Filed 7/30/12 P. v. Figueroa CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO RIOS FIGUEROA, Defendant and Appellant.	G045017 (Super. Ct. No. 09SF0935) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Theresa Osterman Stevenson, 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, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

DNA evidence, vocal recognition, and eyewitness identification all showed appellant Eduardo Rios Figueroa to be one of at least three (maybe four) men who invaded a Laguna Niguel apartment early one morning, threatened its occupants, robbed them of their valuables, and tried to pin the crime on a rival gang by declaring they were from that gang, there for the purpose of "taxing" the occupants. Figueroa was subsequently convicted of four counts of first degree robbery, one count of residential burglary, and one count of street terrorism. He was sentenced to 35 years to life in prison.

On appeal, Figueroa's main argument centers on the testimony of a gang expert who, in the process of opining that Figueroa was an active member of his gang, recounted a series of contacts by police officers (about seven of them if we count right) in which Figueroa was found in gang territory and in the company of fellow gang members. Figueroa claims the contact evidence was unduly prejudicial to his case under section 352 of the Evidence Code,[1] having the effect of encouraging the jury to convict him based merely on his bad character.

Not so. There was no abuse of discretion in allowing the testimony. The kind of evidence that exceeds the pale of a trial judge's discretion permitted by section 352 is evidence that "*uniquely* tends to evoke an *emotional* bias against the defendant" and "has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638, italics added.) The evidence which the deputy district attorney elicited from the gang expert here was prosaic, devoid of any emotional impact, took very little time in the trial, and went directly to the contested issue of whether Figueroa was an active member of the Varro Viejo gang. And, given the strength of the other evidence tying Figueroa to the

---

[1] All references to section 352 in this opinion are to the Evidence Code. All other undesignated statutory references are to the Penal Code.

Laguna Niguel robbery, any arguable error was obviously harmless under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

FACTS

Three, maybe four, intruders broke into a Laguna Niguel apartment about half past 5 on the morning of October 4, 2009, to rob its six occupants of their valuables.[2] One of the intruders was a shorter, Hispanic, "older" guy of about 35 who stood by a doorway with a gun. The older guy pointed a gun at one of the occupants and told them they were being "taxed" by "San Clemente," a gang which the occupant understood to mean the "Varro Chico" gang. As the intruders left, one exclaimed that they'd be back every month.

The older guy standing by the doorway had buzzed hair, a mustache, and a tattoo on his left upper arm, "SJC" (for San Juan Capistrano).[3] Another occupant had seen him before at a friend's house, recognized him, and also recognized his voice. That particular occupant would later identify Figueroa in open court as the man standing at the doorway with the gun.

The intruders were in the apartment some 30 to 45 minutes. As they were about to leave, they took a number of the occupants into a room "as hostages." A stern admonition was given to remain seated there, and not call the cops, because if they did, the intruders, having the identification of the occupants, would return and "do something about it."

Even so, it was not a clean getaway. Within a minute after the intruders had slammed the front door and left the house, one of the occupants grabbed a baseball

---

[2] One of the occupants woke to find a Hispanic male holding a knife next to him, and later testified he noticed three other males running in and out of the apartment with their loot. The subsequent indictment, however, identified only Figueroa and two other males, and those two were not prosecuted because there was insufficient evidence as to them. For purposes of this appeal the question of whether there were three or four intruders is academic.

[3] Figueroa's and Varro Viejo's identification with the town of San Juan Capistrano extended to tattoos of swallows on Figueroa's shoulder.

bat, another occupant grabbed a skateboard, and the two gave chase. They found the getaway car reversing. The occupant with the skateboard managed to break the back driver's side window. The one with the bat smashed the back trunk. The car kept on going.

The getaway car was a tan, four-door Honda Accord. Later that day police found a tan Honda Accord with a smashed driver's side window and a dented trunk, ditched on the outskirts of territory claimed, not by the Varro Chico gang, but by the rival Varro Viejo gang.

A slurpee cup with a red straw was found in the smashed Honda. There was enough DNA on the red straw to match it to Figueroa.[4] Figueroa's DNA was also found on the Honda's steering wheel. While two other sets of DNA were found on the steering wheel, Figueroa was a "major contributor" to the DNA found on the steering wheel. There was only one "major DNA profile" found on the gear shift – and that was Figueroa's also.

