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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTOS TORRES,

Defendant and Appellant.

D060112

(Super. Ct. No. CR45818)

APPEAL from a judgment of the Superior Court of Riverside, Helios J. Hernandez and Craig G. Riemer, Judges. Reversed and remanded with directions.

A jury convicted Santos Torres of shooting at an occupied motor vehicle (Pen. Code,¹ § 246, counts 3 & 4) and assault with a firearm (§ 245, subd. (a)(2); counts 5-7 & 9). The jury also found true Torres personally used a firearm (§§ 12022.5, subd. (a), 667, & 1192.7, subd. (c)(8)) as to counts 5 through 7 and 9. The court sentenced Torres to prison for 11 years, eight months.

¹ Statutory references are to the Penal Code unless otherwise specified.

Torres appeals, contending the court committed reversible error in denying his motion to dismiss the charges because his right to due process under the United States and California Constitutions was violated by the over 14-year delay between the filing of the criminal complaint and his arrest. He also asserts his due process right to present a defense was violated when the trial court sustained an evidentiary objection preventing him from asking an eyewitness if she could identify him in court. Because we determine the court committed reversible error in denying Torres's motion to dismiss, we do not reach his second contention.

FACTUAL AND PROCEDURAL HISTORY

Facts

Torres does not challenge the sufficiency of the evidence supporting his convictions; therefore, we only discuss the facts of his crimes in enough detail to provide context to Torres's claims on appeal.

In August 1992, Torres was involved in a number of incidents in which he pointed a gun at various people and threatened to kill them. In committing these crimes, he drove a Datsun B-210. All the incidents occurred in Riverside. On one occasion, Torres shot at a victim, but did not hit him. On another occasion, Torres shot twice at a victim's car and rear-ended the victim's car, causing the victim to lose control of his car and crash.

At trial, most of the prosecution's evidence consisted of eyewitness testimony from the victims. Torres testified in his defense, stating he did not have a gun and was not involved in any of the August 1992 incidents. He also claimed that Abel Paez, who

looked like him, used his car many times and might have been the individual who committed the charged crimes.

Procedural History

On November 2, 1992, the People filed a complaint that charged Torres with various crimes based on the August 1992 incidents. In November 2006, law enforcement officials discovered that Torres had been arrested in Chicago, and he was brought back to California in early 2007 and held to answer the charges arising from the August 1992 incidents.

Torres's Motion to Dismiss

On August 7, 2008, Torres filed a motion to dismiss all charges on the grounds that he was denied due process as a result of his delayed arrest. The prosecution opposed the motion.

At the December 5, 2008 hearing on the motion, Torres's counsel presented the testimony of investigator Christy Threadgold. Threadgold reviewed the police reports related to this case and learned that a specific car was alleged to have been driven by Torres during the August 1992 incidents. Threadgold subsequently requested the car's records from the Department of Motor Vehicles (DMV) and learned that the car's records had been purged from the system due to inactivity for over five years. The last registered owner of the car, La Sierra Motors, did not have any records for the car either.

Torres's counsel, after noting that the subject complaint was filed on November 2, 1992, and the arraignment took place in 2007, asserted there was "essentially" a 15-year delay in this case. He argued Torres was prejudiced by the delay because "we have

eyewitness identification evidence, which is notoriously weak evidence, generally speaking, and what the defense would seek to do at trial is to present circumstantial evidence that [Torres] was not the person driving the car involved in these assaults."

Torres's counsel further asserted that due to the passage of time, he was unable obtain records showing who owned the car at the time of the crimes, which could have been used to impeach the complaining witnesses to show that Torres was not the registered owner or to show that another person, perhaps the registered owner, was responsible for the crimes. He also contended it was the prosecution's burden to justify the 15-year delay, and he was unaware of any evidence that showed the prosecution attempted to locate Torres in Chicago, despite the fact that, allegedly, the police knew he had moved there based on an interview with his aunt.

The court acknowledged that time could affect eyewitness evidence, but thought the motion was premature because a preliminary hearing had not yet been held, and it was not known what the witnesses would testify to remembering. Torres's counsel agreed somewhat and suggested the motion could be heard in conjunction with the preliminary hearing. He asserted the court should rule on the motion at that point or continue it until the preliminary hearing. The court replied, "I'll tell you this: If I rule against you, I'm going to make it very clear that this is without prejudice, that it is -- however, I think I'd be inclined more to rule that it is premature, that it should be heard, so that it's clear that I'm not ruling on the merits, so you would, you know, if you feel that's worth having to get a writ on appeal. And I don't think I want to -- I don't think that would be right. I think somewhere prior to the trial, you have a right for a judge to tackle

this on the merits and make a ruling. I really do. My question is whether it should be now or later? So, the People have anything?"

