

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ANTONIO RESVALOSO,

Defendant and Appellant.

E051096

(Super.Ct.No. SWF001373)

OPINION

APPEAL from the Superior Court of Riverside County. Rafael A. Arreola, Judge.
(Retired judge of the San Diego Super Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Affirmed.

Paul Stubb, Jr., for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, William M. Wood, and Marilyn L.
George, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

During an incident of road rage, the victim, Mark Walker, was shot to death in his truck. Defendant Joseph Antonio Resvaloso's first trial ended in a mistrial because five jurors voted for acquittal. In the second trial, a jury convicted defendant of second degree murder with enhancements for use of a firearm and a motor vehicle. The court sentenced defendant to a total prison term of 45 years to life

The primary issues involve when and how two trucks collided and who began shooting first. According to the prosecution, defendant began shooting at Walker after defendant rammed his truck into Walker's truck. According to defendant, either Walker or a bystander, Ryan Doka, or both, fired at defendant first and he responded by shooting in self-defense.

Defendant argues the trial court erred during the second trial in admitting defendant's prior testimony, including racist language from his statement to investigators, and in excluding evidence potentially relevant to defendant's claim of self-defense. Defendant also charges the prosecutor committed two incidents of misconduct. Defendant makes related claims for ineffective assistance of counsel (IAC) and cumulative error.

The standard of review favors the judgment: "We recite the facts in the manner most favorable to the judgment and resolve all conflicts and draw all inferences in favor of the prevailing party. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1233, fn. 2.)" (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th

549, 552-553.) Therefore, we focus on the significant testimony and evidence presented at trial and supporting the judgment. In the body of the opinion, we will address any contradictions, inconsistencies, and other matters relevant to defendant's arguments on appeal. We reject defendant's contentions and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was 18 years old when the subject events occurred on New Year's Day, January 1, 2003, on the Soboba Indian reservation, near the area of Soboba Road, Castile Canyon Road, and Poppet Flats Road. Soboba Road runs diagonally from northwest to southeast and intersects with Castile Canyon Road, which runs from southwest to northeast. Castile Canyon Road intersects with Poppet Flats Road seven-tenths of a mile to the northeast. Three people were involved in the incident: defendant, driving a GMC Sierra truck; Walker, driving a blue Nissan truck; and Ryan Doka, an armed bystander who intervened.

A. The Shooting of Mark Walker

At approximately 5:00 p.m., Allison Ciccone, who lived on Castile Canyon Road, heard the sounds of racing vehicles, then a crash, followed by people yelling and gunshots. Ciccone looked out her dining room window toward Poppet Flats Road and saw a truck had veered off the road and a man was slumped in the driver's seat. Ciccone observed another man on the road, carrying a shotgun or rifle, who got in a truck and drove away. The man appeared to be Native American.

Because she was pregnant, Ciccone was cautious about leaving her house so she called her mother-in-law, Mary Cozart, who was a nurse and lived a few doors away. Within 10 minutes of Ciccone's call, Cozart came to the scene and recognized the man slumped in the truck as her husband's first cousin, Mark Walker. Walker appeared to have been shot and he did not have a pulse. Cozart called 911. As Cozart waited, Walker's girlfriend, Sue Rhodes, approached the truck, upset and crying. Rhodes began embracing Walker's lifeless body. Cozart knew Walker drank too much and she noticed a cooler in the truck.

Rhodes testified Walker had been her boyfriend for five or six years and he often stayed at her house on Soboba Road, less than a mile from his house on Castile Canyon Road. On January 1, 2003, they spent the day together. They argued and she did not want him to leave her house because he was so drunk. Walker backed his truck into a tree, damaging the taillight. Rhodes recalled there was a cooler of beer and tequila inside the truck. A minute after Walker drove away, Rhodes heard gunshots and saw Walker's truck, traveling on Castile Canyon Road.

