Filed 9/24/13 P. v. Aguilar CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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. ROBERTO GALLARDO AGUILAR, Defendant and Appellant.	E056124 (Super.Ct.No. SWF029134) OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed.

Raymond DiGuiseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Roberto Gallardo Aguilar killed his wife and then set her on fire on the side of a road in Lake Elsinore. Defendant called his uncle and told him what he had done, but later threatened his uncle not to testify against him.

Defendant was convicted of first degree murder and attempting to dissuade a witness from testifying against him. Defendant now claims on appeal as follows:

1. Riverside County was not the proper venue for the charge of attempting to dissuade a witness because the crime was committed in Orange County.

2. The information did not give him proper notice of the charge of attempting to dissuade a witness because it alleged the crime occurred in Riverside County when it was completed in Orange County.

3. The trial court improperly denied his Penal Code section 1118.1[1] motion to dismiss the charge of attempting to dissuade a witness.

We affirm the judgment.

I

PROCEDURAL BACKGROUND

Defendant was found by a Riverside County Superior Court jury guilty in count 1 of first degree murder (§ 187, subd. (a)), and in count 2 of attempting to dissuade a witness from attending and giving testimony at trial (§ 136.1, subd. (a)(2)). In a bifurcated proceeding, after waiving his rights, defendant admitted that he had suffered

[1] All further statutory references are to the Penal Code unless otherwise indicated.

one prior serious and violent felony offense (§§ 667, subds. (a), (c) & (e)(1), 1170.12, subd. (c)(1)). A section 1118.1 motion, brought after the jury reached its verdict, was denied.

Defendant was sentenced to an indeterminate state prison term of 50 years to life for the first degree murder. In addition, he was sentenced to a determinative term of six years for his conviction of attempting to dissuade a witness, and five years for the prior serious felony conviction; both sentences were ordered to run consecutive to the murder sentence. He received a total prison sentence of 50 years to life, plus 11 years.

II

FACTUAL BACKGROUND[2]

A. *People's Case-in-Chief*

1. *Murder of Sharon Contreras*

Defendant married Sharon Contreras in 2007. Contreras's father helped them buy a house in Lake Elsinore. They only lived in the house for a brief period of time and moved into a house in Garden Grove.

Felix Mendez worked with defendant at Heat Ultra Nightclub (Heat) located in Anaheim. Prior to May 23, 2009, defendant had told Mendez that he would rather see Contreras dead than with another man. Defendant told Mendez that he thought about killing her. Defendant told Mendez that Contreras had left him. Defendant also told Mendez that he had hurt Contreras on three occasions. Defendant cut her on her stomach

---

[2] Defendant raises no issues on appeal attacking his conviction of murdering his wife. As such, we only briefly provide the facts of her murder.

with a kitchen knife. Contreras sought medical treatment but did not identify defendant as the perpetrator. In October 2008, Contreras reported that defendant had bruised her thigh by pushing her into a wall but no charges were filed.

Contreras's parents had seen her with bruises on her face prior to her death. Contreras filed a Petition for dissolution of marriage in Orange County on April 21, 2009.

On May 22, 2009, defendant and Mendez were working as busboys at Heat. Sometime around 2:00 a.m., on May 23, defendant disappeared without permission to leave. On May 23, 2009, at around 11:00 a.m., defendant entered the Garden Grove Police Department and reported that Contreras was missing.

Jeff Roach was delivering newspapers in the area of the I-15 freeway and Lake Street in Lake Elsinore at 3:30 a.m. on May 23, 2009. While he was driving on Temescal Canyon Road, he observed a fire; no one else was around. He stopped to see if he could put out the fire. Roach approached the fire and determined there was a person's body in the fire. Roach and several other persons who arrived could not put out the fire. Alexander Campos and his friends were driving in the same area when they observed the fire. Campos and his friend observed a leg in the fire. They called the police at 3:45 a.m.

Riverside County Sheriff's Deputy Jared Hansen was dispatched to the fire at 3:43 a.m. It was clear a body, later identified as Contreras, was in the fire. Deputy Hansen attempted to put out the fire with two fire extinguishers but was unsuccessful. The fire department put out the fire. Clothing found on the body contained gasoline. Dental records were used to identify Contreras's burnt corpse. Contreras was still wearing a ring.

