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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GINO FLORENZO HERNANDEZ,

Defendant and Appellant.

F065741

(Super. Ct. No. VCF257863)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Conness A. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General for Plaintiff and Respondent.

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A jury found defendant Gino Florenzo Hernandez guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)¹) and found true the special allegation of infliction of great bodily injury (§ 12022.7, subd. (a)). He was sentenced to nine years in prison.

In this appeal, Hernandez contends the trial court gave an erroneous jury instruction on moral turpitude. The People do not disagree but respond that the alleged error was harmless. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On December 16, 2011, the Tulare County District Attorney filed an information against Hernandez charging him with a single count of assault with a deadly weapon. The district attorney alleged that, on or about September 17, 2011, Hernandez committed an assault upon Raul Barrera with a knife and by means of force likely to produce great bodily injury. It was further alleged that Hernandez personally inflicted great bodily injury on Barrera and that he had served three prior prison terms (§ 667.5, subd. (b)).

Motion in limine to sanitize prior felony convictions

A jury trial began on June 4, 2012.² Hernandez filed a motion in limine to exclude evidence of his prior criminal convictions from 1992, 1993, and 1995 and to sanitize his convictions from 2002 and 2006, should he decide to testify. Hernandez's 2002 conviction was for violation of section 273d—cruel or inhuman corporal punishment upon a child—and his 2006 conviction was for violation of section 245, subdivision (a)(1)—assault with a deadly weapon. The court granted the motion, finding that the convictions from 1995 and earlier were too remote and the 2002 and 2006

¹Subsequent statutory references are to the Penal Code unless noted otherwise.

²Previously, trial was set to start on April 16, 2012, and prospective jurors were selected that day. The alleged victim, Barrera, failed to appear at trial as agreed, and the prosecutor requested a continuance. The trial court found good cause to continue the matter and set trial for June 4, 2012.

convictions “should be sanitized because they’re both really acts of violence” and “would be too prejudicial for the jury to hear exactly what the convictions were” The court ruled Hernandez could be asked if he had been “convicted of a felony crime of moral turpitude.”

Prosecution’s case

At trial, Raul Barrera testified he could not remember anything from September 17, 2011. He stated, “Only thing I could tell you is I don’t remember nothing. The only thing I remember is losing a lot of blood that day.” After further questioning from the prosecutor, Barrera agreed that, at some point that day, he was sitting on the front porch of his house in Farmersville with his neck slashed open. He remembered that someone asked him for a cigarette; he testified, “I told him I didn’t have one. The next thing I know I walked back to my house and I’m getting cut.” Barrera did not see his attacker in the courtroom. He did not recall speaking with Farmersville Police Officer Jeremy Brogan in the hospital and telling the officer that “Gino” stabbed him, and he did not remember speaking to Farmersville Police Sergeant Orlando Ortiz the day after he was stabbed. Barrera testified that he did not know Hernandez and did not recognize him.

The prosecutor played an audio recording of an interview between Sergeant Ortiz and Barrera that took place on September 18, 2011. Hearing the recording did not help Barrera remember anything.

In the recorded interview, Ortiz asked what Barrera remembered about the previous day. Barrera said his friend Matt woke him up and told him someone wanted to see him. Barrera walked out of his house without his shoes but with his socks on. The man asked if he had a cigarette. Barrera turned to see if he had a cigarette and felt a “knife go right through [his] neck.” During the interview, Barrera could not name his attacker, but he had seen him before and they had worked together at Alvarez Air about four or five years previously. Barrera did not have any problems with the man who attacked him; in the past, he would see the man going by and say, “Hey buddy, how you

doing” Barrera was shown a photo lineup and chose a photo that could have been his attacker. He expressed concern that people would say he “ratted” and “come try to get [him] again”

Sergeant Ortiz testified, among other things, that the photo Barrera picked out of the photo lineup was of Hernandez.

