

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

PEOPLE OF THE STATE OF CALIFORNIA,] No. H036028
]
Plaintiff and Respondent,] (Santa Clara Co.
] Superior Ct. No.
v.] CC813723)
]
MARK ANDREW ZAVALA,]
]
Defendant and Appellant.]
]

**PETITION FOR REHEARING
OF APPELLANT MARK ANDREW ZAVALA**

Appeal from the Judgment of the Superior Court of the
State of California for the County of Santa Clara
HONORABLE, SUPERIOR COURT JUDGE DAVID A. CENA

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PEOPLE OF THE STATE OF CALIFORNIA,) No. H036028
) Santa Clara Cty.
Plaintiff and Respondent,) Superior Ct. No.
) CC813723
v.)
)
MARK ANDREW ZAVALA, et al.,)
)
Defendants and Appellants.)
)

PETITION FOR REHEARING

**TO: THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES
OF THE COURT OF APPEAL FOR THE SIXTH APPELLATE
DISTRICT:**

Appellant, Mark Andrew Zavala, respectfully petitions this Court for rehearing on its order and opinion of the above-titled matter. Rehearing is sought because the court has overlooked key precedents and evidence in the record. Appellant contends what when the errors are corrected and the full facts considered, in light of all the applicable authorities, he established that his convictions for robbery and assault with a firearm were unlawful and must be reversed.

ARGUMENT

I. THE COURT'S OPINION OVERLOOKS APPELLANT'S AUTHORITY THAT IT WAS FEDERAL CONSTITUTIONAL ERROR TO INSTRUCT JURORS THE TESTIMONY OF A SINGLE WITNESS COULD PROVE ANY FACT

A. Instructing Jurors the Testimony of a Single Witness, if Credited, Could Prove Any Fact Was Federal Constitutional Error

The court's opinion holds that incorrectly instructing jurors that the testimony of a single witness, if credited, could prove any fact was harmless, because appellant failed to show the error was prejudicial under the California Constitution. (Opinion, p. 65) Yet, the error, as appellant argued, also was of federal constitutional dimension, both because it authorized the jury to convict without finding a fact necessary to conviction, and because it constituted the arbitrary deprivation of a protection guaranteed by state law. (See *Neder v. United States* (1999) 527 U.S. 1, 17-18 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *Laboa v. Calderon* (2000 9th Cir.) 224 F.3d 972, 979-980; *People v. Flood* (1998) 18 Cal.4th 470, 491.)

B. Prosecution Witness R.B. Was an Accomplice

Moreover, the misinstruction that the testimony of a single witness could prove any fact, and the erroneous omission of an accomplice instruction were viewed in light of the following matter omitted from the court's opinion, prejudicial. While the court's opinion asserts prosecution witness R.B. was not an accomplice, appellant submits the following facts

establish that he too was an accomplice, and thus the instructional errors authorized the jury to accord excessive weight to his opinion, in addition to that of co-defendant Hensley. (Opinion, p. 61)

R.B. was arrested, Mirandized and questioned in conjunction with this case. (5 RT 274-275) He admitted that he was present at the meeting at which the robbery was planned, that the persons who actually carried out the robbery did not know the target of the robbery, and that he did know the target of the robbery; R.B. gave inconsistent accounts of who proposed the target of the robbery, about why he himself did not participate in executing the robbery, when he learned the identity of the target of the robbery; when he learned about the robbery and about why he did not warn the target of the robbery. (5 RT 217-218, 220, 222, 237-238, 242, 251, 253-254, 261-262, 264-266, 274-275; 7 RT 889, 911-914, 917-918) Indeed, one of the reasons R.B. cited for not warning French, the target of the planned robbery, was that the perpetrators would figure out R.B. was the one who had informed him, since he was the only person who knew French. (5 RT 261-262)

R.B.'s admitted presence at the meeting at which the robbery was planned, his mendacity when interrogated by police on matters regarding the extent of his involvement in the planning, and his admission that he was the only person who knew the targeted individual amply authorized the jury to infer R.B. was the one who identified the target for the robberies and

thereby aided and abetted in their commission. (See *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1249-1250; *People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Assuming *arguendo* the evidence did not show R.B. identified the target, it showed nonetheless that he participated in a meeting in which the robbery was planned, that he lied about knowing the target of the robbery, that he lied about who proposed the target of the robbery, and that he lied about the reasons he did not warn the target of the impending robbery. His mendacity about material facts in this context makes it more likely than not that he conspired to commit the robberies. (See *People v. Beyah, supra*, 170 Cal.App.4th at 1249-1250; *People v. Russo* (2001) 25 Cal.4th 1124, 1135.) For both these reasons, R.B.'s testimony in this case constituted the testimony of an accomplice. (See *People v. Holford, supra*, 63 Cal.2d at 81.)

