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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL FRANCOISE HOUSTON,

Defendant and Appellant.

F067414

(Super. Ct. No. F13900318)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Valerie G. Wass, 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, Stephen G. Herndon and Chung Mi (Alexa) Choi, for Plaintiff and Respondent.

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A Fresno County jury found Rafael Houston guilty of attempted murder, shooting at an occupied vehicle, assault with a firearm, and possession of a firearm by a felon. As a result, he is currently serving multiple indeterminate life sentences in prison. Houston

appeals his convictions on grounds of insufficient evidence, focusing on the recantation at trial by the only eyewitness who had identified him as the shooter in the underlying incident. We conclude that the convictions are supported by substantial evidence, and thus affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2011, a man named Bobby Moore sustained gunshot wounds to his hand and leg while driving through a parking lot outside of a Carl's Jr. restaurant. The incident occurred sometime after midnight, near the intersection of North First Street and Shaw Avenue in Fresno. Police arrested Houston later that day in connection with the shooting.

Houston was charged by amended information with premeditated attempted murder (Pen. Code,¹ §§ 664, 187; Count 1), shooting at an occupied vehicle (§ 246; Count 2), assault with a firearm (§ 245, subd. (a)(2); Count 3) and possession of a firearm by a felon (§ 29800, subd. (a)(1); Count 4). Enhancement allegations were attached to these charges for furthering the activities of a criminal street gang (§ 186.22, subd. (b)(1); Counts 1-3), personal and intentional discharge of a firearm with proximate causation of great bodily injury (§ 12022.53, subds. (c), (d); Counts 1-2), personal use of a firearm (§ 12022.5, subd. (a); Count 3), and personal infliction of great bodily injury (§ 12022.7, subd. (a); Count 3). The matter was tried before a jury in April 2013. A defense motion to bifurcate the gang enhancement allegations from the other charges was granted on the first day of trial.

Prosecution Case

Samuel Jalango witnessed the shooting, but was not able to identify the gunman. Then employed as a dispatcher for the Fresno City College Police Department, Mr. Jalango had recently finished his shift at work and was backing into a space in the

¹ All statutory references are to the Penal Code.

Carl's Jr. parking lot when he observed someone lurking around the bushes near the drive-thru lane. The man in the bushes stepped forward with a handgun and fired multiple shots at a moving vehicle. Mr. Jalango ducked down for about 30 seconds, and when he looked up again he saw a Chevrolet Malibu driving away from the scene. Believing that the shooter was inside of the Malibu, Mr. Jalango followed the car as it travelled westbound on Shaw Avenue.

The shooting occurred while officers from the Fresno Police Department were already in the process of responding to a report of people fighting at a nightclub located at 5030 North First Street. Some of these officers were trying to detain an individual outside of the club when they heard gunshots fired from a short distance east of their location, in the direction of the club's parking area which was adjacent to the Carl's Jr. After blocking off an exit to Shaw Avenue, Officer Jeff Gross stopped a sport utility vehicle that was attempting to leave the parking lot and spoke to one of its occupants about the gunfire. The patron, who identified himself as Rafael Houston, claimed to have witnessed the incident.

Houston told Officer Gross that he had walked out of the nightclub when the fighting started and proceeded to the far-east end of the parking lot to wait for his friends. While standing there, Houston reportedly saw a black male in a compact sized, white-colored car discharge a firearm in the direction of the club. The shooter allegedly fired four or five shots through an open passenger-side window as he was driving. After listening to Houston's story, Officer Gross allowed him to leave the premises and made a radio broadcast to his fellow officers with a description of the suspect vehicle.

Acting on Houston's information, police pulled over a white Pontiac Grand Prix that was seen driving westbound from the vicinity of the shooting, but the driver turned out to be Samuel Jalango. Mr. Jalango explained that he was following a car which had left the crime scene and provided officers with the license plate number of the Chevrolet

Malibu. He also said that he had witnessed the shooting and described the perpetrator as a thin black male, approximately 20 or 21 years of age.²

Police traced the license plate number provided by Mr. Jalango to a woman named Aisha Allen, who did in fact own a Chevrolet Malibu. Ms. Allen was taken into custody at around 1:45 a.m. and transported to police headquarters for questioning. By then the authorities had also located the presumed victim, Bobby Moore, who checked himself into a local hospital at 12:33 a.m. Investigators subsequently took possession of a bullet that was removed from Mr. Moore's leg, and recovered a second bullet and an additional bullet fragment from his automobile.

A video recording of Aisha Allen's custodial interview was shown to the jury. Ms. Allen told detectives that she was at the nightclub on First and Shaw the previous evening and left the establishment when a fight broke out inside. From there she walked alone back to her car, which was located next to the Carl's Jr. Once inside of her vehicle, Ms. Allen made a phone call to a female friend to discuss further plans for the night. In the midst of this telephone conversation, she saw someone fire a gun approximately four or five times into a moving vehicle that was travelling directly in front of her parked car. The assailant was "on foot" when he fired the shots, but quickly got into the front passenger seat of a silver-colored sedan parked immediately beside her Malibu.