DISCUSSION

A. *Section 352 and the "Contact" Evidence*

Figueroa contends the trial court erred, under section 352, in admitting testimony from a gang expert: In the process of explaining his opinion why Figueroa was an active member of Varro Viejo, the gang expert recounted a series of contacts Figueroa had with the police prior to the October 4 break-in and robbery. The testimony as to each contact was skeletal. Each contact was documented by either a "STEP notice"[5] or "field

---

[4] The criminalist from the Orange County crime lab said that the chances of someone else's DNA corresponding to the profile found in the car was one in one trillion. The population of the earth is less than one percent of one trillion. That's a match.

[5] The STEP in "STEP notice" stands for Street Terrorism Enforcement Act. Basically it serves as a formal warning to individuals associating with gang members that they are indeed associating with gang members. As stated in *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1414, footnote 1: "A STEP notice informs suspected individuals that law enforcement believes they associate with a criminal street gang."

identification card,"[6] in which Figueroa was found to be associating with a known member of Varro Viejo in Varro Viejo territory. There was no testimony about the circumstances surrounding each contact or any statements which Figueroa might have made to the police during each encounter.

The contact evidence had been the subject of a pretrial conference and a motion in limine brought by the defense concerning the general subject of the field identification cards. At the pretrial conference, defense counsel presented what is now Figueroa's main theory on appeal, namely that the sheer multitude of Figueroa's encounters with the police would tempt the jury to short-circuit the deliberative process and simply convict on a perception of Figueroa's bad character.[7] For his part, the trial judge also recognized the danger.[8] He ultimately ruled that the prosecution was "not to mention through the expert the quantity of the police reports nor the specifics of the police reports."

Part of the pretrial colloquy on the field identifications centered on just how much evidence from the gang expert was really needed to show Figueroa's active membership in the gang. After all, it was pretty obvious Figueroa was at least a member of Varro Viejo, having once admitted to the police he was "jumped into" the gang at age 14. But defense counsel never formally conceded the point of Figueroa's active

---

[6] Field identification cards are internal police documents, showing that a particular person was at a particular location at a given time, his or her reason for being at the location, and the reason for the person's contact with police. (See *People v. Harness* (1983) 139 Cal.App.3d 226, 229.)

[7] Defense counsel argued: "And the defense would object to the officer talking about seven police reports or giving the jury a number because the inference that naturally creates in the mind of a reasonable juror would be, 'Boy, this guy has been contacted by the cops quite a bit.'"

[8] Said the trial judge: "The inference that can be drawn is that this person is in constant contact with the police, and so I have to – I have to weigh under my responsibility under 803, which is a 352 analysis, I have to weigh the danger that the jurors would take this for an improper purpose versus the probative value. And what I have in this case, what I have in this case is I have a defendant who is tattooed with the gang, I have a defendant who admits that he is in the gang, I have a defendant who admits he got jumped into the gang, and I have a defendant that admits he is an active participant now in the gang, and then I have a defendant who admits that he has been active or been associated with the gang for twenty-something years." Accordingly, the judge recognized "a danger that the jurors could use it for an improper purpose in that because he's had all these contacts with the police, he's a bad person and they'll use it for disposition or propensity under 1101(a)."

participation, merely noting that his active membership was a "reasonable inference" from other evidence.[9] Moreover, defense counsel explicitly refused to concede Figueroa's active membership in his closing argument to the jury.

The prosecutor obeyed the letter of the trial judge's pretrial ruling, refraining from asking questions about the specifics of the police reports or any question along the lines of *how many* reports, cards or contacts the gang expert considered. On the other hand, the gang expert was allowed to briefly reference, seriatim, seven contacts, and any juror taking good notes might have been able to count them up.[10]

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." On balance, we cannot say the trial judge abused his discretion under section 352 in allowing the gang expert to recount the seven contacts. The probity easily outweighed any undue prejudice.

As to probity, as noted, the defense never formally conceded the issue of Figueroa's active participation in Varro Viejo – as we have seen the issue was still being contested at the very end of defense counsel's argument.[11] And on the issue of active

---

[9] The court: "But I have the sense from what I've heard so far that the issue that's going to be contested by the defense in this case will not be the fact that the defendant was an active participant in this gang at the time of the offense. [¶] Is that a safe assumption?"

Defense counsel: "It's a reasonable inference."

