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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ROSARIO GONZALES,

Defendant and Appellant.

G044503

(Super. Ct. No. 06CF3111)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed in part, reversed in part, and remanded with directions.

Steven Schorr, 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, Assistant Attorney General, Peter Quon, Jr., Kyle Niki Shaffer and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Carlos Rosario Gonzales of first degree murder for slaying Michael Blankenhorn after Blankenhorn ejected him from a nightclub. (Pen. Code, § 187, subd. (a).) The jury also found multiple firearm enhancements to be true and, in a separate hearing, the trial court concluded defendant suffered two prior felony strike convictions. Defendant contends the trial court erroneously admitted evidence of his prior convictions to impeach the credibility of his pretrial statement that he did not intend to harm the victim and acted only to defend his companion. The record shows, however, *defendant* elicited this testimony, which formed the basis for defendant's defense-of-another murder defense. Given these circumstances, the trial court correctly ruled that a nontestifying defendant may be impeached with prior felony convictions when that defendant gains admission of his own pretrial exculpatory statements. (*People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1450-1452 (*Jacobs*).) Defendant's challenge to his conviction therefore fails, but he is correct that for sentencing purposes the evidence did not establish his 1998 prior conviction constituted a strike under the "Three Strikes" law. Consequently, we reverse the judgment and remand for resentencing.

I

FACTUAL AND PROCEDURAL BACKGROUND

Because the underlying facts are not at issue on appeal, we set them out only briefly and, consistent with the standard of review, in the light most favorable to the verdict. Defendant and his cousin, Larry Garcia, along with a friend, Jacob Lara, spent about three hours on an October afternoon in 2006 at a Santa Ana strip club before they were ejected for fondling the dancers. Blankenhorn and another security guard escorted the men to the parking lot, where defendant and his group began arguing they had been unfairly ejected and demanded to confront the dancers. When the club's manager,

Jeffrey Underwood, and a third security guard, Lorenzo Valentin, joined the dispute, Lara struck Underwood in the face. Underwood wrestled Lara to the ground and punched him four or five times. Valentin pepper-sprayed Lara and Garcia, but not defendant, who had retreated to his truck to obtain a .38-caliber revolver.

Defendant returned to the scene after the fight was over, while Underwood walked back toward the club. When defendant was about 20 feet away, someone noticed his weapon and yelled, “gun” or “he’s got a piece.” Underwood and Blankenhorn turned and ran to the club’s office door. Underwood tripped and fell to the ground. He crouched behind a car and pulled out a handgun, which he had with him during the fight with Lara, but had not drawn or displayed. A witness heard defendant exclaim, “Fuck you, Motherfucker.” Defendant aimed at Blankenhorn, who was running back to the club, and fired one shot. The bullet struck Blankenhorn in the back, piercing his heart, lung, and thymus. Blankenhorn died from blood loss due to the gunshot wound.

The trial court sentenced defendant to an aggregate term of 100 years to life, plus a 10-year determinate term, as follows: 25 years to life for first degree murder, tripled to 75 years to life under the Three Strikes law, plus a consecutive 25 years to life for personal use of a firearm causing death, and two consecutive terms of five years each for the two prior serious felony convictions the trial court found to be true.

II

DISCUSSION

A. *The Trial Court Properly Admitted Evidence of Defendant’s Prior Convictions*

Defendant contends the trial court erred by admitting evidence of his prior convictions because that evidence impeached hearsay testimony elicited from a *prosecution* witness, so there was no basis to conclude *defendant* placed his own veracity

in issue. To the contrary, the record shows defendant, on cross-examination, elicited from Detective Jaime Rodriguez evidence of *defendant's* exculpatory claim to a cohort that defendant fired his gun to defend Lara. By eliciting this evidence, defendant became the proponent of his own exonerating statement and the prosecutor therefore was entitled to impeach his credibility with his prior felony convictions.

