NO.

IN THE

SUPREME COURT OF THE UNITED STATES

ANGEL NOEL GUEVARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITIION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JONATHAN CRUZ-RAMIREZ, AKA Soldado, Defendant-Appellant.	No. 11-10632 D.C. No. 3:08-cr-00730-WHA-6 Northern District of California, San Francisco ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MORIS FLORES, AKA Slow, AKA Slow Pain, Defendant-Appellant.	No. 11-10635 D.C. No. 3:08-cr-00730-WHA-4 Northern District of California, San Francisco

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERICK DAVID LOPEZ, AKA Spooky,	No. 11-10638 D.C. No. 3:08-cr-00730-WHA-10 Northern District of California, San Francisco

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANGEL NOEL GUEVARA, AKA Peloncito,

Defendant-Appellant.

No. 11-10644

D.C. No.
3:08-cr-00730-WHA-3
Northern District of California,
San Francisco

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARVIN CARCAMO, AKA Cyco, AKA Psycho, AKA Syco,

Defendant-Appellant.

No. 11-10645

D.C. No.
3:08-cr-00730-WHA-2
Northern District of California,
San Francisco

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GUILLERMO HERRERA, AKA Shorty, AKA Sparky,

No. 12-10051

D.C. No.
3:08-cr-00730-WHA-5
Northern District of California,
San Francisco

Defendant-Appellant.

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

The motions for leave to file a joinder filed by Appellants Flores, Lopez, and Guevara are **GRANTED**.

The panel unanimously votes to deny the petitions for rehearing en banc filed by Appellants Cruz-Ramirez, Guevara, and Herrera.

The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing en banc are **DENIED**.

782 Fed.Appx. 531
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jonathan CRUZ-RAMIREZ, aka
Soldado, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Moris Flores, aka Slow, aka Slow
Pain, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Erick David Lopez, aka
Spooky, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Angel Noel Guevara, aka
Peloncito, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Marvin Carcamo, aka Cyco, aka Psycho,
aka Syco, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Guillermo Herrera, aka Shorty,
aka Sparky, Defendant-Appellant.

No. 11-10632, No. 11-10635, No. 11-10638,
No. 11-10644, No. 11-10645, No. 12-10051
|
Argued December 4, 2018
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Submission Vacated January 11, 2019
|
Resubmitted July 17, 2019 Seattle, Washington
|
Filed July 19, 2019

Synopsis

Background: Defendants were convicted in the **United States** District Court for the Northern District of California, William H. Alsup, J., for their participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang. Defendants appealed.

Holdings: The Court of Appeals held that:

[1] district court did not abuse its discretion in allowing government to introduce expert testimony on rebuttal regarding defendant's cell-site location information;

[2] district court did not abuse its discretion in excluding defendant's expert testimony on eyewitness identification;

[3] agent's testimony regarding informant's description of telephone call with defendant was testimonial and thus violated defendant's confrontation rights;

[4] district court's error in admitting agent's testimony regarding informant's description of telephone call with defendant was harmless;

[5] testimony of cooperator describing defendant's accounts of participation in shooting was admissible as non-hearsay statements made during and in furtherance of the conspiracy;

[6] defendant failed to demonstrate juror was actually or impliedly biased;

[7] district court did not abuse its discretion by conducting a joint trial or plainly err by providing hundreds of limiting instructions regarding a joint trial;

[8] government did not violate *Brady* obligations by failing to disclose evidence police thought informant was involved in murder;

[9] government did not violate *Brady* obligations by failing to disclose material witness warrants issued for three eyewitnesses;

[10] evidence of defendant's alleged juvenile conduct was admissible;

[11] evidence of defendant's uncharged juvenile acts were admissible;

[12] district court did not abuse its discretion by limiting defendant's cross-examination of witness regarding alleged affair with defendant;

[13] federal agent's search of defendant's cellular telephone during execution of state search warrant did not violate Fourth Amendment; and

[14] district court's decision to deny defendant's request to continue trial or for severance was neither unreasoning or arbitrary.

Affirmed in part, vacated in part, and remanded.

West Headnotes (26)

[1] Criminal Law
Rebuttal

The district court did not abuse its discretion in allowing government to introduce expert testimony on rebuttal regarding defendants' cell-site location information in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the expert testimony did not prejudice the remaining defendants because the government argued inferences in closing arguments that were premised solely on cell-site location records and testimony admitted during government's case-in-chief. 18 U.S.C.A. § 1961 et seq.

[2] Criminal Law
Evidence calculated to create prejudice against or sympathy for accused

Criminal Law
Eyewitnesses

The district court did not abuse its discretion in excluding defendants' expert testimony on eyewitness identification in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the district court balanced the probative value of the proffered testimony against the risk of wasted time and juror confusion, excluding defendants' expert's testimony did not infringe their Sixth Amendment right to present a defense, several problems with eyewitness testimony were evidence from the record which permitted defendants to present the substance of their misidentification defense through cross-examination and logical inferences. U.S. Const. Amend. 6; 18 U.S.C.A. § 1961 et seq.

[3] Criminal Law
Evidence calculated to create prejudice against or sympathy for accused

The district court did not abuse its discretion in determining the probative value of admitting defendant's girlfriend's poem outweighed the danger of unfair prejudice in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the poem was minimally probative as it made it somewhat more likely that defendant was present when crime was committed by street gang or that poem described crimes committed by gang, the poem was not specifically connected to any charged crime, and the poem only posed a slight risk of prejudice to one defendant but no risk of unfair prejudice to other defendants. Fed. R. Evid. 403; 18 U.S.C.A. § 1961 et seq.

[4] Criminal Law
Documentary and demonstrative evidence

Even if the district court erred in improperly admitting defendant's girlfriend's poem as to defendant by determining the probative value outweighed the danger of unfair

prejudice, its admission was harmless in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the eyewitness identifications of girlfriend were strong and evidence from cell-site location records connected both defendant and girlfriend to stabbings. Fed. R. Evid. 403; 18 U.S.C.A. § 1961 et seq.

[5] **Criminal Law**

Out-of-court statements and hearsay in general

Agent's testimony regarding informant's description of a telephone call he received from defendant immediately after shooting was testimonial, and thus, its admission violated defendant's confrontation rights in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; informant routinely reported information to law enforcement, and the circumstances objectively demonstrated that informant did not make his statements to agent during an ongoing emergency. U.S. Const. Amend. 6; 18 U.S.C.A. § 1961 et seq.

[6] **Criminal Law**

Reception of evidence

The district court's error in admitting agent's testimony regarding informant's description of a telephone call he received from defendant immediately after shooting, in violation of defendant's confrontation rights, was harmless in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; informant's testimony described cryptic, equivocal statements from defendant that did not directly implicate him in criminal activity, and cell-site location evidence and other co-conspirator testimony implicated defendant in the shooting. U.S. Const. Amend. 6; 18 U.S.C.A. § 1961 et seq.

[7] **Criminal Law**

Sound recordings

Portion of co-defendant's recorded statement that defendant sought to introduce, in which he arguably described shooting a gun that later jammed, lacked a proper foundation as required to admit the statement in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; informant allegedly recorded co-defendant's statement on a wire that he wore but no witness was called to authenticate the recording, informant was uniquely untrustworthy in light of his perjury charges, there was one incident in the proceedings in which a recorded statement was erroneously identified, and questions remained about how informant's recordings were created. 18 U.S.C.A. § 1961 et seq.

[8] **Criminal Law**

Character of acts or declarations

Testimony of cooperator describing defendant's accounts of his participation in shooting was admissible as non-hearsay statements made by coconspirator during and in furtherance of the conspiracy in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; defendant's jailhouse statements furthered the conspiracy insofar as they apprised cooperator of the gang's ongoing conflicts with rival gang and of defendant's work on behalf of the conspiracy. Fed. R. Evid. 801(d)(2)(E); 18 U.S.C.A. § 1961 et seq.

[9] **Criminal Law**

Intent, belief, or feelings

Informant's testimony that he did not believe defendant when he claimed responsibility for shooting was admissible in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; informant testified only as to his own belief in response to defendant's statement and did not testify about whether defendant was generally credible. 18 U.S.C.A. § 1961 et seq.

[10] **Criminal Law**

Opinion evidence

Even if the district court erred in admitting informant's testimony that he did not believe defendant when he claimed responsibility for shooting, any error was harmless in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the jury heard testimony that defendant claimed he was the shooter in the murder but also heard testimony that defendant claimed he drove the van. 18 U.S.C.A. § 1961 et seq.

[11] **Jury**

Bias and Prejudice

Jury

Form and sufficiency of answers

Defendants failed to demonstrate juror was actually or impliedly biased, as required to dismiss juror in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; juror unequivocally reassured the court that he would follow instructions and be fair, juror gave repeated assurances and the court was able to observe his demeanor and assess his credibility, juror did not conceal information during voir dire, and juror's past experiences being ''checked'' by gang members failed to demonstrate extreme circumstances. 18 U.S.C.A. § 1961 et seq.

[12] **Criminal Law**

Evidence admissible only against codefendant; spillover or compartmentalization

Criminal Law

Particular Instructions

The district court did not abuse its discretion by conducting a joint trial or plainly err by providing hundreds of limiting instructions regarding a joint trial in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the jury acquitted one defendant entirely and partial acquitted another demonstrating its ability to compartmentalize and give each defendant individual consideration, the limiting instructions were given to reduce or eliminate any possibility of prejudice arising from a joint trial, and the predicate crimes underlying the RICO and VICAR counts were well within the ability of the ordinary juror to understand. 18 U.S.C.A. § 1961 et seq.

[13] **Criminal Law**

Impeaching evidence

Government did not violate *Brady* obligations by failing to disclose evidence that police sergeant thought informant was involved in murder and that sergeant connected detective with assistant **United States** attorney for further investigation; evidence was discussed in open court during trial, and even if the evidence had been suppressed it had minimal impeachment value given informant testified that he committed multiple violent crimes, including attempted murder, and evidence showed that sergeant

encouraged further investigation of informant's involvement.