Ryan Doka, Rhodes's son, testified he was working on a car in Walker's front yard when he heard Walker's truck tires screeching to a stop. Doka saw a large, tan-colored truck hit the back of Walker's blue Nissan truck. When the tan-colored truck hit Walker's truck a second time and pushed it off the road, Doka ran to his own truck to get a rifle to help Walker. The driver of the tan-colored truck had pulled up beside Walker's truck and opened fire on Walker before Doka began shooting at the tan-colored truck. Doka did not see the shooter.

Anjelica Walker, Walker's niece, was in the front yard of Walker's house when she saw the tan-colored truck hit Walker's truck and heard gunshots before the tan-colored truck drove away. Anjelica saw Doka running, carrying a rifle, shooting, and driving away in his truck. Doka began shooting after the first gunshots. Anjelica told a detective she thought the tan-colored truck belonged to Gordon Arres. Anjelica disputed any suggestion that Doka had shot Walker.

Another witness, Stella Chacon, was sitting in her car on Castile Canyon Road when she heard vehicles racing and then the sound of metal striking metal. In her rear-view mirror, Chacon watched a beige truck hit Walker's truck twice, followed by gunshots. Chacon was a reluctant witness who had to be arrested after she did not obey a subpoena to testify. Geraldine Roflo, Chacon's passenger, also heard racing sounds, followed by a collision between a blue truck and a larger metal-colored truck, and gunshots.

After Doka learned Walker was dead, he told Rhodes, his mother, he thought the killer was "Little Gordy Arres" because he "had the same kind of truck." Rhodes was walking to her cousin's house when Doka told her Walker had been shot and killed. Rhodes reached Walker's truck in about five minutes by car. Rhodes saw that Walker had a bullet hole near his eye.

Judith Edwards, a deputy sheriff of Riverside County, arrived at the scene at approximately 5:15 p.m. A slight delay was caused by the special response procedures in place for the reservation. Deputy Edwards found a truck on Castile Canyon Road, partly blocking Poppet Flats Road. The truck was damaged on the front, the driver's side, and

the back with the driver's side taillight hanging. The driver was dead and Rhodes was beside him crying. Ten or fifteen people were gathered at the scene. No one admitted seeing the shooter.

Diane Morillo is defendant's cousin, Walker's cousin, and Sara Lugo's cousin. Morillo and defendant's mother are also cousins. On January 1, 2003, Morillo was at home on Poppet Flats Road. At approximately 5:00 p.m., when it was starting to get dark, defendant came to her door and was bleeding from his left hand. Defendant told Morillo, "I was shot." Morillo knew defendant drove a tan-colored truck. Defendant was accompanied by Leonard Arrietta. Lugo arrived in a white SUV and left with defendant and Arrietta. Defendant was treated for a wounded left hand in a hospital emergency room.

The next day, Doka left California and he was arrested in February 2003 in Fort McDowell, Arizona. Doka did not want to talk to the police because he feared retaliation. Finally, he agreed to tell them what had happened. He was not promised any benefits or leniency in exchange for his testimony. Doka had no grudge against defendant and he had never seen Walker and defendant together.

B. The Police Investigation

Walker was severely intoxicated when he died but the cause of death was gunshot wounds.

The two initial suspects were Gordon Arres and defendant. But Arres's truck did not display any relevant damage, including bullet holes or blue paint transfers.

Defendant's GMC Sierra truck, registered to defendant's mother, was located in her garage on January 2, 2003. The truck had a broken rear window and bullet holes in the back. Paint samples showed paint transfers had occurred from a collision between Walker and defendant's trucks. The GMC Sierra displayed other significant forensic evidence—including bullet holes, bullet strikes, copper fragments, defendant's blood and blood stains, a magazine clip, and ammunition—all linking defendant and the truck to Walker's shooting. Defendant's blood was also located in Lugo's car.