An autopsy was performed on May 26, 2009. Contreras's body was "completely and totally charred." She had a broken arm but it was likely caused by the heat of the fire. There was no evidence of blunt force trauma, gunshot or stabbing. Contreras had purple discoloration in her upper mouth, which was more than likely a bruise. She did not die of natural causes. Contreras was already dead when she was set on fire. Strangulation was a possible cause of death but was not confirmed. There was no evidence of any drugs in her system that would kill her. The coroner could not conclusively determine a cause of death but it was as a result of a homicide. The most likely cause of her death was smothering and cutting off her airway.

Telephone records from defendant's cellular telephone were obtained. An expert explained that when a call is made to or from a cellular telephone, the signal connects to the nearest cellular telephone tower. The average maximum range for a cellular telephone tower was 2 to 10 miles. A call was made from defendant's telephone on May 23 at 1:44 a.m. from the area of Katella Avenue in Orange County. Another call was made at 3:35 a.m. on May 23 and the cellular tower used was located at 61000 Lake Street in Lake Elsinore. Another call was also made at 3:40 a.m. and a cellular telephone tower located on Temescal Canyon Road in Corona was used. At 4:09 a.m., defendant's phone used a cellular tower located on Brookhurst Street in Garden Grove.

Heat was located on Katella Avenue, approximately one-half mile from the cellular tower where the call was made at 1:44 a.m. Contreras's body was found one-quarter mile from the cellular telephone tower where the 3:35 a.m. call was made.

2. *Threats to Sandoval*

Luis Sandoval was defendant's uncle. Sandoval allowed defendant and Contreras to live with him in Garden Grove. On May 26, 2009, Sandoval was working at his job at a Norm's Restaurant, which was located approximately 30 minutes from his home. Sometime that evening, defendant called Sandoval's cellular telephone. Defendant told Sandoval that "I didn't want to tell you" but that he "fucked up" Contreras. When Sandoval's shift was over at 11:00p.m., he went home and found defendant standing outside near the house. Defendant told him, "I didn't really want to say this to you. But you see, [Sandoval], I'm the only one who knows how I was feeling. And, well, I didn't really want to tell you but I killed [Contreras] and I threw her out and I burned her. And if anyone comes to ask for me, please tell them that I don't live here anymore and someone will come and pick up my stuff." Defendant said these words in a very calm manner. Defendant then turned around and walked down the street.

Garden Grove Police Detective Robert Campbell was dispatched to Sandoval's home in Garden Grove on May 27, 2009. Sandoval told Detective Campbell that defendant had told him that he killed and burned Contreras.

A call between Maricela Gallardo, defendant's sister, and defendant, occurring on August 31, 2009, was recorded while defendant was incarcerated in the Orange County jail. Defendant asked Maricela if she took the "paper" to Sandoval. Defendant also told Maricela to tell Sandoval that the reason he was in jail was because Sandoval began to talk. Defendant told Maricela to go to Sandoval.

In early September 2009, Sandoval found a note on the windshield of his car while it was parked at his work. The note stated for his own good, he should not go to court, and that he may regret it later. Sandoval believed it was meant to scare him away from attending court. Sandoval had no court proceedings scheduled at the time so he was confused and was also scared.[3] Further, written in the fog on his windshield were the words, "If you set foot in court you'll see what is going to happen to you." Sandoval took it as a threat. Sandoval was afraid because of the message and also because he had told on defendant. Because of the threats, Sandoval moved out his house. Sandoval had thrown the note on the ground and never saw it again.

During an interview at the Garden Grove police department, Sandoval stated, in front of defendant and an officer, that defendant had told him that he had killed and burned Contreras. Defendant admitted making the statement but claimed he didn't know why he said it; he didn't mean it.

B. *Defense*

Defendant testified on his own behalf. On May 22, 2009, he had been working at the Heat and a busboy told him he could leave early. He came home and found Contreras was missing. Her cellular telephone was in the room. Defendant drove around looking for her. He drove to Lake Elsinore to see if she was with her parents. At the last minute, he turned around and never went to the house where he and Contreras used to live.

