

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

IGNACIO LEYBA,

Defendant and Appellant.

C068671

(Super. Ct. Nos. 06F10056,
10F06425)

In case No. 06F10056, defendant Ignacio Leyba entered a plea of no contest to possession of cocaine while armed. The court suspended imposition of sentence and granted probation.

In case No. 10F06425, a jury convicted defendant of second degree murder, attempted premeditated murder, and being a felon in possession of a gun. It also sustained allegations of personal use of a gun resulting in death or great bodily injury. It acquitted him of witness intimidation. The trial court imposed an indeterminate term of 72 years to life on the shooting counts and a concurrent term for the gun possession.

Pursuant to Penal Code section 2933.2, the trial court awarded defendant credit only for his actual days of presentence custody.

Based on this conduct, the court also found defendant in violation of probation in case No. 06F10056. It revoked probation and imposed a concurrent sentence (awarding conduct credits equal to his custody credits against this term).

Defendant filed a notice of appeal in both cases. With respect to his 2010 offenses, he contends the trial court erred in denying his motion in limine to exclude evidence of his gang associations. We shall affirm the judgment in that case. He does not raise any issues in connection with case No. 06F10056; we accordingly deem that appeal abandoned and shall dismiss it.

FACTUAL AND PROCEDURAL BACKGROUND

On a Saturday night in September 2010, defendant and a group of friends were at a bar. At last call, they decided to reconvene at the home of one of their number.

En route to the residence, defendant and two of the women from the group stopped at a neighborhood liquor store. Also at the liquor store were the murder victim, Oquitzin Bravo, the surviving shooting victim, Jorge Lopez, and a third friend, all of whom were best friends working together in construction; they originally were Mexican natives. They were en route home from a Folsom Boulevard club.

As the two shooting victims walked to the door (their third friend remaining behind in the car because he was quite drunk), they began conversing with the women, who invited them to the after-hours gathering. The two victims returned to their car, and followed the women's car to the home and parked. The gathering was in the backyard.

As the victims and their friend approached the gate to the yard, the woman who had invited them suggested that perhaps they all could go elsewhere; victim Lopez said it was up to the women. Defendant and his friend, David Goodier,¹ came up to them. Victim Lopez had noticed them at the liquor store, and now realized they must have been there with the women at the same time in a different car.

Defendant and Goodier asked whether the group had any gang affiliation. Goodier may have said something to indicate having a gang affiliation. Victim Lopez told them that he and his friends were "pisas" (which he testified as meaning a native Mexican not affiliated with any gang),² and asked if it was acceptable for them to join the gathering. At that point, everyone seemed welcoming to victim Lopez³ and the question of

¹ Goodier, the only Caucasian present, was introduced as "White Boy."

² This term was defined by defendant in his statement to the police as meaning an illegal immigrant. He admitted that he had first noticed them at the liquor store, and found their pisa mannerisms laughable.

³ However, defendant asserted in his police statement that he did not like being around people he did not really know.

gang affiliation did not come up again. Because of his drunken condition, the victims' friend simply sat down near the gate and played with a puppy. Four eyewitnesses described what happened thereafter.

Victim Lopez testified that he had been talking with a woman from whom he had bought marijuana. He heard a commotion arise; he looked over and saw defendant punching victim Bravo. There were two or three other people around them. Victim Lopez went to victim Bravo's aid. Goodier intercepted him with a punch. Victim Lopez did not recall his other friend being involved in either fight. Victim Lopez heard shots, and ran out the gate toward the front of the house. As victim Lopez reached for his phone to call 911, he saw defendant approach him. Behind him, two people were dragging victim Bravo out of the backyard. Defendant had a gun in his hand. Victim Lopez began to approach victim Bravo; defendant raised his arm and shot victim Lopez, then ran off. Defendant was the only dark-skinned person present other than a pregnant woman, and victim Lopez was certain his shooter was dark-skinned. He had never described defendant as having dreadlocks. His description to the police in English, which is not his primary language, was meant to indicate the shooter's hair was wavy or kinky. After everyone ran off, the victims' other friend emerged from the backyard.

Goodier's girlfriend described the victims and their friend as being in a good mood and bringing beer with them to share. They did not appear at all threatening. One of the victims, who

had mentioned he had been a Marine stationed in Iraq,⁴ bought some marijuana from one of the women at the gathering and began to smoke it with her. After coming out of the house with Goodier, defendant's friend Moreno (who lived in the house) walked over to victim Bravo, who was over by the victims' friend near the weight bench. Defendant was there as well. Victim Bravo had appeared to be asking defendant about something; defendant responded by abruptly swinging at him. The girlfriend had not heard any angry words or anything shouted that would explain the onset of the fight. When victim Lopez joined the fray in aid of his friend, Goodier went over to confront him. The brawls split apart; victim Bravo remained engaged with defendant while the other four men moved out of the backyard. There were the sounds of two shots, and smoke came from defendant's hand. Victim Bravo fell to the ground. Defendant ran out of the backyard. Defendant moved toward the other brawl in the front of the house, gun still in hand. Defendant fired the gun at victim Lopez and then ran off. The girlfriend had not seen defendant with a gun beforehand, or seen anyone pass him a gun.