[10] We count seven contacts briefly noted by the gang expert. In order of their presentation to the jury they are: (1) September 17, 2009, based on a STEP notice, with Figueroa found to be in the company of Felix Galeana; (2) October 2, 2009, based on a field identification card, with Figueroa found to be in the company of Felix Galeana; (3) September 30, 2009, based on a field identification card, with Figueroa found to be in the company of Pedro Acevedo and Luis Tadeo; (4) September 28, 2009, based on a field identification card, with Figueroa found to be in the company of Felix Galeana; (5) September 19, 2009, based on a field identification card, with Figueroa found to be in the company of Felix Galeana; (6) September 12, 2009, based on a field identification card, with Figueroa found to be in the company of Felix Galeana; and (7) July 25, 2008, with Figueroa found to be in the company of Christian Mendez and Luis Tadeo.

[11] There was obvious strategic method to that madness. Besides street terrorism under section 186.22, subdivision (a), Figueroa also faced gang enhancements under section 186.22, subdivision (b). Street terrorism carries a maximum penalty of three years, but subdivision (b) enhancements can bring up to 10 years. (See § 186.22, subd. (b)(1)(C).) Admitting the three-year street terrorism count merely to head off the evidence of

participation, the relative frequency of the contacts was *itself* indicative of active participation. Some people are nominal members of civic organizations, religious organizations, even bar associations, but never attend their meetings. A juror might reasonably question whether such individuals are really "active" members. But people who go often to meet with their fellow members – a lodge member who attends meetings on a weekly basis or, in Figueroa's case, is found with fellow gang members many times in the course of the month before the sort of event for which Varro Viejo exists – may readily be classified as "active."

As to prejudice, according to *Karis*, the sort of prejudice that exceeds the bounds of discretion under section 352 must have a unique tendency to invoke emotional bias. (*Karis, supra*, 46 Cal.3d at p. 638.) The evidence presented by the gang expert here, however, was dull and short. He counted only a series of cards (in one case a STEP notice), with the minimalist details that Figueroa was with a certain known member of Varro Viejo, in territory claimed by Varro Viejo. The evidence took no more than a few pages transcript in a trial that easily exceed 700 pages, and nothing about the contacts was belabored.

B. *Sufficient Evidence and Harmless Error*

In the spirit of a good defense being a good offense, and as if to say to this court, "don't even think about a harmless error rationale," Figueroa argues on appeal that the evidence of his participation in the break in and robbery was insufficient. It is a brave effort, but an unavailing one. Seldom do we see a case with stronger evidence.

Figueroa's DNA was found on a straw in a cup on the center console of the smashed getaway car. Even if other drivers had driven that car from time to time, a reasonable juror could readily infer that Figueroa was the *last* driver. Why should the

---

the seven contacts would have been tantamount to stipulating to the greater penalties promised by the subdivision (b) enhancements.

driver put up with somebody else's mess in the center console? Moreover, as the DNA expert noted, Figueroa was the "major contributor" to the DNA on the steering wheel and gear shift, corroborating the inference that he was the driver that October morning.

Figueroa's attempt at minimization of the eye and ear witness identification is also unpersuasive. To say that the occupant who heard Figueroa's voice was unreliable because of a lack of training in voice recognition is, charitably, a stretch. It is also a small matter that the same occupant was not as certain (maybe only fifty percent) in his initial photo identification than his in-court identification. Most of us can recognize people we have seen more easily when we see them in person than when we see a photo of them. There was no uncertainty on the part of this witness when he identified Figueroa in court. And the fact he might not have known the difference between a bicep and a tricep (with reference to the "SJC" tattoo on Figueroa's arm) is virtually meaningless – he knew the tattoo was on the arm, whether or not he could pass an anatomy test.

To be sure, the occupants of the apartment had been up the night before, partying, and ingesting alcohol and marijuana. And that was a factor the jury certainly could consider. But they also could consider that the occupants of the house who testified as witnesses, including the occupant who recognized Figueroa in court, had to summon up a considerable degree of courage to do so. They had, after all, been the target of a gang attack and they were testifying against a member in good standing of the Varro Viejo.

In short, the evidence was overwhelming, and the paltry effect of a few brief references to field identifications would have made no difference – certainly under a *Watson* standard.

C. *The Exclusion of the Non-Deliberating Juror*

Appellant complains about the trial court's removal of a juror, juror 10, for failure to deliberate. Both sides agree on the law. As stated in *People v. Cleveland*

(2001) 25 Cal.4th 466, 487-488 (*Cleveland*), the issue turns on whether there was "evidence showing to a demonstrable reality that the juror failed or was unable to deliberate."[12] Where the parties disagree is whether the record shows such a demonstrable reality of failure or unwillingness to deliberate.