---

[3] At the time, Sandoval had not been contacted by the Orange County District Attorney to appear in court on the case. Defendant had been arrested by the time Sandoval had found the note on his car.

During this time, he called Maricela to see if she had seen Contreras. He also called his other sister. He drove back to the house in Garden Grove. The following day he reported Contreras missing.

During the day of May 22, defendant and Contreras had an argument. He slapped her face. Defendant was arrested on May 27. During interviews with police, he was in shock and confused because he found out Contreras was dead. He was not really "conscious" in answering their questions. When he told Sandoval he "fucked up" Contreras, he was talking about earlier in the day when he had slapped her face. Defendant recalled being in the Orange County jail for three or four months.

Defendant admitted telling Maricela to talk to Sandoval about why he was saying things that were not true. He felt the only reason he was in jail was because of what Sandoval was saying about him. Defendant did not leave a note on Sandoval's car. He did not tell Maricela to put the note on Sandoval's car.

Defendant denied that he ever told Mendez that he thought about killing Contreras or that he hurt her with a knife. Defendant never told Detective Campbell that he killed Contreras; he did not kill her. Defendant claimed he never saw divorce papers. Defendant denied he ever said anything about Contreras to Sandoval in person. Defendant had no idea why Sandoval and Mendez were saying the things they said in court.

Maricela denied that she ever put such a note on Sandoval's car and never directed someone else to put a note on Sandoval's car.

III

PROPER VENUE FOR PROSECUTION OF ATTEMPTING TO DISSUADE A WITNESS CHARGE (COUNT 2)

Defendant claims on appeal that his conviction for dissuading a witness in count 2 must be reversed because the proper venue for the charge to be brought was in Orange County and not Riverside County.

A. *Additional Factual Background*

On May 27, 2009, defendant was arrested and taken into custody by the Garden Grove Police Department. A felony complaint was filed on October 8, 2009, alleging that the charge of dissuading a witness occurred in Riverside County. At some point, the matter was transferred to Riverside County. The preliminary hearing was conducted in March 2010, in Riverside County, and Sandoval testified that he received the threatening messages on September 1, 2009 at his work.

The information alleged that count 2 occurred in Riverside County. The charge was read to the jury as for count 2 to have occurred on or about September 1, 2009, in Riverside County.

After the People's case-in-chief, defendant brought a section 1118.1 motion regarding the dismissal of both counts but specifically addressed count 2. Defendant's counsel essentially argued that the evidence did not support the charge. Sandoval was the only person who saw the notes. Further, he was not scheduled to attend court at the time the notes were received. The People argued the evidence supported the charge as a scheduled court date was not necessary and Sandoval did not have to be in fear. The trial

court found there was reasonable, credible evidence to allow the charge to go to the jury. Defendant never objected to the improper venue.

Just prior to sentencing, defendant sought to renew his section 1118.1 motion as to count 2. Defendant's counsel argued that there was nothing in the record that "Orange County had seceded jurisdiction to prosecute" on the charge. The People argued that count 2 was properly joined with the murder charge. The trial court denied the renewed motion without explanation.

B. *Analysis*

"Venue is a question of law that is governed by statute. [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 1276, 1282.) Section 777 provides that "except as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." There are statutory exceptions to this general rule, however. For example, former section 781, in effect at the time of defendant's trial, stated that "[w]hen a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory." (Stats. 1951, c. 1674, p. 3832, § 11.)

Initially, the People contend that defendant has forfeited his claim of improper venue by failing to raise it prior to trial. We agree that defendant has forfeited the claim.