A firearms expert testified that eight 9-millimeter casings recovered from the scene of the shooting had all been fired from the same semiautomatic handgun.¹ Seven casings came from a rifle (as used by Doka). Two bullets recovered from Walker's body and one bullet recovered from his truck were from a semiautomatic handgun. None of the three bullets were from a rifle. The magazine recovered from defendant's vehicle could be used with a TEC-9 semiautomatic assault weapon firing nine-millimeter bullets. Walker's hands tested negative for gunshot residue.

C. Defense Evidence

Leonard Arrietta and Gordon Arres, both now deceased, were the brothers of Carole Arrietta. Carole was also a cousin to Rhodes, Lugo, and Morillo and related to defendant's mother, Linda. Carole lived at the corner of Castile Canyon Road and Soboba Road. On January 1, 2003, she was outside her house with her children and heard a crash followed by a "loud bang." Carole watched Walker drive up, crying and

¹ The actual weapon which killed Walker was never recovered. Defendant testified he had discarded the TEC-9 used in the shooting.

yelling. Eventually, he made a left turn on Castile Canyon Road, heading east toward Poppet Flats Road.

After Alexandra Gutierrez's Saturn sedan nearly collided with defendant's truck on Soboba Road, she had stopped to allow her passenger, Larry Arres, to talk to defendant. Gutierrez watched a blue pickup truck turn on to Soboba Road at the intersection of Soboba and Castile Canyon Roads. The driver looked angry. Although she did not know Walker, Gutierrez claimed he fired a gun at her and Larry as they drove up Castile Canyon Road toward the intersection of Poppet Flats Road. She saw two bullets hit the dirt in front of defendant's truck.²

As the blue truck proceeded up Castile Canyon Road, defendant followed in his truck. Gutierrez continued in the same direction and nearly hit the rear of defendant's truck. She heard tires screeching and a crash and she saw the back of defendant's truck lift up. Both trucks continued and there were "a lot" of gunshots. Gutierrez saw the blue truck in a ditch with a woman crying inside. Gutierrez saw defendant's truck turn right on Poppet Flats Road and drive away.

Gutierrez was friends with defendant. She visited him in jail and wrote letters to him and talked to him on the telephone. Over the years she offered different details about what happened on January 1, 2003, in her statements to the police and previous testimony. She said there were one or two other persons in defendant's truck, identified as Gordon Arres and Leonard Arrietta. She omitted any mention of Walker shooting at

² In 2008, Gutierrez had told an investigator Walker fired four shots. In 2009, she testified in defendant's first trial she heard five to ten shots.

her. She estimated a lapse of 20 minutes occurred between her nearly colliding with defendant's truck and driving past Walker's truck.

Dino Moreno was a defense witness who testified while serving a prison sentence of 109 years to life for attempted murder and other crimes. He was at the Arres residence on Castile Canyon Road when he heard cars racing, a crash, and gunfire. He rushed to the scene where Doka was present with Whanona Rubio. Moreno had been smoking marijuana and drinking beer but he did not think his perceptions or memory were affected. The blue truck was damaged and the back windows broken. Walker was slumped over and Doka was trying to reposition the body. Moreno claimed that, in an effort to protect Walker from being charged with a crime, he removed two guns from the car—a .357 revolver with four expended casings and one live shell and a loaded .38 snub-nose pistol. Moreno was friendly with defendant and his family and had offered to assist the defense.

D. Defendant's Testimony

Defendant had grown up on the Soboba reservation and known Walker all his life. In November 2002, Walker had trailed defendant for about 30 minutes as he drove around the reservation.

Defendant spent New Year's Eve with his cousin, Morillo, on Poppet Flats Road. He drank some beer and smoked some marijuana. At approximately 3:00 a.m. on January 1, 2003, he drove the GMC Sierra to his mother's house in San Jacinto, which was about five minutes away.

Defendant got up at noon on New Year's Day. Defendant was four or five years older than Leonard Arrietta but they were friends and they spent the day driving around the reservation.