[14] **Criminal Law**
Impeaching evidence
Criminal Law
Other particular issues

Government did not violate *Brady* obligations by failing to disclose material witness warrants issued for three eyewitnesses to stabbing; witnesses were afraid to testify against street gang, witnesses testified only on threat of arrest or actual arrest, the resulting warrants did not constitute exculpatory information, and there was no reasonable probability that the result of the trial would have been different had defendant questioned the witnesses about their fear of testifying.

[15] **Criminal Law**
Time for filing; waiver for failing to file or to timely file

The district court did not abuse its discretion when it declined to consider defendant's untimely motion to suppress records containing his cell-site location information in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; government moved for clarification of suppression order that cell phone records could include cell-site location information and the court clarified that cell phone records only referred to text messages and other materials containing content of the communications, and defendant did not seek additional clarification or reconsideration of the order. 18 U.S.C.A. § 1961 et seq.

[16] **Criminal Law**
Time when disclosure is permitted

Late disclosure of witness's testimony detailing defendant's alleged admissions to uncharged acts in response to defendant's asserted entrapment defense was permissible in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; defendant was not harmed by the late disclosure since the court postponed his cross-examination of witness so that defendant could conduct additional investigation, and defendant did not demonstrate prejudice resulting from his alleged inability to investigate the late-disclosed acts. 18 U.S.C.A. § 1961 et seq.

[17] **Criminal Law**
Juvenile misconduct
Criminal Law
Limiting effect of evidence of other offenses

Evidence of defendant's alleged juvenile conduct was admissible in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; district court's jury instruction permitted conviction on conspiracy charges only if defendant continued in the conspiracy after he turned 18 years old and only if the government proved all elements of the crime as of or after defendant's 18th birthday. 18 U.S.C.A. § 1961 et seq.

[18] **Criminal Law**
Conspiracy, racketeering, and money laundering
Criminal Law
Juvenile misconduct
Criminal Law
Necessity

Evidence of defendant's uncharged juvenile acts were admissible in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR)

conspiracies and associated crimes in furtherance of a criminal street gang; evidence of defendant's uncharged acts was evidence directly related to, or inextricably intertwined with the crime of conspiracy and thus were not subject to notice requirement, and the court was not required to strike testimony about defendant's uncharged juvenile acts even after it declined to give an entrapment instruction since the testimony was admissible as proof on the full scope of the conspiracy. Fed. R. Evid. 404(b); 18 U.S.C.A. § 1961 et seq.

[19] Criminal Law

Other particular offenses

Defendant was not entitled to jury instruction on entrapment in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; defendant was the leader of a clique of the street gang, and the dearth of evidence concerning defendant's lack of predisposition defendant failed to point to even slight evidence satisfying the elements of an entrapment defense. 18 U.S.C.A. § 1961 et seq.

[20] Criminal Law

Time for proceedings

The district court did not abuse its discretion by denying as untimely defendant's motion to sever his trial and group him with another individual in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; in defendant's only timely motion to sever he requested severance from all other defendants and said nothing about his desire to be grouped with another individual. Fed. R. Crim. P. 12(b)(3), 12(c)(3); 18 U.S.C.A. § 1961 et seq.

[21] Witnesses

Particular matters as subjects of cross-examination

The district court did not abuse its discretion by limiting defendant's cross-examination of witness regarding her alleged affair with defendant in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the probative value of witness's alleged affair with defendant was minimal and substantially outweighed by the threat of a mini-trial on the issue, and the jury had sufficient information to assess the credibility of witness and informant, particularly because informant admitted that he told witness to lie to federal agents by saying that she was being stalked. 18 U.S.C.A. § 1961 et seq.

[22] Criminal Law

Acts, admissions, declarations, and confessions of accused

Even if a *Massiah* violation occurred, cooperator's testimony that defendant stated he was arrested in possession of a gun linked to two murders was harmless beyond a reasonable doubt and did not warrant a mistrial in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; three additional witnesses offered the same substantive testimony as cooperator, and one witness testified that defendant admitted he was responsible for the killings which was testimony far more damaging than anything cooperator said. 18 U.S.C.A. § 1961 et seq.

[23] Searches and Seizures

Persons participating; place of search

Federal agent's search of defendant's cellular telephone during execution of a state search warrant did not violate the Fourth Amendment, and thus, photographs taken from federal

agents' search were admissible in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; properly issued search warrant was not rendered void for purposes of the Fourth Amendment simply because it was executed by federal law enforcement officers who lacked warrant-executing authority under state law. U.S. Const. Amend. 4; 18 U.S.C.A. § 1961 et seq.

[24] **Criminal Law**
Evidence wrongfully obtained
Criminal Law
Illegally obtained evidence

Even if the search warrant was not properly issued that allowed federal agent's to search defendant's cellular telephone, any error in admitting the photographs found in the search was harmless in trial for defendants' participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the only evidence from defendant's telephone admitted at trial was twelve photographs showing defendant and other individuals making gang symbols and tattoos and writings featuring gang characters, and the photographs were cumulative to other witnesses' testimony. U.S. Const. Amend. 4; 18 U.S.C.A. § 1961 et seq.

[25] **Criminal Law**
Conduct of Trial in General
Criminal Law
Preferability of raising effectiveness issue on post-conviction motion

Defendant's claim that defense counsel was ineffective would not be reviewed on direct appeal; defendant's argument for ineffective counsel was premature and was insufficiently supported by the present record and could be addressed in a motion to vacate, set aside, or correct sentence. U.S. Const. Amend. 6; 28 U.S.C.A. § 2255.

[26] **Criminal Law**
Second or Further Continuance
Criminal Law
Conspiracy cases

The district court's decision to deny defendant's request to continue trial or for severance was neither unreasoning or arbitrary in trial for participation in Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) conspiracies and associated crimes in furtherance of a criminal street gang; the court offered a reasoned explanation that after several continuances, another continuance threatened witnesses' memory loss and exacerbated the ongoing danger to witnesses, and the court permitted defendants to apply for additional resources if necessary to analyze newly-produced discovery and to seek continuances to prepare cross-examination during trial. 18 U.S.C.A. § 1961 et seq.

Attorneys and Law Firms

***537** Merry Jean Chan, Assistant U.S. Attorney, DOJ-USAO, San Francisco, CA, Sonja Ralston, Attorney, Sangita Rao, Attorney, DOJ - U.S. Department of Justice, Washington, DC, for Plaintiff - Appellee

J. Frank McCabe, Burlingame, CA, for Defendant - Appellant

Appeal from the **United States** District Court for the Northern District of California, William Alsup, District Judge, Presiding, D.C. No. 3:08-cr-00730-WHA-6, D.C. No. 3:08-cr-00730-WHA-4, D.C. No. 3:08-cr-00730-WHA-10, D.C. No. 3:08-cr-00730-WHA-3, D.C. No. 3:08-cr-00730-WHA-2, D.C. No. 3:08-cr-00730-WHA-5

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

MEMORANDUM [*]

Defendants Jonathan Cruz-Ramirez, Moris Flores, Erick Lopez, **Angel Guevara**, Marvin Carcamo, and Guillermo Herrera appeal their judgments of convictions for their participation in RICO and VICAR conspiracies and associated crimes ***538** in furtherance of the criminal street gang La Mara Salvatrucha ("MS-13"). [1] We vacate Lopez's conviction on Count 8 and Cruz-Ramirez's and Herrera's convictions on Count 15 and remand for resentencing because these convictions are lesser-included offenses of Counts 7 and 14, respectively. We vacate Cruz-Ramirez's conviction on Count 16, Lopez's conviction on Count 9, and Carcamo's, **Guevara**'s, and Flores' convictions on Count 4 and remand for resentencing in light of ***United States*** *v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 2336, 204 L.Ed.2d 757 (2019), which held that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. We affirm all other convictions.

1. The government concedes that the district court erred by sentencing Lopez, Cruz-Ramirez, and Herrera to concurrent terms of life imprisonment for their convictions under 18 U.S.C. § 924(c) and 18 U.S.C. § 924(j)—premised on the same murders—because their convictions under § 924(c) were lesser-included offenses of their convictions under § 924(j). Accordingly, we vacate Lopez's § 924(c) conviction on Count 8 and Cruz-Ramirez's and Herrera's § 924(c) convictions on Count 15 and remand for resentencing.

2. Defendants' challenge to the constitutionality of 18 U.S.C. § 924(c)(3)(B) was resolved by *Davis*, 139 S. Ct. at 2336. Accordingly, we vacate Cruz-Ramirez's conviction on Count 16, Lopez's conviction on Count 9, and Carcamo's, **Guevara**'s, and Flores' convictions on Count 4, and remand for resentencing.

[1] 3. The district court did not abuse its discretion by allowing the government to introduce expert testimony on rebuttal regarding Lopez's and Herrera's cell-site location information. *See* ***United States*** *v. Koon*, 34 F.3d 1416, 1429 (9th Cir. 1994) (noting the wide discretion of district courts to permit the government to introduce in its rebuttal case evidence that might have been presented in the case-in-chief), *rev'd in part on other grounds*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). This expert testimony did not prejudice the remaining defendants because the government appropriately argued inferences in closing argument that were premised solely on cell-site location records and testimony admitted during the government's case-in-chief.

[2] 4. Under the particular facts of this case, the district court permissibly excluded Dr. Davis' expert testimony. Pursuant to Federal Rule of Evidence 403, the court acted within its discretion in balancing the probative value of the proffered testimony against the risk of wasted time and juror confusion. *See* ***United States*** *v. Rincon*, 28 F.3d 921, 925–26, 925 n.6 (9th Cir. 1994). Assuming Herrera and **Guevara** preserved their Sixth Amendment objection, excluding Dr. Davis did not infringe their Sixth Amendment right to present a defense. Several problems with eyewitness testimony were evident from the record, which permitted **Guevara** and Herrera to "present the substance of" their misidentification defense through cross-examination and logical inferences. ***United States*** *v. Waters*, 627 F.3d 345, 354 (9th Cir. 2010).