Moreover, R.B. was a key witness. R.B. was the prosecution's first witness, his testimony deeply implicated Mr. Zavala in the crimes and -- notwithstanding its inconsistencies-- it was relied on heavily by the prosecutor in his closing argument. (11 RT 1565, 1567, 1571-1572, 1576, 1661-1663, 1667; see *People v. Cruz* (1964) 61 Cal.2d 861, 868.) R.B. testified that he was present hours before the robbery, when a dark complected man named Mark, with a ponytail and shaved head, planned the robbery of Mr. French with several people, including co-defendant

Rodriguez, who was identified at the scene by his own relatives; that Mark said he was willing to shoot someone to execute the robbery; and that at the conclusion of the meeting, Mark left to obtain a gun. (5 RT217-219, 220, 221-222, 225, 237, 242, 358-359, 364-365; 7 RT 894) R.B. also identified Mr. Zavala's photograph in court, although he did not identify Mr. Zavala. (5 RT 219, 271-272)

As noted in Appellant Zavala's opening brief, there is considerable reason to believe the jury relied on R.B. testimony, and a substantial possibility they also relied on that of Defendant Hensley, which supports the inference the error was prejudicial. (Opening Brief of Appellant Zavala, pp. 49-51, 54-61, 64)

II. THE COURT'S OPINION OVERLOOKS EVIDENCE SHOWING FAILURE TO INSTRUCT ON ACCOMPLICE TESTIMONY, ERRONEOUSLY INSTRUCTING ON THE PROBATIVE VALUE OF ONE WITNESS'S TESTIMONY AND FAILURE TO BIFURCATE THE GANG ALLEGATIONS WAS PREJUDICIAL

The opinion overlooks the following facts, which, if considered, would show the erroneous omission of instruction on accomplice testimony, the instruction that the testimony of a single witness could prove a fact, and the denial of the motion to bifurcate the gang allegations were, both singularly and considered together, prejudicial. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Prosecution witness McBee, who identified Mr. Zavala in court, testified that he also had identified Zavala in a photo line-up, but the police testimony was that McBee had been shown a photo of defendant Hensley, not Zavala. (5 RT 341-342; 8 RT 804) McBee also testified that he picked out the photo of Ms. Skotkobic, who initially had accompanied the robbers to Mr. French's house, in a photo line-up, but police testified that he had failed to do so. (5 RT 341; 8 RT 892) In addition, immediately after the robbery, McBee told police that he had a "picture memory" and that the robber with the ponytail was the one who went through his pockets." (7 RT 878; 5 RT 334-335) In court, however, McBee said the Caucasian robber who did not have a ponytail was the one who had gone through his pockets. (5 RT 332-333)

Additionally, McBee, French and Esquibel, the three percipient witnesses who provided an estimate of the height of the robber with the ponytail, supposedly Zavala, estimated his height, respectively, as 5' 8", 5' 5" and 5' 6;" Mr. Zavala is 5' 11." (7 RT, pp. 745, 758-759, 8 RT, p. 1004, 11 RT, p. 1615; Defense Exhibit D)

Defense expert Dr. Shomer did not testify, as the court's opinion states, that two of the persons in the photo line up shown to witnesses fit the description of Hispanic male with dark complexion, which was supposed to have been Mr. Zavala. (Opinion, p. 38) He testified that only two person in the photo line-up fit the description of being dark complected males –

without any reference to apparent ethnicity. (10 RT 1419-1420) Dr. Shomer also testified that once a witness is shown a prejudicial photo-line-up, it no longer is possible to obtain an unprejudiced identification by using a fairly compiled show-up. (10 RT 1416) He stated there is a high level of agreement among experts in the field about the basic findings in this area, the nature of witness identification and the nature of procedures that should be used to obtain accurate identification. (10 RT 1403-1404)

Prosecution witness Janet Lacava testified that Mr. Zavala wore his hair in different styles over the years; at one point he had corn rows. (7 RT 927) She had last seen him no later than mid-April 2008, when he came to the store to pick up his paycheck after being promoted and transferred to a different store. (7 RT 929-932)

She stated the store at which they worked together would not have promoted Zavala if he had fallen into trouble or received a write up within the six months preceding his promotion. (7 RT 933-934) Zavala had a reputation for being a good worker; she thought he was and she liked him. (7 RT 934)

III. APPELLANT ZAVALA JOINED IN THE ARGUMENT OF APPELLANT RODRIGUEZ THAT THE COURT ERRONEOUSLY ADMITTED TESTIMONIAL HEARSAY RECITED BY PROSECUTION GANG EXPERT LIVINGSTON

The court's opinion notes that appellant Zavala joined in the argument raised by co-appellant Hensley that admission of testimonial

hearsay recited by prosecution gang expert, Officer Livingston violated his Sixth Amendment confrontation rights. (Opinion, p. 73) Appellant Zavala filed a notice of joinder (noted on the court's docket as filed October 7, 2011) asserting he also joined in the argument of co-appellant Rodriguez that denying appellant's motion to exclude the testimonial hearsay of Officer Livingston violated his Sixth Amendment rights.