In *People v. Simon* (2001) 25 Cal.4th 1082, the court held as follows: "In light of the nature and fundamental purpose of the venue safeguard, we conclude that under the general forfeiture doctrine, a defendant in a felony proceeding who fails timely to assert an objection to the venue in which the proceeding has been brought and is to be tried should be found to have forfeited any right to object to trial in that venue. As discussed above, the question of venue does not involve a matter of a court's fundamental authority or subject matter jurisdiction over a proceeding. Instead, the right to be tried in a statutorily designated venue is intended, from the perspective of an accused, as a safeguard against being required to stand trial in an unrelated and potentially burdensome distant location. This protection can be meaningfully afforded to a defendant only if he or she objects to venue *before* being required to proceed to trial in the allegedly improper locale. If a defendant's timely challenge to venue is sustained, the trial can be conducted in the proper location, before the parties, the witnesses, and the court have incurred the burden and expense of a trial in an unauthorized venue." (*Id.* at pp. 1103-1104.) "[A] defendant who fails to raise a timely objection to venue in a felony proceeding forfeits the right to object to venue . . . on appeal. [Citations.]" (*Id.* at p. 1104.) Such objection must be made prior to the commencement of trial. (*Id.* at p. 1107.)

Here, defendant waited until the jury returned its guilty verdict to object to the venue. It was clear he was on notice that the charge occurred in Orange County as he was advised at the preliminary hearing of the date that Sandoval received the messages and that he was at work. The information alleged the date and victim putting him on notice that the crime occurred in Orange County.

Defendant argues that *Simon* allows review if there are "unusual circumstances" despite a lack of objection. No such unusual circumstances are present in this case. Defendant was aware that the charge occurred in Orange County. Further, his claims that we should review his claim because he is entitled to constitutional protections are of no avail. He essentially asks this court to reject *Simon*. We are bound by *Simon*, which is clearly applicable to this case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant forfeited any claim of improper venue by failing to object prior to the commencement of trial. Since the law of forfeiture in this instance is well settled, we need not address the merits of defendant's claim.

IV

LACK OF NOTICE

Defendant further claims that he did not receive adequate notice of the charge in count 2 because the information alleged that the crime was committed in Riverside County when the crime was completed in Orange County. As noted, *ante*, the information provided that count 2 occurred on September 1, 2009, in Riverside County. Defendant has waived this claim on appeal. A defendant is required to object to such a variance in order to preserve the issue on appeal. "[D]efendant has forfeited his right to object to an alleged variance between the pleading and the proof by failing to raise the objection in the trial court. [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 427.)

In order to avoid this forfeiture, defendant claims that the variance is of a "substantial character." He insists that even without a showing of prejudice, forfeiture

will not be found where substantial evidence at trial did not correspond to the charges established at the preliminary hearing.

What defendant ignores is that he waived any objection to improper venue. As such, he could not complain that the information erroneously stated count 2 occurred in Orange County as a basis for a variance in the pleading that was of a substantial character.

Further, this variance in the information was not prejudicial to defendant and did not impede his ability to bring his defense. As noted, at the preliminary hearing, Sandoval testified that on September 1, 2009, he received the notes on his car. Defendant was well aware of the allegations supporting count 2. In his defense, he claimed that there were no witnesses to the notes and defendant adamantly denied he directed Maricela to put the notes on Sandoval's car. Maricela denied that she put the note on Sandoval's car. It is inconceivable how defendant would have prepared his defense differently if the information had stated the charge occurred in Orange County. Defendant's claim of variance in the information requires reversal is forfeited.

V

DENIAL OF HIS MOTION TO DISMISS (§ 1118.1)

Defendant, in another attempt to avoid forfeiture of his venue claim, insists that the trial court should have granted his section 1118.1 motion because the evidence could not support a jury finding that count 2 occurred in Riverside County.

"'The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate

court in reviewing the sufficiency of the evidence to support a conviction, that is, "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."' [Citation.] 'The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.' [Citations.] The question 'is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.' [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review." (*People v. Stevens* (2007) 41 Cal.4th 182, 200.)

Initially, defendant cannot avoid forfeiture by failing to object prior to trial and then claiming the evidence did not establish the proper venue. Such finding would be in direct contravention of *Simon*. Moreover, "[v]enue does not constitute an element of any crime, and hence is not a necessary component of any verdict of guilty for any crime." (*People v. Posey* (2004) 32 Cal.4th 193, 216.) As such, the trial court properly denied defendant's motion for acquittal.

VI

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.