[3] **[4]** 5. The district court did not abuse its discretion by admitting the Hernandez poem. The court permissibly determined the poem was not hearsay because it was not offered to prove the truth of the matter asserted, and the court appropriately exercised its discretion pursuant to Rule 403. *See* ***United States*** *v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009) (en banc) (noting that a court's Rule 403 ruling is entitled to great deference). The poem ***539** was minimally probative because it made it somewhat more likely that **Guevara** was present when a crime was committed by MS-13, or that the poem described crimes committed by MS-13. The poem was not specifically connected to any charged crime, but other evidence established that 20th Street clique members were violent against their rivals, that Hernandez was a member of an affiliated gang, that she was **Guevara**'s girlfriend, and that she was near him on the night of December 26, 2007. The poem only posed a slight risk of unfair prejudice to **Guevara** and no risk of unfair prejudice to other defendants. Even assuming that the poem was improperly admitted as to **Guevara**, its admission was harmless because, as noted, the eyewitness identifications of Hernandez were strong and evidence from the cell-site location records connected both **Guevara** and Hernandez to the December 26, 2007 stabbings.

[5] **[6]** 6. Herrera challenges four evidentiary rulings. First, we agree that the court erred when it allowed an agent to testify about Roberto Acosta's description of a telephone call he received from Herrera immediately after the Estrada shooting. *See* ***United States*** *v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017) (reviewing de novo alleged violations

of the Confrontation Clause). This call was testimonial because Acosta was an informant who was routinely reporting information to law enforcement, and the circumstances objectively demonstrate that Acosta did not make his statements to the agent during an ongoing emergency. *See* ***United States*** *v. Brooks*, 772 F.3d 1161, 1168 (9th Cir. 2014) (citation omitted). Nor was Acosta's call an excited utterance. *See Bemis v. Edwards*, 45 F.3d 1369, 1373 (9th Cir. 1995) ("[T]he excited utterance exception is only available if the declarant has firsthand knowledge of the subject matter of [his] statement."). Nonetheless, the district court's error was "harmless beyond a reasonable doubt," ***United States*** *v. Bustamante*, 687 F.3d 1190, 1195 (9th Cir. 2012), because Acosta's testimony described cryptic, equivocal statements from Herrera that did not directly implicate him in criminal activity, and cell-site location evidence and other co-conspirator testimony implicated Herrera in the Estrada shooting.

[7] The district court did not abuse its discretion by excluding Cruz-Ramirez's recorded statement in which he arguably described shooting a gun that later jammed. *See* ***United States*** *v. Estrada-Eliverio*, 583 F.3d 669, 672 (9th Cir. 2009) (reviewing a ruling concerning the authentication of evidence for abuse of discretion). Acosta allegedly recorded Cruz-Ramirez's statement on a wire that he wore, but no witness was called to authenticate this recording. Acosta was uniquely untrustworthy in light of his perjury charges, and there was at least one incident in these proceedings in which a recorded statement was erroneously identified. The court also observed that questions remained about how Acosta's recordings were created. Therefore, the court did not abuse its discretion by concluding that the portion of the recording Herrera sought to introduce lacked a proper foundation. *See* ***United States*** *v. Gadson*, 763 F.3d 1189, 1203 (9th Cir. 2014) ("[T]he party offering the evidence must make a prima facie showing of authenticity so that a reasonable juror could find in favor of authenticity or identification." (internal quotation marks omitted)).

[8] Next, assuming Herrera timely objected, the court did not abuse its discretion by admitting cooperator Jose Alvarado's testimony describing Cruz-Ramirez's accounts of his participation in the Estrada shooting. The court properly admitted this ***540** testimony under Federal Rule of Evidence 801(d)(2)(E) because Cruz-Ramirez's jailhouse statements furthered the conspiracy insofar as they apprised Alvarado of the gang's ongoing conflicts with the Nieros and of Cruz-Ramirez's "work" on behalf of the conspiracy. ***United States*** *v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007) (per curiam) ("When offered against a party, a statement by a coconspirator of a party during the course and in furtherance of the conspiracy is not barred by the hearsay rule." (internal quotation marks omitted)); *see* ***United States*** *v. Tamman*, 782 F.3d 543, 553 (9th Cir. 2015) ("[S]tatements made to keep coconspirators abreast of an ongoing conspiracy's activities satisfy the 'in furtherance of' requirement." (internal quotation marks omitted)).

[9] **[10]** The court did not abuse its discretion by admitting informant Walter Palma's testimony that he did not believe Cruz-Ramirez when Cruz-Ramirez claimed responsibility for the Estrada shooting. *See* ***United States*** *v. Mendoza-Paz*, 286 F.3d 1104, 1113 (9th Cir. 2002) (reviewing admission of lay opinion testimony for abuse of discretion). Palma testified only as to his own belief in response to Cruz-Ramirez's statement, and did not testify about whether Cruz-Ramirez was generally credible. Finally, any error was harmless; the jury heard testimony that Cruz-Ramirez claimed he was the shooter in the Estrada murder, but also heard testimony that Cruz-Ramirez claimed he drove the van.

[11] 7. The district court did not err when it declined to dismiss Juror 57. Juror 57 unequivocally reassured the court that he would follow instructions and be fair. Because Juror 57 gave repeated assurances and the court was able to observe his demeanor and assess his credibility, we are not firmly convinced that the court's factual findings regarding Juror 57's truthfulness and impartiality were wrong. [2] ***United States*** *v. Olsen*, 704 F.3d 1172, 1190 (9th Cir. 2013). Defendants therefore fail to demonstrate actual bias. *See id.* at 1189. Next, because the district court plausibly found that Juror 57 did not conceal information during voir dire, and its finding was not clearly erroneous, defendants fail to demonstrate *McDonough* bias. *See Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007) (en banc). Last, Juror 57's past experiences being "checked" by gang members fail to demonstrate the extreme circumstances necessary to find implied bias. *See* ***United States*** *v. Kechedzian*, 902 F.3d 1023, 1028 (9th Cir. 2018).

[12] 8. The district court did not abuse its discretion by conducting a joint trial, nor plainly err by providing hundreds of limiting instructions. *See* ***United States*** *v. Barragan*, 871 F.3d 689, 701–02 (9th Cir. 2017) (reviewing decision to conduct a joint trial for abuse of discretion), *cert. denied*, —— U.S. ——, 138 S. Ct. 1565, 200 L.Ed.2d 757, *and cert. denied*, —— U.S. ——, 138 S. Ct. 1572, 200 L.Ed.2d 757

(2018). Joint trials are "particularly appropriate where the co-defendants are charged with conspiracy," and here, the jury acquitted one defendant entirely and partially acquitted Cruz-Ramirez, "demonstrating its ability to compartmentalize" and give each defendant individual consideration. *Id.* at 702. The limiting instructions were given to "reduce or eliminate any possibility of prejudice arising from a joint trial," *United States v. Fernandez*, 388 F.3d 1199, 1243 (9th Cir. 2004), and ***541** the predicate crimes underlying the RICO and VICAR counts were "well within the ability of the ordinary juror to understand." *See id.* at 1244. Accordingly, the joint trial was not "manifestly prejudicial" and was not an abuse of discretion. *Id.* at 1241.

[13] 9. The government did not violate its obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To prevail on a *Brady* claim, a "defendant must show: (1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced; and (3) the suppressed evidence was material to his guilt or punishment." *United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011) (internal quotation marks omitted). Evidence that Sergeant Molina thought Walter Palma was involved in the Marquez murder and that Sergeant Molina connected the Marquez detective with an Assistant United States Attorney for further investigation was discussed in open court during trial. Even if this evidence had been suppressed, it had minimal impeachment value given that Palma testified that he committed multiple violent crimes, including attempted murder, and because the evidence concerning Sergeant Molina shows that he encouraged—rather than stifled—further investigation of Palma's involvement in the Marquez murder.

[14] Likewise, the government did not violate its *Brady* obligations by failing to disclose material witness warrants issued for the three eyewitnesses to the December 26 stabbings. The record is clear that these witnesses were afraid to testify against MS-13 and that they testified only on threat of arrest or actual arrest. The resulting warrants do not constitute exculpatory information, and there is no reasonable probability that the result of the trial would have been different had Guevara questioned these witnesses about their fear of testifying.

[15] 10. The district court did not abuse its discretion when it declined to consider Flores' untimely motion to suppress records containing his cell-site location information. *See United States v. Tekle*, 329 F.3d 1108, 1113 (9th Cir. 2003) ("The decision whether to grant an exception to a Rule 12 waiver lies in the discretion of the district court."). The deadline for filing suppression motions was July 27, 2010. The court granted in part Flores' July 27 motion and suppressed "cell phone records predating May 1, 2008." The government moved for clarification on the grounds that "cell phone records" could include cell-site location information, and the court clarified that "cell phone records" only referred to "text messages and other materials containing *content* of the communications." Flores did not seek additional clarification or reconsideration of the order, and the court's denial of Flores' subsequent and untimely motions to suppress during trial was not an abuse of discretion.

[16] 11. The district court did not err when it permitted the late disclosure of Jaime Martinez's testimony detailing Flores' alleged admissions to uncharged acts in response to Flores' asserted entrapment defense. *See United States v. Loftis*, 843 F.3d 1173, 1176 n.1 (9th Cir. 2016) (reviewing admission of "other crimes" evidence for abuse of discretion and reviewing de novo whether evidence constitutes other crimes evidence). Furthermore, Flores was not harmed by the late disclosure because the court postponed his cross-examination of Martinez so that Flores could conduct additional investigation, and Flores does not demonstrate prejudice resulting from his alleged inability to investigate the late-disclosed acts.

***542** **[17]** 12. The district court did not err by admitting evidence of Flores' alleged juvenile conduct. *See United States v. Camez*, 839 F.3d 871, 877 (9th Cir. 2016) (concluding defendant's conviction "must stand" where the district court instructed the jury that it could convict defendant "only if it found that [d]efendant continued his participation [in the criminal enterprise] after turning 18"). The district court's jury instruction here was just as restrictive as the one given in *Camez*, permitting conviction on conspiracy charges only if Flores continued in the conspiracy after he turned 18 and *only* if the government proved "all elements of the crime as of or after the defendant's 18th birthday."