As defendant was driving southeasterly on Soboba Road, Walker pulled out of his driveway at a high speed and fishtailed in the middle of the road, just missing defendant's truck. Defendant believed Walker was intoxicated. Defendant stopped to talk to Larry Arres in the Saturn driven by Gutierrez. Defendant began driving up Castile Canyon Road. He did not hear any gunshots but he always played loud music. Defendant had to slam on his brakes to avoid hitting Walker's truck, which had stopped in the middle of the road.

The two trucks continued driving northeast on Castile Canyon Road. Defendant had a TEC-9 gun under the seat. As he came around a curve, defendant saw Walker had stopped again in the middle of the road. Defendant was afraid of Walker and he moved the gun for better access. Defendant thought he had seen Walker or Doka shooting at a house two nights earlier. Defendant saw that one of Walker's taillights was hanging down. Walker continued to drive erratically while defendant followed. Finally, Walker made a flagging gesture at defendant. When defendant tried to pass him on the right, Walker rammed his truck into defendant's truck on the driver's side. Defendant thought Walker was shooting at them. Leonard, defendant's passenger began screaming and defendant's back windows were shattered.

Defendant heard a gunshot and grabbed his gun. At first defendant's gun jammed but then he fired seven shots because Walker was pointing at him. Using his left hand,

defendant shot out the window to protect himself and Leonard. Defendant thought Walker, not Doka, was shooting at them.

Afterwards defendant drove off, discarded the gun, and abandoned his truck. He went to his cousin Morillo's house for aid and Lugo took defendant and Leonard to a motel. Then defendant hired a lawyer.

When defendant was arrested and interviewed, he did not tell the investigators about Morillo and Lugo's assistance because he did not want them to get in trouble. He thought if he was honest the police would let him go. He admitted there were inconsistencies between his statement and his testimony. Some of what he told investigators was not based on his personal knowledge but what he heard from other people on the reservation before he surrendered to custody.

In summary, defendant testified that he knew and was apprehensive about Walker. Defendant thought Walker was armed and fired upon him first. Defendant's back windows were shot out and Leonard began screaming before defendant fired. Defendant's motivation was self-defense.

III

ADMISSIBILITY OF DEFENDANT'S PRIOR TESTIMONY AND STATEMENT

A. The Parties' Contentions

The primary issue on appeal involves the effect of an error in the first trial on the second trial. Relying on *Massiah v. United States* (1964) 377 U.S. 201, 207 and *People v. Viray* (2005) 134 Cal.App.4th 1186, the parties agree that the first trial court violated defendant's Sixth Amendment right to counsel when it ruled that defendant's 2003

statement to the police was admissible in the first trial in 2009. Respondent concedes that defendant's right to counsel was violated when the investigators interviewed defendant after defendant's attorney had informed them defendant would not give a statement.

Defendant claims he was compelled to testify in the first trial based on the court's erroneous ruling. As a consequence, defendant contends the second trial court should not have admitted his statement to investigators or his prior testimony from the first trial.

Respondent, however, proposes a distinction can be made between the first and second trials. In the first trial, the prosecution elected not to introduce defendant's statement during its case-in-chief. Nevertheless, defendant voluntarily waived his privilege against self-incrimination by testifying and introducing his statement as part of defendant's case. The second trial court made a factual finding that defendant voluntarily introduced his statement into evidence in the first trial. Because defendant acted voluntarily and waived his privilege against self-incrimination in the first trial, respondent contends the second trial court did not err in ruling defendant's statement and his prior testimony were admissible in the second trial in which he also waived his privilege and testified voluntarily.

B. The History Concerning Defendant's Statement and Prior Testimony

After issuance of an arrest warrant, defendant's lawyer, Eric Shevin, contacted the investigator, John Cook, on January 13, 2003, to arrange for defendant's surrender and for defendant to give a statement. The next day, Shevin changed his mind and retracted the offer for defendant to give a statement. Nevertheless, the two criminal investigators were instructed to take a statement from defendant, which they proceeded to do. The

investigators advised defendant of his *Miranda*³ rights, which defendant waived before giving his lengthy statement.