The prosecutor asserted the trial court should rule on the motion at that time and argued the court should deny the motion because Torres left Riverside, Torres failed to demonstrate prejudice, and it was the prosecution that actually had been prejudiced by the passage of time.

The court denied the motion as premature.

Torres's Renewed Motion to Dismiss

Torres's refiled his motion to dismiss, the prosecution opposed it, and the court heard the motion on August 5, 2009. At the hearing, Torres called two witnesses: Robert Hathaway and Margaret Swank. Hathaway was a detective with the Riverside City Police Department in September 1992. He discovered one of the victims obtained the license plate number of the car involved in the August 1992 shootings. When he first attempted to locate the registered owner of the car through DMV records, there was no current registered owner. Subsequently, on or about September 3, 1992, Hathaway ran the license plate number through the DMV system again, and it came back registered to La Sierra Motors. Hathaway and his partner then contacted the owner of La Sierra, Tom Paez, who indicated he obtained the car from Torres. Hathaway could not recall if Paez actually had the car on his lot at that time. Paez told the officers that Torres lived with his aunt, and he also heard that Torres possibly moved to Chicago or Puerto Rico.

On or about September 9, 1992, Hathaway and his partner spoke to Torres's aunt who said that Torres moved to either Chicago or Puerto Rico. According to Hathaway,

neither Paez nor Torres's aunt knew for sure whether Torres had actually moved to Chicago or Puerto Rico; they were just guessing.

After learning that Torres may have moved, Hathaway ran all the records that would have given him Torres's location "since [he] couldn't come up with any knowable whereabouts where he would be." After obtaining identifications from the victims, Hathaway applied for an arrest warrant through the district attorney's office. At that point, the district attorney's office assumed the investigation.

Swank is a senior investigative technician for the Riverside District Attorney's Office. In December 2006, she worked in the warrants division and had been recently assigned to the fugitive apprehension unit. Swank was tasked with locating Torres. On November 1, 2006, she reviewed a CLETS report and discovered that, on March 5, 2004, Torres had been arrested in Chicago. Swank contacted the Chicago Police Department to obtain records to verify whether Torres was the same person under a different name, and she received fingerprints from the Chicago police that matched Torres's prints. Swank subsequently contacted the U.S. Marshal.

According to Swank, she received an arrest report from the Chicago Police Department, which showed that Torres had been arrested five times between July 30, 1995 and March 5, 2004. Because that same arrest report listed Torres's name as "Santos Torres" not "Santos Rodriguez Torres" as Torres was referred to in the California felony complaint, Swank admitted that Chicago police would not have gotten a "hit" that Torres had an outstanding warrant in California. Swank also stated that the arrests listed on the report were not reportable to the FBI. As for the March 2004 arrest, Swank used a search

engine to verify Torres's address and the search showed that Torres had lived at the same address since 2004.

After presenting the testimony of Hathaway and Swank, Torres's counsel introduced the DMV record of the subject car (apparently showing no information existed), the printout of Torres's Chicago rap sheet, and the CLETS report. He also asked the court to take judicial notice from the "case print" that showed an arrest warrant was issued for Torres on November 2, 1992, the filing of a complaint on the same date, and Torres's arraignment date of January 10, 2007.

The prosecution offered the testimony of Leonard Ortiz. On April 17, 2007, Ortiz, an investigator with Riverside District Attorney's Office, traveled to Chicago, executed a governor's warrant, arrested Torres, and took him into custody. During the plane ride home, Torres said to Ortiz, "Did the guy get hurt bad? I don't know because, I left."

After the presentation of evidence, Torres's counsel argued that Torres was prejudiced by his delayed arrest because Torres was linked to the crimes by his alleged possession of a car for which the records no longer existed. He asserted the DMV records would have been circumstantial evidence that Torres never had the car involved in the incident and that the car was never registered to him. However, because the DMV records were destroyed, Torres could not show that circumstance and lost the ability to investigate the possibility that the person to whom the car was registered was a potential suspect.

Torres's counsel further contended Torres was extremely prejudiced because the "main evidence" against him was eyewitness identification evidence, and two witnesses

could not identify Torres at the preliminary hearing. He asserted there was "very little reason" for the delay and suggested the district attorney's office did nothing until almost 15 years after the complaint was issued.

In response, the prosecutor argued the delay was caused by Torres fleeing Riverside just as he was about to get caught. The prosecutor did not know how Torres could have been caught sooner because variations of his name appeared on Torres's rap sheet. The prosecutor insisted the loss of the Datsun's DMV records was minor in light of the other evidence that still existed. He also pointed out that two witnesses identified Torres at the preliminary hearing. Ultimately, the prosecutor contended the prosecution, not Torres, was prejudiced by the delay.