Officer Brogan testified that, on the day of the attack, he was dispatched to the hospital where Barrera was taken. Brogan stood with Barrera in a recovery room after Barrera had surgery. When he awoke, Barrera said that he could have died that day, and Brogan agreed and said he was lucky. Barrera said, “What hurt me the most was my homey stuck me.” Brogan asked who stuck him, and Barrera responded “Gino man.” Barrera told him that Gino had asked him for a cigarette and then pulled out a blade. Barrera said he and Gino were friends and they had worked together. Brogan asked if he was talking about Gino Hernandez, and Barrera confirmed that he was referring to Hernandez.

A Farmersville police sergeant who was dispatched to Barrera’s house testified that he observed a blood trail that began at Barrera’s house and ended at Hernandez’s father’s house.

A sheriff’s deputy who works at the main county jail classifying inmates also testified. He classifies inmates by their history and status to determine what kind of housing they need; inmates are classified as “general population,” “protective custody,” or “ad[ministrative segregation].” The purpose of classification is the safety of the inmates and the safety and security of the facility. The deputy testified that, when he spoke to Hernandez for classification purposes, Hernandez told him he was a Northern gang member,³ and past issues regarding gang status were not valid. Hernandez told him

³While the classification deputy spoke only of “Northerners,” another witness used the terms “Northerner” and “Norteno” interchangeably referring to a street gang commonly called the Norteños and its members.

that he would have no problems in general population housing. The deputy further testified that Northern gang members are housed in general population. Hernandez was initially classified as “general population” but was reclassified as “protective custody” later the same day.

Defense

Hernandez testified on his own behalf. Early in the morning on September 17, 2011, he went to his father’s house in Farmersville. He made breakfast and then he and his father did some yard work. Later, his father was barbecuing and Hernandez decided to go to the store to get bread or tortillas. He walked by a house and Matthew Hernandez and Gilbert Hernandez⁴ were standing on the porch. Matthew asked him for a light. Hernandez approached them and reached in his right pocket for his lighter. Matthew and Gilbert were walking toward him when Matthew said, “You’re Gino Hernandez from Tula.” Tula is slang for Tulare. When he heard this statement, Hernandez “immediately knew [his] life was in danger.” He turned to walk away and was hit from behind. Hernandez turned around and Matthew was lunging at him with a knife. The knife went through his fingers. Hernandez grabbed Matthew’s hand and pulled the knife away. Matthew and Gilbert called him “a fucking piece of shit and dropout.” Gilbert kicked him. Hernandez saw someone in a red t-shirt coming out of the house. As the person approached, Hernandez swung the knife in self-defense. He recognized the person as “Raul Kool-aid,” referring to Barrera. Hernandez did not know he had hit anyone. He dropped the knife and ran; he had to jump over a fence. Matthew ran after him. Hernandez ran to his father’s house. He was cut and described his arm as “full of blood”

⁴Because these men share the last name of the defendant, we refer to Matthew and Gilbert by their first names. We also note that, elsewhere in the record, Gilbert is referred to as “Gilbert Gonzales.” Barrera testified that Gilbert and Matthew lived with him at the time of the attack.

When he was arrested and processed at the jail, Hernandez told a classification deputy that he was a “Northerner.” He testified that this did not mean he was a gang member and he was, in fact, a gang dropout. He was placed with Norteño gang members, but was removed within a day because he was assaulted by them. Hernandez admitted that he had been affiliated with the Norteños, also referred to as Nuestra Familia, from 1993 to around 2002. He testified at some length about the history and structure of the Norteños prison and street gang. He described the chain of command within the gang and referred to the “Nuestra Familia Constitution.” At one time, he held the position of “channel,” within the gang. The duties of a “channel” were “to ensure that all Nortenos follow [the] policies and procedures and to regulate and to establish the line of communications [with the county jail] and Delano State Prison”

According to Hernandez, by leaving the gang, he was under a “death sentence” and “had a green light put on [him].” A “green light” meant “any Norteno that runs across [him] is to engage in combat” Hernandez testified that there had been numerous attempts on his life. He said, “There’s so many of them, on the streets and the jail system.” The first time was in 2000 when his throat was slit. He was shot at his father’s house, he had been attacked at funerals and parties, and he was assaulted with a baseball bat many times.