1. Procedural Background

The issue arose in a convoluted fashion over the course of two witnesses' testimony, but it is clear defendant elicited his exculpatory statement. The seeds of the issue lay in the prosecutor's direct examination of Garcia. Garcia described how the nightclub security staff pepper-sprayed him and defendant, who were standing "kind of close to each other." Garcia testified he heard a gunshot but did not see who fired the weapon; then he made his way back to his truck and drove away. He believed defendant fired the shot, and he identified defendant in the courtroom as the shooter. Given Garcia's testimony that he did not see defendant shoot the gun, the prosecutor asked him the basis for his belief defendant was the shooter. Garcia claimed detectives gave him this information in a later interview. Garcia flatly denied *he* told the detectives defendant admitted being the shooter.

After the prosecutor concluded his questioning, the parties met in chambers for an unreported bench conference, which the trial court summarized as follows: "We've had a discussion with respect to questioning Mr. Garcia on cross-examination. The issue came up[:] how do you know he is the shooter? Eventually he says the cops told me. The defense would like to bring out [that] it wasn't the cops who told you, it was the defendant who told you. And the court [agreed,] ruling . . . that would be an inconsistent statement. [¶] Then the issue was well, if it comes in [that] the defendant

told him, doesn't the whole context have to come in under [Evidence Code¹] section 356, that the defendant told him yes, I shot, but I wasn't trying to hit anyone? And the court's ruling would be that that would come in under [section] 356 [¶] I know the People don't agree with that, but I think that's appropriate."² The prosecutor repeated his objection to "any statement regarding the defendant saying he was the shooter," but the trial court reaffirmed its ruling.

During Garcia's cross-examination, defense counsel asked Garcia whether he told Rodriguez he learned from defendant that defendant fired the shot at the nightclub. The prosecutor interjected, "Your Honor, I'm going to object for the record, calls for hearsay," which the trial court overruled. The following colloquy then occurred: "[Defense Counsel]: Didn't you tell Detective Rodriguez that my client told you that he had shot the gun, but that he did not intend to hurt anybody? [¶] [Garcia]: I can't recall, sir. [¶] [Defense Counsel]: Didn't you tell Detective Rodriguez that you learned from my client that he shot the gun, did not intend to hurt anybody, and he was just trying to help Lara, who was getting beat down? [¶] [Garcia]: I can't recall."³ Defense counsel elicited that "[e]verything" Garcia told Rodriguez was true.

¹ All further statutory references are to this code unless noted.

² Section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Defendant does not challenge on appeal the trial court's section 356 ruling.

³ The trial court found Garcia's lack of recall "evasive." Garcia earlier on direct exam denied he told the detectives defendant was the shooter. Whether viewed as a denial or an evasive lack of recall, Garcia's testimony provided the basis for admitting a

After Garcia concluded his testimony and the trial court dismissed the jury for the day, the prosecutor noted he had “objected to the *defense request* to allow the defendant’s statements in” (Italics added.) Of course, the statements were not yet in evidence because Garcia could not recall the assertions in the questions defense counsel posed to Garcia, and the questions did not themselves constitute evidence. The prosecutor, assuming defendant’s exculpatory statements would be admitted on cross-examination of the next witness, Detective Rodriguez, sought leave to introduce defendant’s prior convictions to impeach defendant’s credibility. The trial court granted the prosecutor’s request to introduce the priors at a later time, subject to an instruction limiting the jury’s consideration of this evidence to its impeachment value, if any.

The prosecutor next called Rodriguez, but did not ask him whether Garcia had told him defendant admitted being the shooter, nor any similar question. Instead, the prosecutor focused on other pretrial statements Garcia made to Rodriguez. Rodriguez had interviewed Garcia the day after the shooting, and he had Garcia draw a map of the scene to illustrate each person’s location as the shooting unfolded. According to Rodriguez, Garcia told him that, although his vision was partially obstructed, he observed defendant standing to his right and then heard a gunshot ring out from that side. When Garcia looked that way — according to Rodriguez’s account of what Garcia told him — Garcia saw defendant holding a small handgun in his right hand, pointed toward the nightclub personnel.