Ms. Allen initially denied having any memory of what the shooter looked like apart from the fact that he was male. She also told detectives, "I think he was black." When pressed further about her knowledge of the incident, Ms. Allen said, "I know who it was," and identified the gunman as a friend of hers named "Ralph" Houston, who was also known as Rafael. She explained that Houston conversed with her outside of the Carl's Jr. at the beginning of the night and briefly met up with her again at her car after

² Houston is identified in the record as an African-American male with a thin build. He was 27 years old at the time of these events.

both of them had left the nightclub. On the latter occasion, Houston asked Ms. Allen if she was planning on going home. When she responded affirmatively, he said, “That’s probably a good idea.” Moments later, Houston opened fire on a passing motorist. Afterwards, Houston entered the front passenger seat of a silver sedan before disappearing from the area.

When the detectives looked through Ms. Allen’s cell phone, they saw that Houston had called her at 12:41 a.m. Ms. Allen acknowledged receiving the call, saying that she had contacted Houston after the shooting “to see if he was okay.” They got disconnected in the middle of their conversation, so he called her back about a minute later. Her phone also contained photographs of Houston, and she confirmed his identity from the pictures.

Based on the information obtained from Ms. Allen, police were able to determine Houston’s home address and set up a surveillance operation at that location. At approximately 3:30 p.m., the surveillance team saw a silver/gray Lexus pull into the driveway. A short while later, Houston came out of the house and got into the front passenger side of the vehicle. Police surrounded the car and detained both Houston and the driver, Nelson Cumbry.³ A search of the Lexus uncovered a “.38 Special” revolver containing five expended cartridges.

Once in custody, Houston repeated essentially the same story he had told to Officer Gross at the time of the shooting. Although he admitted that Nelson Cumbry had driven him to the nightclub in the Lexus, Houston maintained that he was merely a witness and that the crime was committed by an unknown individual whom he had seen driving a white car. According to trial testimony by the investigating officers, there was no evidence of bullet holes, strike marks, or shell casings in the vicinity of the nightclub to corroborate Houston’s version of events.

³ It is unclear from the record whether Mr. Cumbry was ever charged in connection with the shooting. He asserted his constitutional rights against self-incrimination at the time of Houston’s trial and did not testify in front of the jury.

Michael Appel, a criminalist at the California Department of Justice's crime laboratory in Fresno, conducted a forensic analysis of the prosecution's physical evidence. This process involved test-firing the seized .38 Special revolver and performing a microscopic comparison of the test-fired ammunition against the bullets and bullet fragments that were removed from Bobby Moore's leg and automobile. The results led Mr. Appel to conclude the latter items were fired from the gun found inside of the car that Houston was in at the time of his arrest.

Defense Case

Aisha Allen was called as a witness by the prosecution and the defense, but was apparently reluctant to provide her testimony. She was ordered to appear at trial following the denial of her own motion to quash a subpoena served on her by the prosecution. Ms. Allen filed a sworn declaration in support of the motion to quash wherein she claimed to have no personal knowledge of any facts or circumstances pertaining to the charges in the case. On the witness stand, she recanted her previous identification of Houston as the shooter and indicated that she had lied to the detectives in order to expedite the conclusion of her custodial interview and also out of fear that she would be charged as an accessory to the crime.

According to Ms. Allen's trial testimony, Nelson Cumbry drove Houston to the nightclub in a silver car and parked the vehicle next to her Chevrolet Malibu. There was a silver car located beside her Malibu at the time of the shooting, and she saw Houston near that vehicle shortly before the shots were fired, but she did not know if it was the same car he had arrived in earlier. The witness clarified that she only *heard* the gunshots and did not actually see the shooting take place, and said the last time she had visual contact with Houston that night was before the shooting occurred.

Two of Houston's friends, Monique Ward and Jawana Washington, testified on his behalf as alibi witnesses. Ms. Washington had driven Houston home from the nightclub in her Chevrolet Tahoe and was present when he spoke to Officer Gross about

the shooting. She claimed Houston was with her when the shots rang out and her testimony implied that he was not the gunman. Ms. Ward similarly testified that Houston was in her sight at the time of the shooting and she did not see him fire a gun.

Verdict and Sentencing

The jury returned guilty verdicts on all counts and found the non-gang enhancement allegations to be true. In subsequent proceedings, the trial court allowed the prosecution to further amend the information with a substantive gang participation charge under section 186.22, subdivision (a), which was added as Count 5. Pursuant to a plea agreement, the gang enhancement allegations for Counts 1-3 were dismissed in exchange for Houston's plea of no contest to Count 5 and a waiver of his right to appeal the resulting conviction.