During cross-examination, the prosecutor asked Hernandez about his prior convictions pursuant to the court’s ruling on the motion in limine. Hernandez confirmed that he was convicted of a crime of moral turpitude in 2003⁵ and another crime of moral turpitude in 2006.

⁵Hernandez’s motion in limine referred to convictions from 2002 and 2006. The prosecutor, however, asked about convictions in 2003 and 2006. It appears from a probation report that the prosecutor was correct about the dates of Hernandez’s convictions for cruel corporal punishment upon a child and assault with a deadly weapon.

Jury instructions

At a conference on jury instructions, the trial court stated that CALCRIM No. 316, “Additional Instructions on Witness Credibility—Other Conduct,” would have to be given. The following discussion occurred:

“THE COURT: ... It should read: ‘If you find the witness has been convicted of a crime of moral turpitude, you may consider that fact only in evaluating the credibility of the witness’[s] testimony.’ [¶] Just that 316 only. 316 says, ‘If you find a witness has been convicted of a felony.’

“[PROSECUTOR]: Moral turpitude.

“THE COURT: The question was asked were you convicted of a crime of moral turpitude?

“[PROSECUTOR]: I’ll switch that language and put moral turpitude instead of felony.

“THE COURT: Okay. Now, I think the generally accepted definition of moral turpitude is a willingness to do a crime.

“[DEFENSE ATTORNEY]: Willingness to do evil and willingness to lie is what I understand that to be from the cases, but I also thought that there was an instruction—I thought I’ve seen some instruction on that....”

The attorneys and court continued to discuss whether there was a standard definition of moral turpitude. The court then proposed, “Any objection, if I instruct the jury that the crime of moral turpitude is interpreted to mean a willingness to do evil or a willingness to lie.” The attorneys had no objections.

At the close of evidence, the trial court read instructions to the jury. The court deviated from the instructions agreed to during the conference on jury instructions. The court orally instructed the jury as follows:

“If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness’[s] testimony.

“[A] conviction for moral turpitude does not necessarily destroy or impair a witness’[s] credibility. It’s up to you to decide the weight of that

fact and whether the fact makes the witness less believable. A crime of moral turpitude is explained as a willingness to do evil or to violate the law.”

The written jury instructions were also made available in the jury room.

According to the clerk’s transcript, the written instruction for CALCRIM No. 316 read:

“[If you find that a witness has been convicted of a felony, you may consider that fact [only] in evaluating the credibility of the witness’s testimony. The fact of a conviction does not necessarily destroy or impair a witness’s credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]

“[If you find that a witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness’s testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness’s credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]”

These written instructions tracked exactly the language of CALCRIM No. 316’s “Alternative A—felony conviction” and “Alternative B—prior criminal conduct with or without conviction.”

Verdict

The jury reached a verdict on June 7, 2012. It found Hernandez guilty of assault with a deadly weapon and found true the special allegation that he personally inflicted great bodily injury. On August 8, 2012, the trial court imposed the middle term of three years for assault with a deadly weapon, plus three years for the special allegation of great bodily injury, plus three years for three prior prison terms, for a total of nine years in state prison.

Hernandez filed a notice of appeal on September 5, 2012.

DISCUSSION

Hernandez contends the trial court committed reversible error by giving an incorrect moral turpitude instruction in violation of his constitutional right to a fair trial. He acknowledges that his trial attorney did not object to the instruction but argues that he

has not forfeited his claim because the erroneous jury instruction affected his substantial rights. He also contends in the alternative that, if the issue has been forfeited, his trial attorney's failure to object to the instruction was ineffective assistance of counsel.