On cross-examination, defense counsel reviewed Garcia’s map with Rodriguez and confirmed Garcia stated in his interview that when he and defendant

prior inconsistent statement under the hearsay exception for such statements. (§ 1202.) Statements admitted under a hearsay exception are admitted for their truth. (§ 1200.)

moved away from the club entrance toward the street, the club manager and security staff “proceeded to beat on” Lara. Defense counsel then delved into the details of a conversation Garcia told Rodriguez he had with defendant the morning after the shooting. According to Rodriguez, Garcia told him defendant admitted being the shooter and assured him he would take responsibility if anyone were arrested. Rodriguez could not recall if Garcia told him how many shots defendant admitted firing. But according to Rodriguez, Garcia remembered defendant “saying he didn’t intend to hurt anybody” and that defendant “only wanted to get them away from Lara so he could help him, because he was being beaten down[.]” Defense counsel relied on this evidence in closing argument for his “defense of another” theory of the case.

Before closing argument, the trial court admitted the parties’ stipulation “that the defendant has been convicted of a felony involving violence in 1998. And a felony involving robbery in 2004.” The trial court instructed the jury to limit its consideration of this evidence to defendant’s credibility.⁴

2. No Error in Admitting Defendant’s Prior Convictions

We conclude under *Jacobs* that because defendant was the proponent of his exculpatory statements about why he fired his gun (not to hurt anyone but only to protect Lara), the prosecution could impeach his credibility with his prior convictions. In

⁴ The trial court’s instruction stated: “You have heard evidence that the defendant has previously been convicted of a felony involving violence and a felony involving robbery. You may only consider this evidence in evaluating the credibility of the defendant’s statements. You may not consider this evidence on the issue of whether the defendant committed the charged crime. You may not draw any inference that the defendant is more likely to be guilty of the charged crime because of his previous convictions. You may not draw any inference that the defendant has the propensity to commit criminal acts or violent acts because of his previous convictions. The evidence of defendant’s prior convictions only has relevance to a determination of the weight to be given to his statements, and to no other issue.”

Jacobs, a codefendant facing with Jacobs charges of receiving stolen property introduced Jacobs's pretrial admission he owned the vehicle in which the police discovered the loot. Jacobs, who did not testify, moved successfully (presumably under § 356) to introduce his explanation to police about how he came into possession of the property. *Jacobs* held "a defendant's prior felony convictions are admissible under Evidence Code sections 1202 and 788 to attack his credibility when, at his own request, his exculpatory statement to the police is admitted into evidence, but he does not testify at trial."⁵ (*Jacobs, supra*, 78 Cal.App.4th at p. 1446, fn. omitted.)

Defendant does not challenge the holding in *Jacobs*, only its applicability here. He observes that *Jacobs* did not address the "admissibility of such convictions where a defendant is not the proponent of his own statement." (*Jacobs, supra*, 78 Cal.App.4th at p. 1454.) Defendant argues he was not the proponent of the evidence because the "line of inquiry originated with the prosecution." Put another way, defendant insists that because "the prosecutor elicited testimony which was false" (i.e., Garcia's claim the detectives told him defendant fired the shot), he was entitled to attack Garcia's credibility.

Defendant is correct that "the origins of the line of questioning" of Garcia lay with the prosecutor. He is also correct he was entitled to attempt to cast doubt on

⁵ As noted, section 1202 provides for impeaching a witness with prior inconsistent hearsay statements. Section 788 specifically provides for impeachment with a prior felony conviction or convictions "[f]or the purpose of attacking the credibility of the witness" The *Jacobs* court also noted that independent of the Evidence Code, Proposition 8 expressly endorsed use of prior convictions for impeachment. (*Jacobs, supra*, 78 Cal.App.4th at pp. 1452-1453; see Cal. Const., art. I, § 28, subd. (f)(4) ["Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." Only felonies involving moral turpitude may be used for that purpose. (*People v. Castro* (1985) 38 Cal.3d 301, 313-317.)

