshot residue to fall off through normal activities.

The distance between the site of the shooting and the location of Alejandro's detention was variously described as two, three, and four blocks. Hernandez estimated the time of Alejandro's detention as approximately 8:10 or 8:12 p.m.

The parties stipulated that no fingerprints were found on the revolver.

Alejandro was 17 at the time of the offense, but was 19 at the time of the adjudication.

Citing his interviews with eyewitnesses, the prosecutor sought to amend the petition at the start of the adjudication hearing to add an allegation that Alejandro willfully discharged a firearm in a grossly negligent manner in violation of section 246.3. Alejandro objected, and the juvenile court refused to permit the amendment.

The juvenile court sustained the petition with respect to both counts, declared Alejandro to be a person described by Welfare and Institutions Code section 602, and terminated jurisdiction because Alejandro was in “adult custody” serving a 20-year prison term.

DISCUSSION

1. Sufficiency of evidence

Minor contends the evidence was insufficient to support the juvenile court’s finding that he violated section 246 because there was no substantial evidence that he was the person who fired the gun or that the shooter fired toward or in close proximity to an occupied vehicle or inhabited dwelling house.

To resolve this issue, we review the whole record in the light most favorable to the juvenile court’s order to decide whether substantial evidence supports the court’s finding, so that a reasonable fact finder could find the allegation true beyond a reasonable doubt. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) Substantial evidence is “““evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.””” (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) We also presume in support of the juvenile court’s finding the existence of every fact the trier could reasonably deduce from the evidence and make all reasonable inferences that support the finding. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1089.) A reasonable inference may not be based solely upon suspicion, imagination, speculation, supposition, surmise, conjecture, or guesswork. (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

No eyewitness to the shooting identified Alejandro, and both Gamez and Villegas were adamant that the man shown to them by police had on a different shirt. Although light grey could reasonably be mistaken for white, the insistence of these witnesses—a very short time after the shooting—that Alejandro’s shirt was not the same color as that worn by the shooter demonstrates that they did not simply mistake one light color for

another. When asked, neither witness was able to identify the bicycle Alejandro abandoned as the one ridden by the shooter.

Circumstantial evidence supported a strong suspicion that Alejandro may have been the shooter, but suspicion does not constitute substantial evidence or form the basis for a reasonable inference. In addition, most of the circumstances casting suspicion upon Alejandro were either of dubious significance or susceptible of reasonable alternative interpretations. Although Alejandro ran from Barillas, this did not necessarily establish consciousness of guilt of any offense, let alone the shooting on State Street. Barillas did not testify that he was in uniform or driving a marked police car or that he announced that he was a police officer. He did testify that he “nearly intercepted” Alejandro in the car, then got out of the car with his gun aimed at Alejandro. Thus, an alternative reasonable inference is that Alejandro ran because he feared being shot by an unknown assailant. Alternatively, it is reasonable to infer that Alejandro fled and disposed of the gun simply because he was a minor carrying a concealed and loaded gun, which violated sections 12101, subdivisions (a)(1) and (b)(1) and 12025, subdivision (a). Gamez’s testimony that the gun in the prosecutor’s photograph appeared to be the one the shooter used added to the suspicion that Alejandro may have been the shooter, but Gamez disclaimed knowledge of guns, was at least 24 feet from the shooter when he was nearest her, and was unable to identify Alejandro’s bicycle, which would have been a significantly larger object presenting a larger viewable surface than a handgun in the shooter’s hand.

In contrast, the uncontradicted evidence established that Alejandro had no gunshot residue on his hands when they were tested at 8:55 p.m., approximately 51 minutes after the shooting. The testimony of the detectives and officers established that Alejandro was detained at about 8:10 or 8:12 p.m., six to eight minutes after the shooting, and that he had no opportunity to wash his hands between the time of his detention and the gunshot residue testing. In addition, the other particles on Alejandro’s hands indicated he had not washed his hands recently before the testing.

Considering all of the evidence in the light most favorable to the juvenile court's order, we necessarily conclude that the record does not present substantial evidence such that a reasonable trier of fact could find beyond a reasonable doubt that Alejandro was the person who fired shots on State Street. In light of our conclusion, we need not address Alejandro's contention that the evidence was also insufficient to establish a violation of section 246. The juvenile court's order finding count 1 to be true and sustaining the petition with respect to count 1 must be reversed, and the allegation may not be readjudicated.

2. Failure to declare offense to be misdemeanor or felony

Alejandro contends, and the Attorney General aptly concedes, that the juvenile court failed to comply with its duty under Welfare and Institutions Code section 702 to declare whether the offenses, which were "wobblers," were misdemeanors or felonies, and a remand is accordingly required. The issue is moot with respect to count 1, which we have reversed. We remand for the juvenile court to comply with Welfare and Institutions Code section 702 with respect to count 2.

DISPOSITION

The order under review is reversed with respect to count 1. The cause is remanded to the juvenile court to declare whether count 2 is a misdemeanor or a felony pursuant to Welfare and Institutions Code section 702.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.