After the matter was submitted, the court ruled:

"The things yes, there was delay outside the ordinary time a case would be brought. It's an attempt murder so the statute of limitations is quite long, but it's still a delay that shifts the burden to the People. There is prejudice in the sense that people's memories fade, as seen in the preliminary hearing, two people seemed okay and they were able to identify [Torres], two said it was a long time and they weren't sure it was him, and they didn't want to say one way or the other in court because they didn't want to make a mistake. [¶] I don't know for sure the record has been destroyed of the car, which it's hard to say how that would cut. If it's his car, that would be bad for him. To pursue the issue of why he left, sometimes it could be he's running from the crime, or that's where his job took him, or that's -- in America people move all over the place. It's not a here nor there. [¶] The other factor he could have been caught had the system had all the warrants and things in place, because he'd been arrested many times when he was in the Chicago area, but I don't see any negligence. I don't see any significant prejudice, and it doesn't create in me a desire to dismiss this case under the laws that are applicable. There is some prejudice, but not enough. [¶] People have explained what happened, and I deny the motion."

DISCUSSION

Torres asserts his federal and state due process rights were violated by delay in arresting him. As such, he contends the court committed reversible error when it denied his motion to dismiss the charges. We agree.

"The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging." (*People v. Cowan* (2010) 50 Cal.4th 401, 430 (*Cowan*); *People v. Nelson* (2008) 43 Cal.4th 1242, 1250 (*Nelson*).) When, as here, a defendant does not complain of delay after his arrest and charging, but only of delay between the crimes and his arrest, he is "not without recourse if the delay is unjustified and prejudicial. '[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' [Citation.] Accordingly, '[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.' [Citation.]" (*Ibid.*; see *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1327-1330.)

In *Nelson, supra*, 43 Cal.4th 1242, our high court explained that "[t]he state and federal constitutional standards regarding what justifies delay differ" and, although "the exact standard [for due process violations] under [the federal] Constitution is not entirely settled[, i]t is clear . . . that the law under the California Constitution is at least as favorable for defendant in this regard as the law under the United States Constitution." (*Id.* at p. 1251.) The court concluded that "under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process." (*Id.* at p. 1255; *Mirenda, supra*, 174 Cal.App.4th at p. 1328.) However, a due process violation " 'claim based upon the federal Constitution also requires a showing that the [prearrest] delay was undertaken to gain a tactical advantage over the defendant.' [Citation.]" (*Nelson, supra*, at p. 1251.)

The court in *Nelson* also observed that "whether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*Nelson, supra*, 43 Cal.4th at p. 1256.)

Prejudice may be shown by " 'loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.' " (*People v. Catlin* (2001) 26 Cal.4th 81, 107, quoting *People v. Morris* (1988) 46 Cal.3d 1, 37, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) Even a minimal showing of actual prejudice may require dismissal if the proffered

justification for the prearrest delay is insubstantial. By the same token, the more reasonable the delay, the greater the prejudice the defense must show to require dismissal. (*Mirenda, supra*, 174 Cal.App.4th at p. 1327; see also *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185.) However, the court need not engage in the balancing process if the defendant has failed to meet his or her initial burden of showing actual prejudice since there is nothing against which to weigh such justification. (*Mirenda, supra*, at pp. 1327-1328.)

"We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them [citation]." (*Cowan, supra*, 50 Cal.4th at p. 431.)

Here, the People argue Torres failed to show prejudice. The People's argument, however, misses the mark. In ruling on Torres's motion, the court found "some prejudice" As such, we review the record to ascertain if substantial evidence supports the court's finding of prejudice. (See *Mirenda, supra*, 174 Cal.App.4th at p. 1330.)

We are satisfied substantial evidence supports the court's finding that the delay prejudiced Torres. As the court noted, "people's memories fade" and the over 14-year passage of time between when the crimes were committed and Torres's arrest impacted the eyewitnesses' memories. The majority of the prosecution's case was based on eyewitness testimony. However, two eyewitnesses were not able to identify Torres at the preliminary hearing. Torres's defense to the charges was based on mistaken identity. He claimed he was not the person driving the Datsun and threatening people with a gun.

Instead, Torres asserted it was Abel Paez, a Hispanic with a similar height and build as Torres, who committed the crimes. Abel Paez, who was in Riverside in August 1992, had moved away and Torres apparently could not locate him as a witness for trial. In addition, as the People conceded, there was very little physical evidence and the records of the car Torres allegedly used in committing the crimes were destroyed. In a case such as this, in which the passage of over 14 years from the date the crimes were committed to the arrest of the defendant, it would be difficult not to conclude a defendant was prejudiced by the delay.