IV. APPELLANTS PRESERVED THEIR SIXTH AMENDMENT OBJECTIONS TO THE TESTIMONIAL HEARSAY RECITED BY PROSECUTION GANG EXPERT LIVINGSTON

The court of appeal's opinion asserts that Mr. Zavala did not preserve a Sixth Amendment confrontation clause objection to testimonial hearsay recited by prosecution gang expert Livingston. (Opinion, pp. 79-85) The court's opinion omits the several occasions on which the claim was preserved. First, after Mr. Zavala objected in limine on confrontation clause grounds to the admission of hearsay from the gang expert, and the motion was denied, the court expressly instructed counsel it considered the motions continuing and that there was no need to present the motion again absent a change of circumstances. (3 RT 107-109, 117-118) There was no change of circumstances.

Nonetheless, during the trial, Mr. Zavala objected on confrontation clause grounds to the admission of testimonial hearsay from gang expert Livingston concerning Zavala's involvement with a criminal street gang. (6 RT 558-559) The court overruled the objection, and expressly noted the

issue was whether the Sixth Amendment precluded the expert from relying on otherwise admissible evidence, because the evidence was hearsay. (6 RT 560-561) The court ruled:

an expert witness may rely on otherwise inadmissible evidence, including hearsay statements, if it's the type of evidence that an expert would rely upon in forming or bolstering that opinion.

Statements of other gang members and witnesses, whether they're from police reports or field identification, past contacts, including statements from other officers are generally relied upon, and the Court finds that this expert can rely on those statements and that those are going to be admissible with a limiting instruction.

With regard to the statements by the witnesses that are given in this court of the investigation of the current case, those statements may be permissible for the purpose of supporting the expert's opinion only....

.....if statements were made by Moneyhun and Stojkovic (who did not testify) that Mr. Zavala and Mr. Rodriguez are gang members.... Those (statements) would be admissible for the person to rely on.

(6 RT 589-591)

Furthermore, Mr. Zavala expressly stated that his previously recited arguments that the admission of testimonial hearsay from Mr. Livingston violated the Sixth Amendment also applied to all evidence concerning the pattern offenses admitted to prove the gang to which Mr. Zavala allegedly belonged was a criminal street gang. (6 RT 611) The court expressly overruled the objection. (6 RT 611-612)

Mr. Zavala then objected on confrontation clause grounds to Officer Livingston's testimony that Mr. Zavala was a member of the Shalu Gardens gang. (6 RT 623) The court overruled the objection. (6 RT 623) Appellant Zavala submits these objections preserved his claim the

admission of Officer Livingston's testimonial hearsay statements, that 1) Zavala was a member of a criminal street gang, 2) that he interacted with present or former gang members, 3) that the Shalu Gardens, the group with which he allegedly was involved, was a criminal street gang, 4) the nature of Shalu Gardens' primary activities, 5) the names of other individuals who were members of Shalu Gardens, and 6) the events on which the alleged predicate crimes were based, violated the Sixth Amendment.

Moreover, particularly, in light of the above-quoted reasoning by the trial court in response to the defendants' Sixth Amendment objections to Officer Livingston's recitation of testimonial hearsay, it is manifest that further objection would have been futile. For this reason also, the claim was preserved. (See *Cramer v. Tyars* (1979) 23 Cal.3d 131, 138; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 236-237.)

CONCLUSION

For the reasons set forth herein, rehearing must be granted.

DATED: November 5, 2010

Respectfully submitted,
RANDY BAKER, P.S.

By: Randy Baker
Attorney for Appellant
Mark Andrew Zavala

CERTIFICATION OF WORD COUNT

I, Randy Baker, certify that application of the program Word shows the attached appellant's opening brief contains 2,191 words.

Executed under penalty of perjury under the laws of the State of California in Seattle, Washington on this 5th day of November 2013.

Randy Baker

DECLARATION OF SERVICE

People v. Zavala, H036028, Santa Clara County Superior Court No. CC813723

I, Beth Sanders, declare that I am over eighteen years of age and not a party to this action; that my business address is 219 First Avenue South, Suite 310, Seattle, WA 98104. I served a true copy of the attached "PETITION FOR REHEARING OF APPELLANT MARK ANDREW ZAVALA" on each of the following by placing a true copy thereof in envelopes addressed respectively as follows:

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Each envelope was sealed and deposited in the U.S. mail with First Class postage affixed at Seattle, Washington on the 6TH day of November 2013.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Seattle, Washington on this 6TH day of November 2013.

Randy Baker