[18] 13. The district court did not circumvent Federal Rule of Evidence 404(b) and did not abuse its discretion by admitting evidence of Flores' uncharged acts. *See United States v. Rizk*, 660 F.3d 1125, 1131–32 (9th Cir. 2011) (reviewing a decision to admit evidence for abuse of discretion). Evidence of Flores' uncharged acts was evidence "directly related to, or inextricably intertwined with, the crime charged in the

indictment," and was therefore not subject to Rule 404(b)'s notice requirement. *Id.* at 1131 (internal quotation marks omitted). The court was not required to strike testimony about Flores' uncharged juvenile acts even after it declined to give an entrapment instruction, because this testimony was admissible as "proof on the full scope of the conspiracy." *Id.*

[19] 14. The district court did not abuse its discretion by declining to instruct the jury on entrapment. *See* ***United States*** *v. Spentz*, 653 F.3d 815, 818 (9th Cir. 2011) (reviewing for abuse of discretion the denial of an entrapment instruction due to insufficient evidence). Flores was the *leader* of the 20th Street clique by 2008, and given the dearth of evidence concerning his lack of predisposition, Flores fails to point to even slight evidence satisfying the elements of an entrapment defense.

[20] 15. The district court did not abuse its discretion by denying as untimely Flores' motion to sever his trial and group him for trial with Manuel Franco. Motions filed after the deadline set pursuant to Federal Rule of Criminal Procedure 12(b)(3) are untimely. Fed. R. Crim. P. 12(c)(3). In his only timely motion to sever, Flores requested severance from "all other defendants" and said nothing about his desire to be grouped with Franco. The court properly declined to consider Flores' subsequent and untimely motion to be tried with Franco. *See Tekle*, 329 F.3d at 1113.

[21] 16. The district court did not err by limiting Flores' cross-examination of witness Ana Ramos. *See* ***United States*** *v. Larson*, 495 F.3d 1094, 1102 (9th Cir. 2007) (en banc). The probative value of Ramos' alleged affair with Flores was minimal and substantially outweighed by the threat of a mini-trial on the issue. The jury had sufficient information to assess the credibility of Ramos and informant Jaime Martinez, particularly because Martinez admitted that he told Ramos to lie to federal agents by saying that she was being stalked.

[22] 17. The district court did not abuse its discretion by denying Lopez's motion for a mistrial. *See* ***United States*** *v. Banks*, 514 F.3d 959, 973 (9th Cir. 2008) (reviewing a denial of a motion for a mistrial for abuse of discretion). Assuming a *Massiah* violation occurred, cooperator Oliver Marota's testimony was "harmless beyond a reasonable doubt," *see Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), because three additional witnesses offered the same substantive testimony that Lopez stated he was arrested in possession of a gun linked to ***543** two murders. One witness in particular testified that Lopez admitted he was responsible for the killings—testimony far more damaging than anything Marota said.

[23] **[24]** 18. Lopez argues that federal agents searched his cellular telephone in violation of the Fourth Amendment because the applicable state search warrant did not authorize federal law enforcement officers to execute the search. However, "[a]n otherwise properly issued search warrant is not rendered void for Fourth Amendment purposes merely because it was executed by law enforcement officers who lacked warrant-executing authority under state law." ***United States*** *v. Artis*, 919 F.3d 1123, 1130 (9th Cir. 2019). Thus, the district court did not err by admitting photographs taken from federal agents' search of Lopez's cellular telephone. Even assuming the warrant was not "otherwise properly issued," any error in admitting the photographs was harmless beyond a reasonable doubt. The only evidence from Lopez's telephone admitted at trial was twelve photographs showing Lopez and other individuals making gang symbols, and tattoos and writings featuring characters such as "MS" and "13." To the extent the photos showed Lopez's involvement in MS-13, they were cumulative of other witnesses' testimony.

[25] 19. Carcamo argues that his first counsel was ineffective. This argument is premature and insufficiently supported by the present record. It may be addressed in a petition filed pursuant to 28 U.S.C. § 2255. *See* ***United States*** *v. McGowan*, 668 F.3d 601, 605 (9th Cir. 2012) ("Challenge [of ineffective assistance of counsel] by way of a habeas proceeding is preferable because it permits the defendant to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted." (internal quotation marks omitted)).

[26] 20. The district court did not abuse its discretion when it denied Carcamo's request to continue trial or for severance. *See* ***United States*** *v. Turner*, 897 F.3d 1084, 1101 (9th Cir. 2018) (reviewing the denial of a motion for a continuance for abuse of discretion), *cert. denied*, —— U.S. ——, 139 S. Ct. 1234, 203 L.Ed.2d 247 (2019). The court offered a reasoned explanation that after several continuances, another continuance threatened witnesses' memory loss and exacerbated the ongoing danger to witnesses. The court permitted defendants to apply for additional resources if necessary to analyze newly-produced discovery, and to seek continuances to prepare for cross-examination during trial. Accordingly, the court's denial was neither "unreasoning" nor arbitrary. *See id.* at 1102.

21. Besides the two errors for which we vacate defendants' convictions (sentencing based on lesser-included offenses and the unconstitutionality of 18 U.S.C. § 924(c)(3)(B)), any errors committed by the district court were marginal, and they do not cumulatively warrant a new trial. *See* ***United States*** *v. de Cruz*, 82 F.3d 856, 868 (9th Cir. 1996) (discussing cumulative error).

VACATED AND REMANDED IN PART, AFFIRMED IN PART.

All Citations

782 Fed.Appx. 531

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 The parties are familiar with the facts, so we need not repeat them here.

2 Nor did the court abuse its discretion by investigating Juror 57 over several hearings and concluding that Juror 57 responded truthfully to questions asked during voir dire. We cannot say that this investigation extended "beyond permissible limits of inquiry." *See* ***United States*** *v. Simtob*, 485 F.3d 1058, 1064–65 (9th Cir. 2007).

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGEL NOEL GUEVARA,
MORIS FLORES,
MARVIN CARCAMO,
JONATHAN CRUZ-RAMIREZ,
GUILLERMO HERRERA,
WALTER CRUZ-ZAVALA, and
ERICK LOPEZ.

Defendants.
_____/

No. CR 08-0730 WHA

FINAL CHARGE TO THE JURY

Some exhibits may have some Spanish-language writings on them, but will not be accompanied by a translation. You are to disregard and not translate all such Spanish-language writings, except for writings that you find are simply monikers, clique names or dates.

12.

You have heard testimony about recordings made by informants, some of which were received in evidence and some of which were not. You should not speculate about recordings not received in evidence. The question is whether or not the testimony and exhibits received in evidence are sufficient to prove the charges against defendants and, in evaluating that question, you should not speculate about items not received in evidence. Some exhibits have redacted passages. You may not speculate about what has been redacted. Redactions are irrelevant material.

13.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it or none of it. In considering the testimony of any witness, you may take into account:

1. The opportunity and ability of the witness to see or hear or know the things testified to;
2. The ability of the witness to remember the events testified to;
3. The witness' manner while testifying;
4. Any interest of the witness in the outcome of the case;
5. Any bias or prejudice;
6. Whether other evidence contradicted the witness' testimony;
7. The reasonableness of the testimony in light of all the evidence; and
8. Any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. Nor does it depend on which side called the witnesses or produced evidence. What is important is how much weight you think the evidence deserves.

14.

A discrepancy in a witness' testimony or between a witness' testimony and that of other witnesses does not necessarily mean that the witness should be discredited. Inability to recall is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction sometimes will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial may be considered by you.

However, a witness who willfully testifies falsely in one part of his or her testimony may be distrusted in others. You may reject the entire testimony of a witness who has willfully testified falsely on a material point unless, from all the evidence, you believe that the probability of truth favors his or her testimony on other particulars. It is always, however, up to you to decide how much weight to give any testimony by any witness.

15.

You have heard testimony of eyewitness identifications. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning witness credibility. In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

1. The capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting, distance and angle of view;
2. Whether the identification was the product of the eyewitness' own recollection or was the result of subsequent influence or suggestiveness;
3. Any inconsistent identifications made by the eyewitness;
4. The witness' familiarity with the subject identified, including whether the offender was of a different race from the witness;
5. The strength of earlier and later identifications;
6. Lapses of time between the event and the identification(s);
7. The totality of circumstances, including combinations of the foregoing factors, surrounding the eyewitness' identification;

8. The fairness of the photographic lineup shown to the eyewitness; and

9. The fairness of the way in which the lineup was shown to the eyewitness.

Of course, the testimony of any eyewitness should be evaluated in light of all other eyewitnesses and all other evidence in the case.

16.

You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions. Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves.

17.

You have heard testimony that some defendants made statements. It is for you to decide: (1) whether the defendant made the statement; and (2) if so, how much weight to give to it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the defendant may have made it.

18.

You have heard testimony from witnesses who pled guilty to crimes arising out of the same events for which the defendants are on trial. As stated before, their guilty pleas are not evidence against the defendants, and you may consider their guilty pleas only in determining these witnesses' believability.

These and other witnesses entered into cooperation agreements with the government. This means that they agreed to cooperate with the government and to testify on the government's behalf in exchange for a benefit from the government in the form of a recommendation for a reduced sentence in connection with this case or another case or other benefits for themselves or their family members.

For these reasons, in evaluating the testimony of these witnesses, you should consider whether and/or the extent to which the witnesses' testimony may have been influenced by any of these factors. You should examine their testimony with greater caution than that of other witnesses.

2011 WL 2445978
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

UNITED STATES of America, Plaintiff,
v.
Angel Noel GUEVARA, et al., Defendants.

No. CR 08–0730 WHA.
|
June 17, 2011.

ORDER EXCLUDING PROPOSED EXPERT DR. DEBORAH DAVIS

WILLIAM ALSUP, District Judge.