Under section 1259, an appellate court may “review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” Therefore, we consider Hernandez's appellate claim to determine whether the challenged instruction affected his substantial rights, even though he did not object in the trial court. (*People v. Felix* (2008) 160 Cal.App.4th 849, 858.)

In determining whether the challenged instruction affected his substantial rights, we use the reversible error standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11; *People v. Felix, supra*, 160 Cal.App.4th at p. 857.) This means we must determine whether “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson, supra*, at p. 836; see *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

“[T]he law provides that any criminal act or other misconduct involving moral turpitude suggests a willingness to lie and is not necessarily irrelevant or inadmissible for impeachment purposes.” (*People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24; see Evid. Code, § 788 [evidence of felony conviction admissible for purpose of attacking credibility of witness].) “‘Moral turpitude’ refers to a general “‘readiness to do evil’” even if dishonesty is not necessarily involved.” (*Contreras, supra*, at p. 157, fn. 24.)

In this case, the prosecutor was allowed to impeach Hernandez's testimony by asking about his two recent convictions for crimes involving moral turpitude. The parties agreed to modify CALCRIM No. 316 to instruct the jury that a “crime of moral turpitude

is interpreted to mean a willingness to do evil or a willingness to lie.”⁶ The trial court, however, stated to the jury that a “crime of moral turpitude is explained as a willingness to do evil or *to violate the law*.” (Italics added.) Hernandez challenges the court’s instruction that moral turpitude includes a “willingness . . . to violate the law.” He argues, “The erroneous instruction compromised Mr. Hernandez’s presumption of innocence by suggesting that Mr. Hernandez had a propensity to commit crime.”

The People concede that the orally given instruction on moral turpitude was incorrect but assert the error was harmless. We agree. The instruction did not provide an accurate definition of moral turpitude because not all violations of the law are crimes of moral turpitude. (*People v. Castro* (1985) 38 Cal.3d 301, 314, 317 [recognizing there are felonies that do not show moral turpitude; simple possession of heroin does not necessarily involve moral turpitude].) Under the circumstances of this case, however, we conclude the error was harmless.

First, before giving the challenged instruction on moral turpitude, the court stated, “If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness’[s] testimony. [¶] [A] conviction for moral turpitude does not necessarily destroy or impair a witness’[s] credibility. It’s up to you to decide the weight of that fact and whether the fact makes the witness less believable.” While it was somewhat confusing for the court to switch from talking about a conviction of a “felony” to a “conviction for moral turpitude,” the point of the instruction was clear: Prior convictions could be used only to evaluate a witness’s credibility. Thus,

⁶This appears to be an accurate statement of the law; it has been observed that crimes of moral turpitude fall into two groups: (1) crimes in which dishonesty is an element, such as fraud and perjury, and (2) “crimes that indicate a “general readiness to do evil,”” from which a readiness to lie can be inferred.” (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) We observe that Hernandez does not claim it was error to give the jury a definition of “moral turpitude,” nor does he challenge the use of his prior convictions to attack his credibility.

considering the instruction in context, we see little risk the jury would have understood the instruction as suggesting that prior convictions could be used to establish a propensity to commit crime. We also note that the possibility of prejudice to Hernandez was further diminished because the written instructions given to the jury did not contain the instructional error. (See *People v. Osband* (1996) 13 Cal.4th 622, 687 [error in misstating instruction where written instruction was not erroneous was harmless].)