The People argue the prosecution's case, not Torres's defense, was actually prejudiced because of the passage of time. Again, the prosecution's argument goes astray. We are not concerned with any prejudice the delay causes the prosecution. Instead, we are concerned about any prejudice the defendant experiences because of the delay. (See *Mirenda*, *supra*, 174 Cal.App.4th at p. 1329.)

Moreover, the passage of time clearly prejudiced Torres's counsel's opportunity to cross-examine one of the eyewitnesses at trial. Knowing that one of the eyewitness's could not identify Torres in court, the prosecution did not ask her to do so during trial. Instead, the prosecutor asked the eyewitness if she had selected a picture of Torres out of a photographic lineup in 1992. The prosecutor then objected to Torres's counsel's attempt to ask the witness if she could identify Torres in court. The court sustained the objection. Torres's attorney also was not permitted to question the witness about the photographic

lineup as the court again sustained the prosecutor's beyond the scope objection.² Thus, Torres was denied the opportunity to probe and expose the eyewitness's infirmities, most importantly, her ability to identify Torres as the man who threatened her with a gun some 17 years prior to the trial.³

Having determined that substantial evidence supports the court's determination Torres was prejudiced by the delay, we analyze the People's justification for the delay. (*Mirenda, supra*, 174 Cal.App.4th at p. 1329.) The court found the prosecution "explained what happened." In other words, the court was satisfied with the prosecution's justification for delay. We will uphold this finding if supported by substantial evidence. (*People v. Boysen* (2007) 165 Cal.App.4th 761, 777; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911-912.)

Here, the People offer no justification for the delay other than Torres had fled the jurisdiction. There is no justification at all proffered regarding the over 14-year delay since that time. The People did not attempt to show that they tried to locate Torres during the lengthy delay. Moreover, when the People finally did try to locate Torres, on or around November 1, 2006, they found him in Chicago, one of the two places they were told he might have relocated to in 1992. Further, Torres had been arrested in Chicago

² Torres's cross-examination of this eyewitness gives rise to his second issue in this appeal: whether he was denied his due process right to present a defense because the trial court sustained the prosecution's beyond the scope objection when Torres's counsel asked the witness if she could identify Torres in court. We do not reach this issue, however, because we reverse the judgment based on Torres's motion to dismiss.

³ The jury convicted Torres jury of assault with a firearm (§245, subd. (a)(2)) on both counts 6 and 7, which involved this eyewitness.

five times between July 30, 1995 and March 5, 2004. While there is some disagreement in the record whether the earlier arrests would have shown up on a CLETS report as did his most recent arrest, the fact remains the People do not explain their failure to even attempt to locate Torres during the over 14-year delay period.

In addition, this is not a case of investigative delay. Based on the record, the prosecution identified Torres as a defendant and secured an arrest warrant for him on November 2, 1992. No further investigation was needed or conducted. Nevertheless, the People provide no explanation for the 14-year delay to begin looking for Torres. To the contrary, the People merely blame Torres for the delay because Torres "ran from the jurisdiction just as he was about to get caught." Put another way, the People offer no justification for their delay, but only blame Torres for fleeing the jurisdiction where he committed the crimes. However, the court did not make any factual finding regarding why Torres left Riverside: "To pursue the issue of why he left, sometimes it could be he's running from the crime, or that's where his job took him, or that's -- in America people move all over the place. It's not a here nor there." The court thus found the prosecution had not established why Torres left Riverside, and his reason for doing so was insignificant to its analysis in any event. We see nothing in the record that leads us to different conclusion.

In summary, we determine this is a very acute case of delay. The prosecution was finished with its investigation in the fall of 1992 and the complaint against Torres was filed on November 2, 1992. Two separate people told investigators that Torres moved to Chicago or Puerto Rico. Even if these individuals were "guessing" as the People assert,

there is no indication the prosecution did *anything* to try to locate Torres for 14 years. And when it finally did try to locate Torres, it seemed to do so fairly easily and found him in Chicago where he had been arrested five times from July 1995 to March 2004. As such, we determine substantial evidence does not support the court's finding that the prosecution presented a justification for the delay under these extreme facts.

As we note above, even a " 'minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial.' " (*Mirenda, supra*, 174 Cal.App.4th at p. 1332, citing *People v. Dunn-Gonzales, supra*, 47 Cal.App.4th at p. 915.) Here, even if the prejudice was minimal, the People's justification of delay is virtually nonexistent. Any balancing of the prejudice and the justification therefore must tip in favor of Torres. Accordingly, we conclude the court abused its discretion in denying Torres's motion to dismiss for prearrest delay.

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to enter an order granting Torres's motion to dismiss all charges against him in this action.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.