INTRODUCTION

***1** Traditionally, eyewitness identifications are challenged through cross-examination and the presentation of fact witnesses who can draw into question the accuracy of the identification. The assistance of a forensic expert is not usually needed, as jurors can understand the issues in play on their own. After full consideration of the parties' submissions, oral argument, the evidentiary hearing, supplemental proffers, and the trial testimony of the actual eyewitnesses and the investigating officers, this order finds Dr. Deborah Davis' proposed testimony, even as revised, should clearly be excluded under Rule 403. The proposed testimony has minimal probative value at best and would waste time and confuse the issues.

STATEMENT

In this RICO/VICAR prosecution, defendant Angel Noel Guevara is accused of the stabbing of three individuals on December 26, 2007. For these stabbings, defendant Guevara has been charged with three counts of assault with a dangerous weapon and three counts of attempted murder in aid of racketeering. All three victims identified defendant Guevara in photographic line-ups. A fourth individual—a witness to two of the stabbings—did not identify defendant Guevara but stated that his picture "resembled" one of the attackers. To challenge the accuracy of these identifications/statements, defendant Guevara seeks to introduce the testimony of Dr. Deborah Davis, a "witness memory expert" and professor of psychology at the University of Nevada.

The original FRCrP 16(b)(1)(C) notice for Dr. Davis specified she would opine on factors that may compromise the accuracy of a witness' perception at "each of three stages of memory" (during an event, after the event but before it is recounted to others, and when the event is recounted to others) (Dkt. No. 3249). The government moved to exclude the testimony, arguing her proposed testimony was unscientific, irrelevant, invaded the province of the jury, and unreliable (Dkt. No. 3371). The motion also protested that the government had not been provided with a sufficient summary of her opinions.

Oral argument on the motion was first heard on the second day of the final pretrial conference (Dkt. No. 3569). There, the Court explained that it was inclined to wait for the eyewitnesses to testify before making a particularized Rule 403 determination regarding whether there was a need for Dr. Davis' testimony (Dkt. No. 3569 at 98–99, 105). To assist with this determination and to address the government's *Daubert* challenge, an evidentiary hearing was held during the four-week interim between the commencement of jury selection and opening statements (Dkt. No. 3522). [1]

After the evidentiary hearing, both sides were given a further opportunity to submit supplemental, post-hearing proffers and briefing without page restrictions (Dkt. No. 3741). Defendant Guevara submitted a 17–page supplemental proffer, to which the government objected (Dkt.Nos.3796, 3851). After consideration of the testimony at the evidentiary hearing, the post-evidentiary hearing supplemental proffers, and all previously submitted material and oral argument, the undersigned decided to reserve judgment regarding what aspects, if any, of Dr. Davis' proposed testimony would be allowed (Dkt. No. 3863). Counsel was informed that the decision would be a "traditional Rule 403 determination" made after the eyewitnesses testified, when the record was better developed with respect to the usefulness of Dr. Davis' proposed testimony.

***2** After the government presented testimony from the eyewitnesses and the investigating officers, the Court requested a further offer of proof from Dr. Davis *"limited* to issues raised by the testimony of SFPD Inspector Scott Lau that the photographic line-ups used in connection with the stabbings on December 26, 2007, were 'as fair as possible'

" (Dkt. No. 4066). Counsel and Dr. Davis were warned that the critique "should not extend to general weaknesses in eyewitness identification and memory or anything other than photographic lineups." In response to the request, counsel filed a 43–page, single-spaced submission from Dr. Davis, accompanied by two large binders of over 1,000 pages of exhibits (Dkt. No. 4211). *The voluminous submission extended well beyond the parameters of the request.* Both sides filed briefs (Dkt.Nos.4281, 4326). Finally, on June 10, the Court heard more oral argument on the admissibility of Dr. Davis' proposed testimony. Defense counsel then asserted that Dr. Davis could assist the jury by opining on the discrete issues of: (1) the importance of selecting fillers for photographic line-ups who generally fit the witness' description of the perpetrator; and (2) the importance of a consistent appearance between the suspect and the fillers in a photographic line-up (Tr. 9619, 9621–22).

ANALYSIS

The probative value of Dr. Davis' proposed voluminous testimony, even as revised, is far outweighed by the time it would consume and the risk of juror confusion. As our court of appeals has explained, eyewitness identification expert testimony may be excluded when it will not materially assist the jury more than the traditional methods of challenging eyewitness identification (*e.g.* cross-examination). *See* ***United States*** *v. Hicks,* 103 F.3d 837, 847 (9th Cir.1996), *overruled on other grounds;* ***United States*** *v. Rincon,* 28 F.3d 921, 923 (9th Cir.1994). Although there are aspects of the field of human perception and memory that are based on genuine science and opinions regarding eyewitness identification may be worthwhile in some instances, it will not be worthwhile here. The most recent proffer by Dr. Davis —in disregard of the Court's request for a narrowly tailored submission regarding photographic line-ups—was not only voluminous but published a small treatise on argumentative concepts far outside the scope of what was invited. For example, a substantial portion of the proffer was devoted to a discussion of general causes of identification errors —such as guessing, source memory confusion, and post-event interference with the original memory. Beyond the fact that the order specifically disinvited a proffer based on such generalities, these generalized concepts would not offer any probative value to the photographic line-ups at issue. There has been no indication that the eyewitnesses or their identifications were plagued by these infirmities. Allowing Dr. Davis to testify in this regard would be no more than argument shrouded as expert testimony.

***3** Most recently, defense counsel has argued that Dr. Davis' testimony will assist the jury by explaining that photographic line-ups may be suggestive when: (1) the suspect contains a unique feature that the fillers do not; and (2) the fillers do not generally fit the witness' description of the perpetrator. The jury does not need a forensic expert, however, to explain these basic concepts. For example, defense counsel already made the point to the jury that the administered lineups were unduly suggestive because not all of the fillers had facial scars. An ordinary layperson can easily understand that if an eyewitness believed the perpetrator had a facial scar, a photographic line-up would be suggestive if only one individual in the photographic line-up had a visible facial scar. [2]

After due consideration of the eyewitness' actual testimony and all other particulars of our ongoing trial, this order finds that the time and confusion involved would outweigh the little probative value possibly lurking somewhere in the proffer. In opening argument and cross-examination of the eyewitnesses and examining officers, counsel has already explored the possible shortcomings and weaknesses of the eyewitness identifications at issue.

While it is true that Inspector Lau testified that the SFPD *"wants* to be as fair as possible" and tries to present "as fair a photo spread as [the SFPD] can," forensic testimony is not needed to meet or rebut Inspector Lau's lay testimony (Tr. 3187, 3208). In fact, cross-examination of Inspector Lau has already elicited testimony addressing many of the points that Dr. Davis proposed to make regarding the ideal presentation of photographic line-ups (Tr. 3357–89). By way of example, Inspector Lau has already conceded that a line-up would be suggestive if it included only one individual with a unique feature (Tr. 3361). Inspector Lau was also vigorously cross-examined regarding the actual photographic line-ups at play and through this cross-examination, counsel elicited probative testimony going to the heart of the matter. Further generalized testimony by Dr. Davis would add little.

CONCLUSION

For the reasons stated herein, the proposed testimony of Dr. Davis is excluded in its entirety. The jury will be given a modified version of Model Criminal Jury Instruction 4.11. This will provide the jury with ample guidance regarding

factors it may consider in assessing how much weight to give the eyewitness identifications at issue.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2445978

Footnotes

1 Dr. Scott Fraser—an eyewitness memory expert proposed by another defendant—was also examined at the evidentiary hearing. Dr. Fraser's proposed testimony was excluded after the hearing (Dkt. Nos.3863, 4065).

2 Defendant **Guevara** appears to have a small facial scar or blemish on his left cheek in the photographic line-ups given to the eyewitnesses.

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Nuvaring Products Liability Litigation, E.D.Mo., March 4, 2013

788 F.Supp.2d 1026
United States District Court,
N.D. California.

UNITED STATES of America, Plaintiff,
v.
Guillermo HERRERA, et al., Defendants.

No. CR 08–0730 WHA.
|
April 20, 2011.

Synopsis
Background: Defendants who were charged with Racketeer Influenced and Corrupt Organizations Act (RICO) and Violent Crimes in Aid of Racketeering (VICAR) violations sought to introduce expert opinion testimony regarding eyewitness memory and eyewitness identifications.

[Holding:] The District Court, William Alsup, J., held that probative value of testimony of proposed expert witness was substantially outweighed by danger of unfair prejudice, confusion, and misleading the jury.

Ordered accordingly.

West Headnotes (3)

[1] Criminal Law
Evidence calculated to create prejudice against or sympathy for accused
Criminal Law
Eyewitnesses

In Racketeer Influenced and Corrupt Organizations Act (RICO) and Violent Crimes in Aid of Racketeering (VICAR) prosecution, probative value of testimony of proposed defense expert witness on accuracy of eyewitness identification was substantially outweighed by danger of unfair prejudice, confusion, and misleading the jury; proposed testimony's probative value was limited in light of expert's failure to interview eyewitness and his lack of knowledge about eyewitness's physiological characteristics, where eyewitness was located when shooting he witnessed occurred, and whether there were perceptual obstructions, and there were severe disconnects between expert's proposed opinions and bases from which they were purportedly derived, and he demonstrated a tendency to leave false impressions. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Evid.Rule 403, 28 U.S.C.A.

1 Cases that cite this headnote

[2] Criminal Law
Subjects of Expert Testimony

District courts have a continuing duty to act as vigilant gatekeepers to ensure expert testimony is based upon scientific knowledge that is both reliable and helpful to the jury.

[3] Criminal Law
Subjects of Expert Testimony

An opinion is unreliable under *Daubert* where the witness unjustifiably extrapolates from an accepted premise to an unfounded conclusion.

Attorneys and Law Firms

***1027** Krystal N. Bowen, Bingham McCutchen, Martin Antonio Sabelli, Law Offices of Martin Sabelli, John R. Grele, Law Office of John R. Grele, San Francisco, CA, for Defendants.