Second, the challenged instruction was that a crime of moral turpitude “is explained as a willingness to do evil *or to violate the law*,” while Hernandez had agreed to an instruction of “willingness to do evil *or a willingness to lie*.” (Italics added.) In light of Hernandez’s testimony and defense, it is difficult to discern how the instruction given, in place of the one agreed to, could have caused him prejudice. Hernandez’s defense depended on the jury believing him when he said he was attacked by Matthew and Gilbert and he acted in self-defense. There was no dispute that he cut Barrera’s neck with a knife; Hernandez’s credibility was crucial to his defense. Had the jury been given the instruction the parties agreed to—that a crime of moral turpitude means a willingness to lie—it seems *more* likely the jury would have used the evidence of Hernandez’s prior convictions for crimes of moral turpitude to reject his testimony. On the other hand, Hernandez admitted he was a gang member for almost 10 years, and he was knowledgeable about gang governance and had served as a “channel” in the gang. He testified, “I dedicated my life to the organization.” His testimony about the jail classification system suggested a familiarity with jails prior to his arrest for the current offense. He also admitted he was convicted of crimes of moral turpitude in 2003 and 2006. The instruction given that a crime of moral turpitude may include a willingness “to violate the law” would not cause prejudice in these circumstances because Hernandez admitted he devoted many years of his life to a criminal street gang.

Third, as the People argue, no reasonable juror would have found Hernandez’s claim of self-defense credible. A police officer who was dispatched to Barrera’s house

described the laceration on Barrera's neck as eight inches long, and the officer could "see inside his neck, inside of his flesh." Hernandez's testimony that he only swung the knife in self-defense and did not know he hit anyone was incredible given the severity of the wound inflicted upon Barrera. Hernandez's claim that Matthew and Gilbert attacked him also was not credible. An officer dispatched to Barrera's house saw Matthew and Gilbert walking toward the house, and they were walking at a normal pace. They did not appear to be sweaty and did not have any injuries that would indicate they had just been in a physical fight. Further, Hernandez's claim that he was a gang dropout was contradicted by evidence that he identified himself as a Northerner to the classification deputy and reported he would have no problems in the general population.

In sum, we conclude that, had the erroneous instruction on moral turpitude not been given, it is not reasonably probable a result more favorable to Hernandez would have been reached. Stated differently, the instructional error did not affect Hernandez's substantial rights. Our conclusion also means that Hernandez has failed to establish a claim for ineffective assistance of counsel. (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020 [ineffective assistance claim may be disposed of based on lack of sufficient prejudice from alleged deficiency without first assessing counsel's performance].)

Hernandez argues that the instructional error violated his right to due process and therefore should be reviewed under the standard for reviewing constitutional errors set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. The constitutional error he asserts is that the instruction on moral turpitude "subverted the presumption of his innocence." (See, e.g., *People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1177.) We are not persuaded. The jury was correctly instructed: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove the defendant guilty beyond a reasonable doubt." CALCRIM No. 220 and other proper presumption-of-innocence CALCRIM instructions given included No. 224, "Circumstantial Evidence: Sufficiency of Evidence," and No. 3517, "Deliberations and Completion of Verdict

Forms.” We fail to see how the moral turpitude instruction could have caused the jury to ignore the instructions on the presumption of innocence. The instruction did not, for example, serve to eliminate an element of the crime charged. (Cf. *Carella v. California* (1989) 491 U.S. 263, 265 [jury instruction that relieves prosecutor of burden of proving every element of charged offense subverts presumption of innocence].) The challenged instruction did provide an incorrect definition of a crime of moral turpitude, but it was not incorrect to suggest that Hernandez’s prior convictions involved a willingness to violate the law; indeed, any crime other than a strict liability crime may be viewed as demonstrating a willingness to violate the law.⁷ Moreover, in context, the instructions were clear that prior convictions were to be considered *only* in evaluating credibility. Under these circumstances, we reject Hernandez’s claim that the instructional error in this case subverted the presumption of innocence.

DISPOSITION

The judgment is affirmed.

LaPorte, J.*

WE CONCUR:

Kane, Acting P.J.

Peña, J.

⁷Of course, not all violations of law are admissible for impeachment purposes. Only prior crimes involving dishonesty or moral turpitude are sufficiently relevant to credibility to be admissible to impeach a witness. (*People v. Castro, supra*, 38 Cal.3d at p. 314.) As we have mentioned, however, Hernandez does not challenge the determination that his convictions from 2003 and 2006 were admissible for impeachment purposes.

*Judge of the Superior Court of Kings County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.