On the following day, Goodier's girlfriend attended a barbeque that defendant hosted at his home. He did not appear

⁴ The girlfriend was unclear in her testimony about the victims' identities, believing the deceased victim involved in fighting defendant was the Marine rather than surviving victim Lopez (who was in fact the ex-Marine). However, in her earlier interview with a detective, she was clear that it was the Marine who was involved in the fight with Goodier.

to be acting out of the ordinary in any respect. When the girlfriend asked about the shooting, defendant shrugged and said he had "flipped" because he had not liked victim Bravo asking him about the tattoos on his hands. He had meant only to pistol-whip victim Bravo (which the girlfriend had not observed), but the gun went off; at that point, defendant got mad and shot victim Bravo.

Defendant's friend Moreno had a gun in the house of the same caliber as a casing found out front in the street. Moreno's cohabitant testified that she saw defendant shoot victim Bravo; she heard the victim ask for help, but she ran into the house and did not call for aid. She did not come back out until the paramedics arrived.

The defense called the victims' friend as a witness. He testified that Goodier had beaten him up in the front yard. Goodier also pointed something in his hand at the victims' friend, who could not tell whether it was a knife or gun. He did not recall telling an officer on the morning after that he had moved his head out of the way as Goodier fired a gun twice, or telling him that Goodier had shouted that the Mexicans needed to leave. He had seen victim Lopez dancing with a woman before the fight started. He did not see either shooting. Although he had identified defendant at the time as having been at the liquor store and the house, he did not recognize defendant at trial.

The detective who had conducted the interview testified the victims' friend had recalled that "one of the people seemed to not be pleased that he was there"; that victim Lopez was dancing with a woman, which displeased the dark-skinned man he had previously identified as defendant; that people (including defendant) then attacked victim Lopez, at which point victim Bravo interceded; and that Goodier attacked him with a knife. The victims' friend had not seen any gun, but heard first two shots, then a third. Another officer, who had spoken initially with the victims' friend, told the detective that the victims' friend had said Goodier had a gun. When the detective asked about this, the victims' friend made clear that it was a knife, not a gun. Yet another detective involved in questioning the victims' friend recalled that the latter had described Goodier as having a knife, not a gun. The victims' friend had also been certain that defendant had not been fighting with victim Bravo. Although he had identified defendant in a photo from liquor store surveillance footage as being at the house, he could not subsequently select defendant's photo in an array.

Defendant did not testify. In his statement to the police, he denied any involvement in the shootings. In the version of events on which he ultimately settled, he claimed that he had been in the bathroom when all the tumult occurred, and fled when he came outside and saw a body on the ground because he did not want any association with whatever had happened.

DISCUSSION

Before trial, defendant had moved to exclude the evidence of the discussion of gang affiliations. The prosecutor argued the conversation was relevant on the issue of the "comfort level" the victims' group felt in joining in the gathering. Defense counsel asserted that the issue of a concern about being welcome did not require the subject of gang affiliation, which was irrelevant to the offense. The trial court stated that the factual context was too vague at this point to make a definitive ruling, but it was inclined to admit the evidence to explain why victim Lopez felt the need to disclaim gang affiliations, and to give context to what seemed to be otherwise an unprovoked attack.

On renewal before trial of the motion to exclude, defense counsel again asserted Goodier's mention of an affiliation was incidental and prejudicial. The prosecution continued to assert that this was relevant to the victims' state of mind and might also have been toward the end of determining whether the interlopers at the gathering were criminally sophisticated. The trial court concluded it was relevant to give context for the interaction between the two groups.

The prosecutor suggested in closing argument that defendant and his cohort, Goodier, were bullies and thugs who intended to victimize what they perceived to be pisas because they were anti-immigrant (though she abjured any burden to establish a motive for the shootings). Towards this end, defendant and Goodier had asked about any gang affiliation. The prosecutor

did not in any other respect claim that gang affiliation had anything to do with the shootings.

Defendant contends the trial court abused its discretion in admitting victim Lopez's testimony regarding the inquiry about whether he and his friends had any gang affiliation, and Goodier's vague allusion to his (or his cohorts') gang affiliation. Defendant claims it generated reversible prejudice. We disagree in both respects.

Defendant had evinced scorn for pisas in his interview; learning that victim Lopez and his friends were in fact pisas (in confirmation of defendant's earlier observations of them) would help prove a theory of a premeditated attack on them, though the prosecutor at the close of evidence ultimately abandoned a theory of first degree murder in connection with victim Bravo and conceded defendant had killed rashly. Moreover, as the prosecutor suggested, this inquiry would confirm that the men as pisas (rather than gang members) would be easier prey for any violence if defendant intended to act on this enmity. Victim Lopez's efforts to disavow any connection with a gang would not make sense without Goodier's reference to an affiliation. (See *People v. Turner* (1994) 8 Cal.4th 137, 189 [challenged statements relevant as context for admissions].) Moreover, defendant denied being the malefactor, and thus proof of motive helped establish his identity as the shooter. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

In any event, we do not discern any reversible prejudice from this testimony. It was brief and limited to the subject of a claimed affiliation without any evidence of the nature of gang activity in general or defendant's participation in it. To the extent it might have suggested to the jury that defendant had a criminal disposition, the jury was able to distinguish among the counts regardless of this suggestion (acquitting him of witness intimidation). (*People v. Williams* (2009) 170 Cal.App.4th 587, 612-613.) The evidence arrayed against him otherwise included two eyewitnesses to his shooting of victim Bravo, and the absolute certainty on victim Lopez's part that defendant had shot him. We are therefore convinced beyond a reasonable doubt that the result would not have been any different in the absence of the gang affiliation evidence.

DISPOSITION

The appeal in case No. 06F10056 is dismissed. The judgment in case No. 10F06425 is affirmed.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

DUARTE, J.