MEMORANDUM OPINION RE EXCLUSION OF PROPOSED EYEWITNESS MEMORY EXPERT DR. SCOTT FRASER

WILLIAM ALSUP, District Judge.

INTRODUCTION

The classic way to question the accuracy of an eyewitness identification is to cross-examine the eyewitness and to present other fact witnesses to establish particulars at the scene that would have weakened the accuracy of the identification, such as obstacles, lighting, distance, police suggestion and so on. All of this is fact based. We traditionally rely on the common experience of jurors, once apprised of all the factual particulars, to assess the reliability of the identification. In recent times, however, criminal defense counsel have sought to lay before the jury opinions by academics and professional witnesses to elaborate on weaknesses in human perception and memory so as to draw into question the reliability of eyewitness testimony. To this effort, prosecutors have generally responded that the opinions are based on junk science and should be excluded under *Daubert.* Contrary to the government, the Court believes that there are aspects of the discipline that are based on genuine science. That does not mean, however, that all or any such testimony should be admitted.

In this RICO/VICAR prosecution, defendants **Angel Noel Guevara** and Guillermo Herrera seek to introduce expert opinion testimony regarding eyewitness memory and eyewitness identifications. After an evidentiary hearing and much argument and briefing, the undersigned excluded the proffered testimony of Dr. Scott Fraser and reserved judgment on whether certain aspects of Dr. Deborah Davis' testimony would be allowed (Dkt. No. 3863). The determination regarding Dr. Davis (proposed by defendant **Guevara**) will be made after the Court hears the testimony of the eyewitnesses and determines what circumstances might warrant aspects of the testimony, a balancing decision that will be postponed until more fact evidence has been laid before the jury. The instant memorandum opinion explains why the testimony of Dr. Fraser (propounded by defendant Herrera) should not be admitted at all.

STATEMENT

Defendant Guillermo Herrera was identified by an eyewitness as the shooter in ***1028** the Armando Estrada homicide (Dkt. No. 3243). The July 2008 homicide occurred mid-day in clear conditions on Mission Street in San Francisco. The eyewitness was inside a restaurant across the street from the shooting. To challenge the accuracy of this eyewitness identification, defendant Herrera would introduce the testimony of Dr. Scott Fraser.

Defendant Herrera's Rule 16(b)(1)(c) expert notice specified that Dr. Fraser would testify to his conclusion that, "based on a review of the discovery and based on well-established studies in the field," the identification of defendant Herrera as the shooter in the Estrada homicide was made "under circumstances likely to render his identification unreliable" (*id.* at 3). The notice explained that Dr. Fraser came to this conclusion because most or all of supposed causes of an inaccurate eyewitness identification were present in the Estrada homicide. The notice stated that Dr. Fraser would testify that the following factors "influenced the accuracy of [the identification]": "perceptual obstructions, divided attention, multiple targets, distance, weapons focus, kinetic distortions, and physiological arousal" (*ibid.*).

The government moved to preclude the testimony, arguing that Dr. Fraser's proposed testimony was unscientific, irrelevant, invasive of the province of the jury, and unreliable (Dkt. No. 3371). The government also protested that—in violation of Rule 16—it had not been provided with a sufficient summary of Dr. Fraser's opinions.

Oral argument on the government's motion was heard during the second day of the final pretrial conference (Dkt. No. 3569). At that time, it was determined that a *Daubert* evidentiary hearing was appropriate (Dkt. No. 3522). At the pretrial conference, the Court specifically raised the issue of whether the testimony should be allowed under Rule 403 and noted the issue would be considered at the evidentiary hearing.

The evidentiary hearing was held during the four-week interim between the commencement of jury selection and opening statements. At the evidentiary hearing, counsel was given an opportunity to demonstrate the relevance and reliability of Dr. Fraser's expert opinions. Dr. Deborah Davis—an eyewitness memory expert proposed by another defendant—was also examined at the evidentiary hearing. Counsel for defendant Herrera was even permitted to cross-examine Dr. Davis where her testimony tended to undermine the testimony of Dr. Fraser.

Between day one and day two of the evidentiary hearing, counsel for defendant Herrera submitted an "amended" notice for Dr. Fraser's opinions, perhaps seeking to address a concern that Dr. Fraser's noticed opinion would usurp the province of the jury and the fact eventually surfacing that he had considered only a few of the actual particulars of the Estrada identification (Dkt. No. 3729). The amended notice,

however, was identical to the original notice except it: (1) specified that the eyewitness "may" have been—rather than "was"—confronted with factors rendering his identification unreliable; and (2) replaced its assertion that relevant studies strongly suggested the identification *was* unreliable with the assertion that scientific studies indicated that a confluence of error-inducing factors during the Estrada homicide "has consistently been associated with the finding of unreliable recognition."

After the evidentiary hearing, both sides were given an opportunity to submit supplemental, post-hearing proffers without page restrictions (Dkt. No. 3741). Defendant Herrera declined to provide any supplemental proffer, stating he "has not and will not supplement the showing made at ***1029** the hearing" (Dkt. No. 3808). Despite this assertion, defendant Herrera later requested to join in a supplemental proffer submitted by defendant **Guevara** (Dkt. No. 3839).

This memorandum opinion addresses Dr. Fraser and why he should be and has been excluded.

ANALYSIS

[1] Even assuming *arguendo* that Dr. Fraser has some specialized knowledge, training, and experience and that the core discipline of eyewitness memory is scientific, Dr. Fraser's testimony should be and has been excluded as unreliable, unhelpful to the jury, and substantially more prejudicial than probative.

[2] **[3]** District courts have a continuing duty to act as vigilant gatekeepers to ensure expert testimony is based upon scientific knowledge that is both reliable and helpful to the jury. *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); ***United States*** *v. Rincon,* 28 F.3d 921, 926 (9th Cir.1994). An opinion is unreliable under *Daubert* where the witness unjustifiably extrapolates from an accepted premise to an unfounded conclusion. *General Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (finding a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered.")

The disconnects between Dr. Fraser's proposed opinions and the bases from which they were purportedly derived are so severe that Dr. Fraser's testimony would only confuse and mislead the jury. [1] A prime example is Dr. Fraser's proposed testimony regarding the "Rule of 15." On day one of the evidentiary hearing, on questioning by the proponent of the witness, Dr. Fraser repeatedly testified that scientific studies in his field have demonstrated that if a witness views a stranger from 15 meters away (49 feet) in good conditions, the chance of a correct identification is only five percent or less (March 15 Tr. 170–72, 175). As the statistic seemed a remarkable one, the Court repeatedly asked Dr. Fraser about this assertion. Dr. Fraser interchangeably referred to the five percent rate as a "reliability rate," "accuracy rate," or "likelihood of a correct identification." He left the clear and repeated impression that studies in his field directly supported his claim that less than five percent of eyewitness identifications of strangers made from 15 meters away or more are correct. Variations of the following were repeated throughout the evidentiary hearing:

> **THE COURT:** I want to make sure I understand this 15 meter thing. Are you saying that if somebody sees somebody else head on, 49 feet away [15 meters], that the chances that they can make a correct identification on average is 5 percent or less? Did I hear you?
>
> ***1030 DR. FRASER:** That's what the research shows, your Honor. Research studies.
>
> **THE COURT:** So a baseball pitcher on the mound looking at the batter 60 feet away, it's going to be even less than 5 percent that they could identify that person later?
>
> **DR. FRASER:** If that was a stranger?
>
> **THE COURT:** A stranger, yeah.
>
> **DR. FRASER:** A stranger that they were looking at and then subsequently were tested to recognize them by their face. You can see the face, and what are called boundary conditions. From first base to home plate, 90 feet, you can see the player. And you know it's the first baseman. They have block letters, 18 inches high on their uniform, or very large, and from this information, you can tell that it is—
>
> **THE COURT:** No, no. Answer my question. Just the face alone. Forget the uniform; forget everything. Just looking at the face, you're telling me that the pitcher would have one in 20 times or less would be able to remember and recognize who they were throwing the ball to?

DR. FRASER: On that singular encounter to a stranger. And that's what the studies showed. And that's consistent —

THE COURT: I want to see that study. What's the name of that study?

DR. FRASER: That's a study by Wagenaar, W-a-g-e-n-a-a-r, and Van der Schrier, published 1996, Psychology Crime & Law. Subsequently replicated in 2003, I believe, maybe 2005 by Jong, J-o-n-g, and Wagenaar, with familiar faces. Interesting enough.

THE COURT: Do you have that—when you submit that, is that going to be one of the ones you submit to the prosecutor?

DR. FRASER: I'll be happy to give both of them to him.

THE COURT: I'd like to see that, and please bring that tomorrow to court.

(Mar. 15 Tr. 170–72).

* * *

THE COURT: Let's say it's a famous baseball player or a famous movie star, you're at the mall and you see them 60 feet away.

DR. FRASER: And then you tested them immediately as to which of these individuals they actually saw.

THE COURT: What would be the accuracy rate?

DR. FRASER: And again, the accuracy rate appears to be less than 5 percent for those.

(Mar. 15 Tr. 175).

* * *

DEFENSE COUNSEL: You were telling us about the Rule of 15. If you could continue, Dr. Fraser, please?

DR. FRASER: The ability of the human eye to accommodate the detection of facial features necessary for reliable recognition shows that beyond 15 meters, even though the rest of the viewing conditions are optimal—good lighting; over 1,000 lux—high attentional focus, high in motivation to remember the face, and immediate testing afterwards, no time delay, shows that beyond 15 meters, the rates of reliably recognizing among an array of similar alternatives the individuals seen is less than 5 percent.

* * *

THE WITNESS: 15 meters. 49 feet.

THE COURT: All right.

THE WITNESS: Beyond that, you can see the person, you can see the body, but you cannot, the research shows, detect ***1031** —the human eye cannot, regular person with 20/20 vision—cannot detect the features that are used for reliable recognition even under otherwise optimal conditions, all right. That may be relevant to this case.