On June 4, 2013, the trial court sentenced Houston to life in prison with the possibility of parole under Count 1, with a consecutive term of 25 years to life for the section 12022.53, subdivision (d) enhancement and a stayed term of 20 years for the true finding under section 12022.53, subdivision (c). A stayed term of five years plus the same enhancements of 25 years to life and 20 years were imposed under Count 2. As for Count 3, Houston received a stayed sentence of three years in prison, plus enhancements of ten years and three years pursuant to sections 12022.5, subdivision (a) and 12022.7, subdivision (a), respectively. Concurrent two-year terms were imposed under Counts 4 and 5. A timely notice of appeal was filed on June 6, 2013.

DISCUSSION

Sufficiency of the Evidence of Identity (Counts 1-3)

Houston claims there was insufficient evidence to show that he was the shooter because Aisha Allen's statements of identification were "tenuous" and unreliable. Generally speaking, these types of arguments do not hold water at the appellate level. "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification

of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury in the first instance. . . .” (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) For a reviewing court to set aside a jury’s finding of guilt on the basis of a questionable identification, “the evidence of identity must be so weak as to constitute practically no evidence at all.” (*Id.* at p. 521.)

The standard of review for a claim of insufficient evidence is deferential to the verdict. (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) “[T]he reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*)). We do not substitute our own interpretation of the record in place of the jury’s determinations regarding witness credibility and disputed issues of fact. (*People v. Jones* (1990) 51 Cal.3d 294, 314; see *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372 [“Purported weaknesses in identification testimony of a single eyewitness are to be evaluated by the jury.”].)

In *People v. Cuevas* (1995) 12 Cal.4th 252 (*Cuevas*), the California Supreme Court held that the sufficiency of an out-of-court identification to support a conviction should be analyzed under the same substantial evidence test that is used for other forms of evidentiary proof. (*Id.* at p. 257.) The *Cuevas* defendant was found guilty of committing a gang-related shooting based on out-of-court identifications made by two eyewitnesses who recanted their statements at trial. (*Id.* at pp. 257-260.) In upholding the conviction, the high court overruled a previous line of authority which had required additional corroborating evidence to support out-of-court statements of identification. (*Id.* at pp. 257, 263-272.) The upshot of *Cuevas* is that the law does not require a prior

out-of-court identification to be corroborated by an in-court identification. Thus, a testifying witness's out-of-court identification can be used to establish the defendant's identity as the perpetrator of a crime "and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

The probative value of an out-of-court identification will depend on a variety of factors including "(1) the identifying witness's prior familiarity with the defendant; (2) the witness's opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime." (*Cuevas, supra*, 12 Cal.4th at p. 267.) These circumstances were explored at length during trial and the jury had ample evidence from which to draw conclusions regarding whether or not Aisha Allen actually saw the shooting and had any reason to falsely implicate (or exculpate) the defendant. For example, her various descriptions of the incident were generally consistent with those of a second eyewitness, Samuel Jalango. Ms. Allen was forthcoming about the fact that she had been friends with Houston for several years and cared about him. At one point during her recorded interview she told the detectives, "I just wish I would have left sooner, that way I wouldn't even have [been] around to see that."

Despite her recantation, Ms. Allen's testimony still placed the defendant at the locus of the crime and contradicted Houston's own statements to police regarding where and how the shooting had occurred. The jury could have reasonably inferred that Houston exhibited a consciousness of guilt by providing Officer Gross with a false lead at the beginning of the investigation. (*People v. Nelson* (2011) 51 Cal.4th 198, 214 ["An attempt to fabricate evidence may manifest a defendant's consciousness of guilt...].) Even setting aside all of Ms. Allen's statements, Houston was circumstantially tied to the shooting based on the eyewitness account of Mr. Jalango and his description of the

shooter, as well as the forensic evidence concerning the .38 Special revolver. If the jury additionally believed Ms. Allen's recorded statements about Houston's involvement and the gunman entering a silver car after the shooting, it may have reasonably concluded that Houston hid the gun in Nelson Cumbry's Lexus prior to leaving the area in Jawana Washington's sport utility vehicle.

Houston's arguments on appeal speak to the weight of the evidence, rather than its sufficiency, and crediting his position on such grounds would invade the province of the trier of fact. (See *Rodriguez, supra*, 20 Cal.4th at p. 11-12.) There is substantial evidence in the record to place Houston at the scene of the crime and connect him to the gun used in the shooting. This evidence was bolstered by Ms. Allen's out-of-court identification of him as the perpetrator, even though she recanted it at trial. It was up to the jury to decide how the recantation impacted the probative value of her earlier statements. Viewing the record as a whole and in the light most favorable to the judgment, we can only conclude that the evidence of identity was legally sufficient to support Houston's convictions.