We set forth the record on the discharge in detail below. It shows unequivocally that juror 10 had an actual disagreement with the law that allows persons to be convicted without 100 percent certainty of guilt. (See *People v. Brigham* (1979) 25 Cal.3d 283, 303 ["'absolute certainty' . . . is not the degree of belief necessary to convict"].)

The episode began with the jury sending a note to the judge stating: "Jury is deadlocked, 11 to 1." Later that day the jury sent another note saying, "Clarification on the reasonable doubt, circumstantial evidence, and whether you must be 100 percent certain of the evidence."

The two notes provoked discussion between court and counsel on the subject of whether the jury really was deadlocked. Defense counsel took the position that the jury appeared initially deadlocked, but then had resumed deliberations centering on the concept of reasonable doubt. The court gave the instruction approved in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1119, but by the end of the day the jury sent another note back, suggesting the instruction hadn't helped. The note said: "We have a juror that cannot accept making a decision with any grey areas or doubt. This juror has stated their views clearly in the jury room."

While the court and counsel were deliberating what to do about that note, yet another note came in: "A juror wants to elaborate on their views. The juror cannot follow the court's instruction in good conscience."

---

[12] Legal database services might be a little more careful in red flagging opinions. There is nothing in *People v. Thompson* (2010) 49 Cal.4th 79, 137-138 (*Thompson*) that makes *Cleveland* merit a red flag. *Thompson*, in fact, both quoted and cited *Cleveland* with approval. (See *Thompson, supra*, 49 Cal.4th at pp. 137, 138.)

The judge determined to conduct "an inquiry." Then there was more discussion with counsel about how to proceed with that inquiry. Defense counsel's contribution was a desire to know "from this foreperson" if the juror in question "before indicated a willingness to follow instruction and, based on following the instruction, they still were not able to side with the remaining 11 jurors." Defense counsel posited that "their position could have evolved, and at some point this person could have been applying the law and just had what we have here, which is a doubt."

The upshot was that the trial judge asked the jury foreperson some questions outside the presence of the rest of the jury. The judge read the "a juror wants to elaborate on their views" note, and asked: "Can you explain to me what you meant by that [referring to the contents of the note] without telling me the deliberation process in terms of what facts are being discussed, what the views are? Would you be able to tell me that?"

The foreperson said, "Yes. So this juror has a personal standard that is higher than reasonable doubt." The court then asked if there had been "a discussion with the jurors on the reasonable doubt instruction." The foreperson replied that there had been "quite a few."

"I take it's one juror; is that correct?" the judge inquired. The foreperson replied yes.

"All right. Has this juror indicated to the jury it would not follow that instruction [referring to the reasonable doubt instruction]?"

"I don't personally believe it's that juror's interpretation. I understand that reasonable doubt is a bit of vague term, that something reasonable to one person might not be reasonable to another," replied the foreperson.

The foreperson then elaborated, "I believe that this juror felt without completely understandable evidence to them, a hundred percent clear, that they would not be able to judge a particular piece of evidence."

The judge then posited two hypotheticals to the foreperson: In one, a juror says "'I don't care what the instruction says. I'm not going to follow it." In the other hypothetical, the juror says, "'My views on this evidence [are] such that when I read that instruction, these are my views.'"

"It's definitely the first," replied the foreperson.

The judge wanted to make sure. "It's the first case where the juror says, 'I'm not going to follow the instruction.'"

"Yes," replied the foreperson. "The juror says, 'I feel that I understand what I'm being asked to do, and I don't feel that I should do it.'"

After an admonition to the foreperson not to discuss with his fellow jurors the exchange he just had with the judge, the foreperson was excused. Defense counsel thought the forthcoming inquiry should be modified "a bit" from the questions just asked of the foreperson, but did not elaborate. The judge agreed, but likewise did not elaborate. Juror 10 was then brought in.

The judge reassured juror 10 that he could not "inquire about your views as to whether the evidence was sufficient for a conviction." Juror 10 indicated agreement with the judge's reassurance, then the judge asked this question: "All right. But I am going to ask you some questions having to do with the law that the court has instructed you on. And I want to ask you specifically. Specifically, without telling me what instruction, is there a particular instruction that you have read that you cannot follow? Or let put it in a second situation. You've read the law, you understand the law."

"Uh-huh," said juror 10.