(Mar. 15 Tr. 168).

* * *

It turned out that the so-called "Rule of 15" was merely an idea advanced in a single article, one by Willem Wagenaar and Juliette Van der Schrier. Only after requesting the article and reviewing it did the Court discover that it did not support Dr. Fraser's characterization of the Rule of 15. The article described a university experiment wherein participants were asked to first view targets at different distances and illumination levels and then to identify the targets in photographic line-ups. [2] The targets and individuals depicted in the line-ups did not have conspicuous facial hair, marks, varying dress, or other particularly notable physical characteristics. The article summarized the results of the experiment in terms of "hits" (correct identifications of the target) as compared to "false alarms" (false identifications). A table from the article with these results immediately follows.

Table 2. Hits (first number) and false alarms (second number) in the recognition tests (percentage scores). The numbers are rounded off, and should not be used by the reader for further computations.

Distance (m)	*Illumination level (lux)*								
	0.3	*2*	*3*	*5*	*10*	*30*	*150*	*300*	*3000*
3	14	46	61	79	82	82	82	86	86
	9	10	8	8	6	6	3	2	2
5	11	25	54	50	68	79	82	86	86
	5	11	5	1	1	1	0	0	1
7		7	36	43	71	68	82	79	86
		5	9	6	5	5	3	2	1
12			4	25	43	43	57	57	61
			4	6	4	4	1	1	1
20				11	18	18	43	39	57
				5	9	9	8	8	5
30					14	25	21	32	36
					4	7	6	6	6
40						7	14	25	29
						3	8	8	9

As indicated in the table, where the target was 12 meters away (the cell of data closest to 15 meters) and viewed in well-lit conditions (3000 lux), the participants *correctly* identified the

target 61 percent of the time and only incorrectly identified the target one percent of the time. The remainder of the participants (38 percent) declined to make any identification —meaning that those participants who *attempted to make an identification* (that is, excluding those who did not attempt to make an identification), made a correct identification at a rate of 61 out of 62 times (98.3 percent). In the Court's mind, this is a solid and reliable accuracy rate.
How could this reliable accuracy rate of 61 out of 62 somehow be transformed into an unreliable accuracy rate of less than one out of 20?

This amazing transformation was the result of some liberties taken by the authors of the article, together with sleight of hand ***1032** by Dr. Fraser. In order to dilute the force of the 61/62 ratio, the authors invented a concept called "diagnostic value of the total evidence" (Dkt. No. 3729–1 at 329), stating a "diagnostic value" could be derived from the requirement that "20 guilty suspects should be set free against one innocent suspect being convicted." To this was added the "simple legal rule" that "one witness is not enough but two witnesses are." And from these two ideas the authors purported to apply statistical theorems to arrive at a "diagnostic value."

Before proceeding further, it is worth mentioning that it is difficult to extract from the article how the foregoing ideas were factored together to arrive at the so-called "diagnostic value." Even so, at no place did the article undermine the solid, irrefutable fact that 98.3 percent of identifications made were correct at a distance of 12 meters, under lighting conditions comparable to the facts of our case. [3]

For his part, Dr. Fraser tampered with science. He took the sentence quoted above—the "requirement" that "20 guilty suspects should be set free against one innocent suspect being convicted" and transmogrified this concept into a reliability and/or accuracy rate of one out of 20. There was no other reference in the article to a one–to–20 ratio. It bears emphasizing that Dr. Fraser affirmatively advanced the Rule of 15 and explained it as a five percent accuracy rate for targets viewed from a vantage point of 15 meters. He did not front or explain the article. On direct examination Dr. Fraser never explained how he transformed the 61/62 ratio to a one out of 20 ratio. But for the fortuity of a request to produce the article, the issue may not have surfaced in time for anyone to appreciate the shortcomings in Dr. Fraser's proposed testimony.

Through cross-examination by government counsel on the second day, it became clear that Dr. Fraser's five percent figure was not supported by the article. For the first time, he asserted that the article derived the five percent figure from the Wigmore standard. While the article referred to the Wigmore standard, however, it used Wigmore in a wholly different way. Even if we prefer that 20 guilty suspects go free before one innocent suspect is convicted, in no way could it follow that the accuracy rate at 15 meters is only one out of 20 (Mar. 16 Tr. 76–77). The one–and–20 ratio, as used by Dr. Fraser, was a severely unfounded assertion.

Indeed, the article specified that the Rule of 15 was simply a framework to assist non-experts in understanding the probability of achieving an identification which satisfied the authors' view of the "diagnostic value" that *should* be required to convict (Dkt. No. 3729–1 at 329). The authors themselves noted that the decision regarding whether observation conditions were good enough to accept an eyewitness identification, however, should be reserved for the jury. This is a far cry from Dr. Fraser's blanket claim that the article found that only five percent of eyewitnesses can make correct identifications when 15 meters away from a target.

In the Court's view, no honest scientist could have made Dr. Fraser's statements regarding the Rule of 15 under oath in good faith. No honest scientist could have transformed an accuracy rate of 61 out of 62 to less than one out of twenty.

To be sure, Dr. Fraser attempted to backpedal on day two. This change was ***1033** only made after he was exposed. Even in the midst of his attempts to rehabilitate his earlier, misleading testimony, however, Dr. Fraser was still unable to resist reverting to his assertion that the Rule of 15 contemplated a five percent accuracy rate:

> **DEFENSE COUNSEL:** Could you tell the Court again what your conclusion was about the 49 feet, the 15 meters, the percentages—let's get straight to that—what you told the Court yesterday about the percentages? Sorry to the court reporter.
>
> **DR. FRASER:** What is said, the research that's been done by Wagenaar and Van der Schrier and their associates indicates that beyond 15 meters—all right?—which is the cut point when the diagnostic value of the person's accuracy under very optimal conditions of viewing—all right?—was greater than 15, which converts essentially into an error rate of less than five—of five percent. All right? So they used that as the standard, the Wigmore standard,

that it's better to let 19 guilty people go free than convict one innocent person. So that's five percent. One innocent person is what you are trying to—erroneously convicted being the standard they employ. That's five percent. So at what point of illumination and distance, vary both of them, would you consistently have—all right?—more—less than five percent accuracy? All right. Reliability in terms of selecting. Using that diagnostic value of 15, which is what it converts to.

DEFENSE COUNSEL: All right. But you are not saying if a person is more than 49 feet away, that at that point, then under, as you put it, optimal conditions, that the chances of successfully identifying that individual is five percent?

DR. FRASER: That's not what my testimony was yesterday. It's not my testimony today. What the research shows is that, all right?—beyond that distance—all right?—the reliability of a correct selection is less than five percent. So, in other words, the false positives and the number of hits when you put them together—all right?—ends up that less than five percent of the time where they're going to be accurate. As I said yesterday, that doesn't mean it can't happen and doesn't happen.

DEFENSE COUNSEL: It's still possible—

THE COURT: Can I—I do want to be clear on this. Under optimal conditions, if somebody is—

DR. FRASER: Forty-nine feet, your honor.

THE COURT: All right. So let's say 50 feet away. DR. FRASER: Yeah.

THE COURT: If somebody, some unknown person is 50 feet away and they're optimal viewing conditions, and you have 20 trials, you're saying that in one out of 20 times would the eyewitness get it right?

DR. FRASER: No.

THE COURT: Isn't one out of twenty five percent?

DR. FRASER: No. They're using as their standard for what would be the cut point—all right?—five percent. You could pick some other point at which you said it would be sufficiently reliable for you to consider it to be useful or valid information. You could say they could be right only 40 percent of the time and that would be enough, or 60 percent of the time. What they chose as their cut points is at what distance and what illumination are you going to get—all right?—less than five percent accuracy under otherwise optimal conditions, less than five percent. That doesn't mean ***1034** nobody gets it right. It just means less than five percent of the time they get it right.

THE COURT: You are saying 50 feet, under optimal conditions, when you would go from 40 feet, 45 to 50 feet, is that the accuracy rate of identifications is less than five percent?

THE WITNESS: Reliability. That's what the research—and we provided a copy to Attorney Frentzen.

THE COURT: So that means the unreliability rate is 95 percent or more?

THE WITNESS: That's right. When you put them together. When you put false positives and false alarms and misses, yep.

(Mar. 16 Tr. 62–65).

* * *

The confusing and misleading aspects of Dr. Fraser's testimony were not limited to his discussion of the Rule of 15. Dr. Fraser's unreliable methodology and tendency to mislead permeated his testimony at the evidentiary hearing. A few additional representative examples are now recounted.

Dr. Fraser testified that the Wagenaar and Van der Schrier article found that a witness 20 meters away from a target in brightly illuminated lighting conditions (3000 lux) would make an "incorrect" identification 43 percent of the time (Mar. 16 Tr. 72–75).[4] The article itself, however, contained no such figure—it only indicated that at 20 feet and 3000 lux, correct identifications were made 57 percent of the time and incorrect identifications were made five percent of the time (Dkt. No. 3729–1 at 325, Table 2). In other words, 92 percent of actual attempted identifications were correct (a 57/62 ratio). It appears Dr. Fraser arrived at the 43 percent figure by expanding the universe of "incorrect" identifications to include both: (1) instances where witnesses actually made incorrect identifications (proper); and (2) instances where witnesses *chose not to make any identification* (improper) (Mar. 16 Tr. 106–111). This unjustified revision of the article's findings was misleading and would confuse a jury by suggesting that identifications were *incorrect* 43 percent of the time when in reality actual attempted identifications were only incorrect five percent of the time. When a participant

or a bystander declines to even try to make an identification, there is no identification at all, much less an incorrect one. Such a case is a recognition of his/her own limitations. In assessing the risk of wrong identifications, we must focus on identifications actually attempted and ask—of that universe—how many were wrong? Dr. Fraser's approach was a gimmick to inflate the error rate.