During the first trial, although the court had ruled defendant's statement was admissible, the People did not introduce it. Instead, defendant preemptively offered the statement during his own testimony. Defense counsel explained defendant testified because "if my client's statement did not come in, it is very unlikely that I would put him on the stand. If I do put him on the stand now, it will be because of this issue. And the reason I want to make that clear is because I think it is going to open up the door to a lot of other evidence that also wouldn't come in."

During the second trial, the trial court ruled that, if defendant testified, his recorded statement would be admissible only as impeachment. But, if defendant chose not to testify, his prior testimony from the first trial and his statement were admissible. In support of its ruling, the trial court reasoned that defense counsel had made a tactical decision in the first trial to have defendant testify voluntarily and to introduce his statement instead of waiting to present surrebutal testimony "if the People, in fact, presented on rebuttal the testimony of the detectives about your client's admissions and statements." In the second trial, defendant again made a tactical decision to testify, including introducing his statement and prior testimony.

³ *Miranda v. Arizona* (1969) 396 U.S. 868.

C. Analysis

Both parties cite state and federal authority holding: ““A defendant who chooses to testify waives his privilege against compulsory self-incrimination *with respect to the testimony he gives . . .*.”” (*People v. Malone* (2003) 112 Cal.App.4th 1241, 1245, citing *Harrison v. United States* (1968) 392 U.S. 219, 222.) In *Harrison*, the United States Supreme Court held that defendant’s wrongfully-obtained confession from one trial could not be used in a subsequent trial to compel defendant to testify. The principle against compelled testimony, as expressed on *Harrison*, does not apply here where defendant was not compelled to testify by the prosecution introducing defendant’s statement and prior testimony. Instead, the trial court found defendant had testified voluntarily.

The trial court ruled that, although the prosecution could have introduced defendant’s statement in the first trial, it did not do so. As a general matter, defendant’s statement and prior testimony were admissible in the second trial as a party admission and as former testimony. (Evid. Code, §§ 1220, 1290, and 1291.) The trial court made a factual finding, to which we must defer on appeal, that defendant testified voluntarily at both trials because he wanted to explain what had happened. Because the prosecution did not introduce any evidence of defendant’s prior testimony or his recorded statement in its case-in-chief in either the first or the second trial, the trial court did not commit error when defendant chose to testify voluntarily and to introduce his recorded statement as part of his defense. (*People v. Griffith* (1960) 181 Cal.App.2d 715, 719-720.)

For the same reason—because defendant testified voluntarily—this case did not involve *Massiah* error, in which a nontestifying defendant’s statement, obtained

unlawfully, cannot be used against him at trial. (*Massiah v. United States, supra*, 377 U.S. 201.) Because defendant introduced the evidence himself, the second trial also did not involve the prosecutor's wrongful effort to withhold evidence until rebuttal. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1211.)

Additionally, although defendant does not expressly assert an argument about sufficiency of the evidence, defendant does suggest that the prosecution needed defendant's statement and prior testimony to prove its case. Of course, the prosecution did not introduce the statement and prior testimony. Furthermore, substantial circumstantial evidence supported the jury's conviction. The prosecution argued that defendant became angry at the intoxicated Walker for driving erratically and shot him to death after their trucks collided. During the prosecution's case, the witnesses identified defendant's truck at the scene. Defendant's truck was later located and was found to be damaged in ways consistent with how the witnesses described the shooting. Defendant, of course, was injured on his hand the night of the shooting and sought help from his cousins before being treated at a hospital. Circumstantial and forensic evidence supported that defendant fired the nine-millimeter weapon that killed Walker. All of these facts were established without any testimony or statement from defendant and constituted substantial evidence of defendant's guilt without recourse to his testimony or statement.