Garcia's veracity and undermine the prosecutorial value of his courtroom identification of defendant as the shooter. But neither of these observations make defendant any less the proponent of his exculpatory statement. The prosecutor did not seek its admission. Rather, the prosecutor objected not only to admission of defendant's exculpatory explanation of why he shot Blankenhorn, but also to "any statement regarding the defendant saying he was the shooter." Nor can the trial court somehow be viewed as forcing defendant to elicit this evidence; nothing indicates the trial court knew of defendant's exonerating statement before the parties debated its admission. That leaves defendant as the proponent, a conclusion amply supported by the record. Although the bench conference was unreported, we may infer defendant sought admission of his statement under section 356, given the trial court ruled in his favor on that issue. Similarly, when the trial court overruled the prosecutor's objection to defendant's cross-examination of Garcia, defense counsel proceeded to ask Garcia about defendant's exculpatory statements, setting the stage for their admission when defendant cross-examined Rodriguez. On this record, we have no difficulty concluding defendant was the proponent of his exonerating statement, and therefore *Jacobs* applies.

Defendant misplaces reliance on *People v. Fritz* (2007) 153 Cal.App.4th 949. There, this court concluded *the prosecutor* could not seek admission of a nontestifying defendant's denial of criminal involvement in an offense unconnected to the current prosecution, and bootstrap it into grounds for admitting the defendant's prior convictions to impeach his credibility. As we explained, the defendant's general claim of innocence in the unrelated matter, even it were false, had little or no relevance to establishing the defendant's alleged consciousness of guilt in the current prosecution. (*Id.* at p. 952.) Accordingly, the trial court erred by allowing the prosecutor to introduce

the defendant's irrelevant statement, and compounded the error by permitting the prosecutor to impeach the defendant with his priors. The facts are different here. Unlike in *Fritz*, the record shows defendant, not the prosecution, was the proponent of his statement, which the prosecutor then sought to impeach.

The trial court admitted Garcia's inconsistent statements to the detectives under a hearsay exception, and therefore for their truth. Defendant argues that even assuming he was the proponent of his statement, he should have been allowed to introduce it *simply as impeachment* and not for the truth of his statements to Garcia. In other words, defendant sought to undermine Garcia's credibility by showing Garcia gave one account on the stand (the detectives told him defendant was the shooter), but a different account to the detectives (telling the detectives defendant was the shooter). On this view, if the trial court had not erred by admitting Garcia's account of defendant's exonerating statement for its truth, but instead simply as an example of Garcia changing his story, the predicate for impeaching defendant's veracity with his prior convictions would vanish. Defendant is correct that some extrajudicial statements may be relevant only for impeachment and do not constitute "hearsay since they are not offered for the truth of the matter asserted." (*Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 541-542.) But we must view the record in the light most favorable to the verdict, and the record supports the conclusion defendant sought admission of his exculpatory statement for its truth, despite his contrary claim.

In particular, defendant recognized that cross-examining Rodriguez to elicit defendant's admission that *he* was the shooter carried with it "the implication [that] I committed a murder." But he sought to leverage this potential use of his statement for its truth as a reason to admit, also for its truth, his exonerating explanation. Thus, we cannot

say the trial court erred in admitting the statements he made through Garcia for their truth, given that was his manifest purpose for them at trial.