Sufficiency of the Evidence of Intent to Kill (Count 1)

Houston separately challenges the sufficiency of the evidence of his intent under Count 1, arguing that "while the shooting at the occupied vehicle was likely deliberate and premeditated, it did not, in and of itself, demonstrate that it was done with the intent to kill." Among related contentions, Houston submits that the prosecution failed to show he had any motive to kill Bobby Moore or that he was actually aiming for Mr. Moore when he fired shots at his vehicle. We are not persuaded by these arguments. Firing multiple gunshots into an occupied vehicle at close range is sufficient evidence of the intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 741-742 [the act of firing toward a victim at close range, without legal excuse, supports the inference of intent to kill; single gunshot fired into vehicle from a distance of approximately one car length]; *People v.*

Campos (2007) 156 Cal.App.4th 1228, 1244 [multiple shots fired into victims' car from a distance of four or five feet].)

Sufficiency of the Evidence of Firearm Possession (Count 4)

In his final claim, Houston argues that the prosecution failed to establish a violation of section 29800, subdivision (a)(1), as alleged in Count 4. “The elements of this offense are conviction of a felony and ownership or knowing possession, custody, or control of a firearm.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 [citing the predecessor statute, former § 12021, subd. (a)(1)].) The parties stipulated to Houston’s felony record but disputed the elements of knowledge and possession. The prosecution’s evidence included photographs and police testimony which showed that the .38 Special revolver was located underneath a towel behind the driver’s seat of Nelson Cumbry’s Lexus at the time of Houston’s arrest.

A section 29800 offense may be established through evidence of actual or constructive possession of a firearm. “A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others.” (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1083-1084.) Possession may therefore be shared with another person. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 (*Sifuentes*).) “Implicitly, the crime is committed the instant the felon in any way has a firearm within his control.” (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410, italics omitted.)

Constructive possession can be established by circumstantial evidence and reasonable inferences drawn from the defendant’s conduct. (*People v. Williams* (1971) 5 Cal.3d 211, 215; *People v. Taylor* (1984) 151 Cal.App.3d 432, 436.) A good example is found in *People v. Miranda* (2011) 192 Cal.App.4th 398 (*Miranda*). There, the defendant was accused of participating in a shooting and fleeing the scene in a vehicle with three other suspects. He was convicted of unlawful possession of a firearm by a

felon based on his constructive possession of a shotgun that was recovered by police during their investigation into the incident. (*Id.* at pp. 404-405, 410-411.)

The evidence in *Miranda* showed the defendant and his confederates were pursued from the scene of the crime by police, but the officers could not tell who was sitting where in the suspects' vehicle, nor could they discern the nature of various items they saw thrown from that car during the chase. Pieces of a broken shotgun and live ammunition were later found along the same route, though the shooting in question had been committed with a handgun. (*Miranda, supra*, 192 Cal.App.4th at pp. 404-405.) The *Miranda* defendant testified to sitting in the front passenger seat of the fleeing car but claimed ignorance of the presence of guns therein, denied ever seeing a shotgun, and said that while he knew the backseat passengers were throwing items out of the windows, he had no knowledge of what those items were. (*Ibid.*) The Second District affirmed the defendant's conviction for unlawful firearm possession, noting that possession "may be imputed when the contraband is found in a place which is immediately accessible to the joint dominion and control of the accused and another." (*Id.* at p. 410.) The presence of the shotgun during the car chase could be inferred from the evidence that objects were thrown from the suspects' automobile and the subsequent recovery of the firearm along their flight path. The jury was free to disbelieve the defendant's testimony regarding his knowledge of the gun's presence, and it had sufficient circumstantial evidence from which to infer he had at least joint dominion and control over the weapon before it was discarded out the window. (*Id.* at p. 411.)

In challenging his conviction under Count 4, Houston relies on the rule that mere proximity to a gun, standing alone, does not constitute sufficient evidence of possession. (*Sifuentes, supra*, 195 Cal.App.4th at p. 1417.) The proof was not so meager in this case. Appellant was arrested in immediate proximity to the same gun the jury believed he had used to shoot Bobby Moore earlier that day. The evidence of Houston's dominion and control over the firearm at the time of the shooting logically supported the inference of

some type of shared access or use as between him and Mr. Cumbry. Substantial evidence placed Houston in Mr. Cumbry's vehicle before and immediately after the shooting, and then again at the time of his arrest. A rational trier of fact could deduce that Houston hid the gun inside of the Lexus before leaving the crime scene and had knowledge of its location when he reentered the car several hours later. Based on the totality of the circumstances, the record contains sufficient evidence of constructive possession for purposes of section 29800, subdivision (a)(1).

DISPOSITION

The judgment is affirmed.

GOMES, J.

WE CONCUR:

CORNELL, Acting P.J.

PEÑA, J.