"But your view of the evidence," the judge continued, "you applied it to the law, and you've come up with a result. So the difference between the two is you have the law, you're not going to – you disagree with the law. Or, number two, you have the law, you applied the facts to the law, and you have a result. Do you understand the two?"

"Yes."

"All right." The judge then asked which alternative fit. "Are we – are we with you situation number one or situation number two?"

Juror 10's answer was unequivocal. "Number one." She disagreed with the law.

After a quick inquiry as to whether juror 10 could be able to tell the judge what the law was from memory, the judge got a little more specific. "We have had some communications from the jurors. And there was a clarification that was requested yesterday on reasonable doubt and circumstantial evidence." The judge next asked, "Is it the law of one of those two that you cannot follow?" Juror 10 answered yes.

The judge asked which of the two. Juror 10 answered, "I think it's both."

The judge inquired, "Has this been something that has been present throughout the deliberation, or is it something that's just recent."

"No. It's been present," replied juror 10.

Juror 10 then added, "And I wish I would have been able to relate – I mean I'm just learning that, but it's been present all along."

Juror 10 was excused, and the court entertained a motion to remove juror 10.

Defense counsel argued that the court did not "inquire as to the reason why the juror could not follow the law." The reason, he asserted, might have been either "her own personal beliefs, whether or not she personally disagrees with the law," or, on the other hand, "whether that has to do with maybe some outside pressure that she experienced from fellow jurors." Defense counsel thought further inquiry was indicated. The judge disagreed. Juror 10 was discharged, an alternate took her place, and Figueroa was subsequently convicted.

Figueroa's argument on appeal is a gloss on his trial counsel's complaint that further inquiry was necessary to establish precisely why juror 10 was not deliberating

– the trial judge's "truncated inquiry" did not demonstrate that juror 10 was really unable or unwilling to continue deliberations.

The exchange we have recounted leaves no doubt that juror 10 simply disagreed with the law that does not require absolute certainty to convict. The judge was careful to construct alternative scenarios – did the juror disagree with the law or merely have a different view of the evidence – put those scenarios to both the foreperson and the juror herself, and each answer was consistent: disagreement with the law. The court also specifically asked juror 10 whether her disagreement had been "present throughout the deliberation," or was "something that's just recent." Juror 10 was clear that it had been present throughout, thus eliminating trial defense counsel's supposition that undue pressure from other jurors might have been the real reason for her position. We find no error; the trial judge's handling of the matter was exemplary.

D. *Cruel and Unusual?*

Figueroa's sentence was 35 years to life, based largely on the trial court's decision not to strike one of his prior convictions for assault with a deadly weapon. The math behind the 35 years to life goes like this: The court took Figueroa's conviction on just count one (first degree robbery in concert) which came with a 15 years to life sentence, then doubled that for the strike prior, arriving at 30 years to life, then added another five years because of another prior for assault with a deadly weapon.[13]

Figueroa's final argument is that it was an abuse an abuse of discretion for the trial judge to refuse to strike his earlier conviction (see *People v. Ramero* (1996) 13 Cal.4th 497) and section 186.22, subdivision (b)(4) enhancement. (Another prior had already been dismissed before trial.) The net result of these refusals, he asserts, was to

---

[13] Convictions on the other counts either ran concurrent to the 35 years to life, or were stayed under section 654.

impose a sentence that contravenes the cruel and unusual punishment clauses of the state and federal constitutions.

As a straight-out challenge to the sentence on cruel and unusual grounds, Figueroa cannot, of course, prevail. (See *Ewing v. California* (2003) 538 U.S. 11, 20-21 [25 years to life for theft of golf clubs under three strikes law not cruel and unusual]; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 536, 568-569 [upholding sentence of 210 years to life for six robberies imposed on recidivist offender].) The question thus comes down to whether the trial court abused its discretion in deciding not to strike the gang enhancement and prior conviction. (See *People v. Carmony* (2004) 33 Cal.4th 367, 376 [review is for abuse of discretion].)

And the answer is an unqualified no. Figueroa was 39 years old at trial, a Varro Viejo member since age 14. As the trial judge was careful to spell out for the record, there were multiple victims of Figueroa's crimes, the crimes were committed in concert with a street gang, the victims were put in great fear, and the crime involved a home invasion. Further, as the judge noted, Figueroa has a "significant criminal history." Given his recidivism, use of a gun, home invasion, and active promotion of the interests of a criminal street gang, Figueroa approaches the archetype the Legislature had in mind when it passed the three-strikes law and provided for additional gang enhancements.

IV. DISPOSTION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.