Notably, defense counsel elicited Garcia's affirmation at the close of his testimony that "[e]verything" Garcia told Rodriguez was true. This set the stage in counsel's cross-examination of Rodriguez for admission of Garcia's recounting of defendant's exculpatory statement for its truth, not merely for impeachment. True, when defense counsel learned *before* he cross-examined Rodriguez that the prosecutor intended to impeach defendant with his priors if necessary, counsel seemed to change course and attempted to argue he intended admission of defendant's statement only to impeach Garcia's veracity. But defendant's exonerating explanation to Garcia did not impeach Garcia's testimony denying he told the detectives defendant was the shooter. Rather, Garcia's pretrial admission he told the detectives defendant was the shooter would impeach Garcia's contrary trial testimony, coupled with a limiting instruction for the jury to consider Garcia's admission only to impeach Garcia, not for its truth. But defendant never sought such a limiting instruction, nor did he deviate from his trial strategy to introduce *his* pretrial statement.

Defendant's pretrial explanation for the shooting, however, did not impeach Garcia. To the contrary, the statement bolstered rather than undercut Garcia's testimony defendant was the shooter and had nothing to do with whether Garcia lied in claiming the detectives as the source of this information. Thus, the only basis for admission of defendant's pretrial statement explaining his actions was for the truth. Indeed, this formed the foundation of defendant's defense of others claim, and explains why defense counsel did not seek to limit his inquiry to impeaching Garcia about how he came to identify defendant as the shooter. Had counsel actually limited his inquiry in the manner

he claimed, defendant's explanation of his intent would not have been admitted at all, given it did not impeach Garcia's testimony. Consequently, we discern no error in the trial court's ruling to admit defendant's statement for its truth rather than impeachment, and to allow the prosecutor to impeach defendant's credibility with his prior convictions.

B. *The Evidence Failed to Show Defendant's 1998 Conviction Qualified as a Strike*

Defendant contends the evidence failed to establish his 1998 assault conviction qualified as a strike because it neither showed he personally used a deadly weapon, nor otherwise personally inflicted great bodily injury in that offense. The Attorney General correctly concedes the Three Strikes law required at the time of the offense either personal weapon use or personal infliction of great bodily injury. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261 (*Rodriguez*), superseded by statute as noted in *People v. James* (2001) 91 Cal.App.4th 1147, 1149.) The Attorney General also concedes, and we agree, the guilty plea form does not establish defendant's personal use of a deadly weapon. The plea merely recites: "On or about 3/7/98 in Orange County, I unlawfully aided and abetted Larry Robert Garcia and Marcelino Robles in assaulting John Malavasi with a deadly weapon."

The Attorney General relies on a probation report filed after defendant's conviction in *this* proceeding to establish he aided and abetted the personal infliction of great bodily injury on the victim in the 1998 offense.⁶ This was insufficient for two reasons. First, the prosecutor must present evidence that an offense qualifies as a strike at the time the trial court makes that determination, not later. (*Rodriguez, supra*, 17 Cal.4th

⁶ According to the Attorney General, the police records referenced in the probation report disclose defendant and his cohort fought with the victim at a bar. Witnesses saw defendant punching the victim and shoving him to the ground. Defendant and a codefendant then held the victim down while codefendant Garcia stabbed him. The victim suffered puncture wounds and a laceration to his left eye.

at p. 262.) Second, even assuming we were to review the probation report, aiding and abetting the personal infliction of injury is not the same as inflicting it oneself, and does not qualify under the statutory requirement for conduct the defendant personally commits. (*Id.* at p. 261 [“one may aid and abet the assault without *personally* inflicting great bodily harm,” original italics]; *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 349 [“an aider and abettor of a crime can commit a direct act — affirmatively blocking a victim’s exit — which proximately causes injury, but does not constitute personal infliction of an injury”]; accord, *People v. Cole* (1982) 31 Cal.3d 568, 572.) Consequently, the evidence is insufficient to support a finding defendant’s 1998 conviction constitutes a strike.

III

DISPOSITION

Defendant’s conviction is affirmed, but his sentence must be reversed because the evidence failed to establish he suffered a second prior strike conviction. The matter is remanded for resentencing.

ARONSON, J.

WE CONCUR:

O’LEARY, P. J.

BEDSWORTH, J.