We also reject defendant's related argument concerning IAC based on defense counsel purportedly advising defendant to testify. As we have already explained, defendant's trial attorney emphatically asserted that defendant's decision to testify in

both cases was knowing, intelligent, and entirely volitional, an assertion supported by defendant's own testimony. The record does not support a claim for IAC. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

IV

OTHER EVIDENTIARY ERROR

We review evidentiary rulings for an abuse of discretion, meaning a ruling which falls outside the bounds of reason. (*People v. Waidla* (2000) 22 Cal.4th 690, 714; *People v. Weaver* (2001) 26 Cal.4th 876, 933.) Some of the evidentiary rulings made by the second trial court differed from those made by the first trial court. Defendant claims his defense was "eviscerated" by the second trial court. In particular, defendant identifies error in excluding the following evidence: Walker's .36 blood alcohol content at the time of death; Walker's involvement as a victim in two past shootings; the suggestion that Rhodes might have suspected Gordon Arres of killing one of her sons, Doka's half-brother; and Doka's history of feuding with Arres.

Respondent contends the trial court did not abuse its discretion under Evidence Code section 352 and that the second trial was different than the first trial because of the testimony from additional witnesses, Chacon, one of the bystanders, and Angelica, Walker's niece.

Here it was not an abuse of discretion; in fact, it was entirely reasonable to exclude as irrelevant Walker's history as a victim of two previous shootings in which defendant was not involved. The history of a feud between Doka and Arres also seemed irrelevant and, in any event, there was no preliminary showing made by the defendant that a feud

actually existed. The record offers no support for defendant's speculations that there was ongoing conflict between Arres, Walker, Doka, and Rhodes that was pertinent to defendant shooting Walker.

As to the blood alcohol level, defendant argues he should have been allowed to present evidence that Walker's level of intoxication, which typically results in a coma or death, would certainly increase the potential for violence and impaired judgment. But defendant's expert was not able to support her opinion with appropriate studies. Notwithstanding the absence of expert opinion, the jury heard testimony from several witnesses, including the pathologist, about Walker's extreme level of intoxication. Chacon and Walker, who did not testify in the first trial, also testified about Walker's erratic driving and how the gunshots began before Doka started shooting. The jury did not need the expert evidence about Walker's level of intoxication and the trial court did not abuse its discretion in excluding it.

V

RACIAL BIAS

In his recorded statement, defendant claimed a person had been standing next to Doka and firing on defendant. Defendant repeatedly using a common racial epithet for an African-American to describe the unidentified shooter. Defendant also proclaimed, "I don't talk to black people," a statement which the court allowed. In spite of defendant's language, there was no evidence whatsoever that an African-American person was involved in these events. Apparently, defendant was using the racial epithet pejoratively, not factually.

When defendant's interview was played for the jury, the racial epithet was redacted or made unintelligible. The single phrase in which defendant seems to express mild bias against "black people" hardly constituted prejudice to defendant in the context of this protracted trial. We find no prejudicial error in the possibility the jury may have discerned the use of the racial epithet or in allowing the comment about "black people."

VI

PROSECUTORIAL ERROR

In cross-examination, the prosecutor asked defendant if he was glad Leonard Arrietta was dead because that meant Arrietta's statement could not be used to impeach defendant's testimony. Defense counsel also objected to an instance of the prosecutor "laughing in front of the jury and making faces."

Defendant argues the prosecutor committed prejudicial misconduct. We disagree. The court cured any harm by fully admonishing the jury concerning the prosecutor's references to Arrietta being dead and unavailable to testify. (*People v. Friend* (2009) 47 Cal.4th 1, 29.) The second incident of laughing was isolated and promptly addressed by the court. (*Id.* at pp. 31-32.) Neither "of the asserted instances of misconduct was of such severity, considered alone or together with the other asserted instances of misconduct, that it resulted in an unfair trial in violation of defendant's state and federal constitutional rights." (*Id.* at p. 30.)

VII

DISPOSITION

The second trial court did not err in ruling defendant's statement and prior testimony were admissible. The prosecutor did not commit misconduct. In the absence of prejudicial error, we hold there was no cumulative error. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

KING
J.