Put differently, Dr. Fraser's testimony ignores the eyewitness self-selection process. If those who cannot make an identification say so, they never appear in court. Similarly, some eyewitnesses may be fearful to testify against those accused of being violent gang members. This fear drives some to invent or exaggerate inability to recall, especially in prosecutions of violent street gangs where retribution is a genuine concern. By contrast, the subset of the general eyewitness population who are able and willing to identify a perpetrator in front of a jury have survived these impulses to self-select out of the process. This was ignored by Dr. Fraser.

Dr. Fraser also testified that studies have shown that 75 to 77 percent of eyewitness ***1035** identifications made only four to six hours after viewing the target are "incorrect" (Mar. 16 Tr. at 13–14). Only after questioning by the government did Dr. Fraser admit that his statistics for "incorrect" identifications again incorporated instances where no identification was even attempted (*id.* at 16–17).

When asked if he had ever been barred from testifying as an expert in federal court, Dr. Fraser repeatedly answered "not to my knowledge" or "not to my recollection" (Mar. 16 Tr. 34–35). After being confronted with a 2009 published decision from the **United States** District Court in Kansas finding his proffered expert testimony unreliable and scientifically invalid, *P.S. ex rel. Nelson v. The Farm, Inc.,* 658 F.Supp.2d 1281 (D.Kan.2009), Dr. Fraser claimed that he had no knowledge of the opinion and was only told by the defense attorneys in that case that they had decided not to call Dr. Fraser as an expert (*id.* at 36–37). Especially given that at least a part of Dr. Fraser's living is made through his expert testimony, it stretches credulity to believe that he was unaware of the district court's order excluding his expert testimony.

In the same vein, when Dr. Fraser was asked what ultimately happened to a California judge's request that perjury charges be filed against him for his sworn statements in *People v. Adam Anthony Noriega,* Case No. BA201786 (Cal.Sup.Ct.2001), Dr. Fraser stated that the Attorney General had "reviewed all the information and they refused to file for inadequacy" because his conduct was not perjury (Mar. 16 Tr. 100). Upon additional cross-examination, however, Dr. Fraser admitted that he was never directly told that the Attorney General made any such finding that the case against him was inadequate.

Dr. Fraser also tried to leave the impression that he had not been able to provide a full and complete expert evaluation of the actual viewing conditions in this case because the government had somehow failed to produce the records he needed to render such an evaluation (*id.* at 30–31, 39–41). This also proved to be untrue. Questioning by the Court and the government revealed that Dr. Fraser was in possession of needed material, but had simply failed to review the material prior to the evidentiary hearing (*id.* at 104–06). Dr. Fraser then asserted this was because he was denied adequate funding to conduct the review. This claim, however, also proved incorrect, as further CJA funding had been authorized and was available to Dr. Fraser over a month prior to the evidentiary hearing. Notice of this further funding authorization was sent to defense counsel and one of his staff members via email—receipt of which was acknowledged by the staff member shortly thereafter (*id.* at 105–06, 113).

Dr. Fraser's testimony offers little probative value. For example, Dr. Fraser's expert disclosure specified that certain factors such as "perceptual obstructions" and "physiological characteristics" of the eyewitness to the Estrada homicide supported Dr. Fraser's conclusion that the identification was made under circumstances likely to render it unreliable. During the evidentiary hearing, however, Dr. Fraser admitted that he had not interviewed the eyewitness and knew nothing about the witness' physiological characteristics, where specifically the witness was located when the shooting occurred, and whether there were any perceptual obstructions at the scene (*id.* at 50–52, 54–58). An opinion based on unwarranted and unfounded premises and assumptions with no anchor in the actual facts would be pure argument and would call upon the jury to speculate.

Under *Daubert* and Rule 403, should a witness who persistently exaggerates, if ***1036** not prevaricates, be tolerated merely because in those instances he is caught he will come clean? The Court thinks not. In this instance, the witness, when caught, would not even come clean.

In stark contrast to the testimony's limited probative value, the risk for juror confusion, unfair prejudice, and waste of time is very high. Because of his demonstrated tendency to

leave false impressions, it would be confusing and wasteful of the jury's time for cross examination at trial to try to winnow down Dr. Fraser's testimony to those few nuggets that are more probative than prejudicial. There are some aspects of the field of eyewitness identification and memory that lend themselves to scientific treatment and this order does not condemn the entire discipline. Dr. Fraser's proposed testimony, however, went well beyond any such science. At best, Dr. Fraser's testimony was an amalgam of a whiff of science mixed with unjustified extrapolation. *See Joiner,* 522 U.S. at 146, 118 S.Ct. 512 (holding a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered.") It is like a small dose of medicine in a large bottle of snake oil. Yes, there is some medicine in there, but it is hard to separate from the snake oil. Under Rule 403, the jury should not be burdened with trying to drain the snake oil to find the medicine.

CONCLUSION

For the reasons stated herein, Dr. Fraser's proposed testimony has been excluded in its entirety.

IT IS SO ORDERED.

All Citations

788 F.Supp.2d 1026

Footnotes

1 Dr. Fraser did not submit an expert report to support his proposed opinions and the written summary of Dr. Fraser's opinions was inadequate (Mar. 16 Tr. 38–39). The summary did not cite any bases for Dr. Fraser's opinions beyond the general assertion that his conclusions would be based on "literature in the field" and "scientific studies." Indeed, the summary did not even identify Dr. Fraser's specific field of expertise. This was a violation of Rule 16. Accordingly, Dr. Fraser's testimony at the evidentiary hearing was the only instance in which Dr. Fraser offered any explanation for the bases of his opinions and any methodology used. The vague disclosure was particularly vexing given the defense's earlier vehement objections to the government's expert disclosures which—after much litigation—were revised and made more detailed on multiple occasions (*see, e.g.,* Dkt. Nos. 1669, 1821, 1884–1, 2288, 2092–2).

2 There were 56 participants in the experiment who made the identifications—social science students at Leiden University.

3 The identifications were made at an illumination of "3000 lux"—which is the equivalent of "daylight, clouded weather" (Dkt. No. 3729–1 at 323). Dr. Fraser testified that the conditions in the instant case were at least equivalent to 3000 lux (Mar. 16 Tr. at 68).

4 The 61–out–of–62 rate was at 12 meters, the cell of data closest to 15 meters. The next farther cell was at 20 meters. The accuracy rate for that cell was 57 out of 62, also a solid figure and nowhere near the one-out-of 20–rate suggested by the witness (see table in text).

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM ALSUP

UNITED STATES OF AMERICA, PLAINTIFF, VS. MARVIN CARCAMO, ANGEL NOEL GUEVARA, MORIS FLORES, GUILLERMO HERRERA, JONATHAN CRUZ-RAMIREZ, WALTER CRUZ-ZAVALA, ERICK LOPEZ, DEFENDANTS.	NO. CR 08-0730 WHA SAN FRANCISCO, CALIFORNIA MONDAY APRIL 18, 2011

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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THE COURT: MR. MARTINEZ?

CROSS EXAMINATION

BY MR. MARTINEZ:

Q. GOOD MORNING, OFFICER LAU.

A. GOOD MORNING.

Q. I WANTED TO TALK TO YOU A LITTLE BIT ABOUT THE PHOTOGRAPHIC LINE-UPS IN THIS CASE. IN YOUR EXPERIENCE AS A POLICE OFFICER -- I THINK YOU INDICATED FOR 20 YEARS, RIGHT?

A. I DID.

Q. AND YOU'VE DONE MANY, MANY PHOTOGRAPHIC LINE-UPS; IS THAT CORRECT?

A. THAT'S FAIR TO SAY.

Q. HOW MANY, APPROXIMATELY, HAVE YOU DONE OVER THE YEARS? JUST A ROUGH BALLPARK GUESS.

A. SAY 50.

Q. NOW, IN YOUR EXPERIENCE, THERE'S VARIOUS FACTORS THAT EFFECT THE ACCURACY OF AN IDENTIFICATION; IS THAT CORRECT?

MR. FRENTZEN: I'LL OBJECT TO THIS LINE OF QUESTIONING, YOUR HONOR.

THE COURT: WHAT IS THE OBJECTION?

MR. FRENTZEN: THE OBJECTION -- THE QUESTION IS NOT WITH RESPECT TO THE SERGEANT'S WORK. THE QUESTION IS WITH RESPECT FOR HIS SPECULATIVE BELIEFS ABOUT VICTIMS OF VIOLENT CRIME, APPARENTLY.

THE COURT: WHAT WAS YOUR QUESTION AGAIN,

MR. MARTINEZ?

MR. MARTINEZ: THAT THERE ARE FACTORS THAT AFFECT THE ACCURACY OF EYEWITNESSES IDENTIFICATION BASED UPON HIS EXPERIENCE. PUTTING TOGETHER, I THINK, OVER 50 --

THE COURT: ARE YOU REFERRING TO THE PROCEDURE THAT THE OFFICERS USED TO THE PHOTO LINE-UP, OR ARE YOU REFERRING TO JUST IN GENERAL THE RELIABILITY OF EYEWITNESS IDENTIFICATION?

MR. MARTINEZ: ACTUALLY, BOTH, YOUR HONOR. I'M GOING TO BE GETTING INTO THE SPECIFICS OF THE LINE-UPS THAT WERE USED HERE; BUT I ALSO WANT TO GET SOME BACKGROUND OF THE FACTORS THAT IN HIS EXPERIENCE AFFECT AN EYEWITNESS'S ACCURACY.

THE COURT: WELL, BASED ON THAT EXPLANATION, THE OBJECTION IS SUSTAINED. I WOULD LET YOU GET INTO THE SUBJECT OF THE PROCEDURES USED TO COMPOSE A PHOTOGRAPHIC LINE-UP AND WHETHER OR NOT THOSE ARE SUGGESTIVE OR NOT, AND THE REASON I'LL DO THAT IS THE WITNESS STATED ON DIRECT EXAMINATION THAT IN COMPOSING THE PHOTOGRAPHIC LINE-UPS, HE, QUOTE, WANTED TO BE AS FAIR AS POSSIBLE, CLOSE QUOTE. AND SO IT WOULD BE FAIR GAME FOR YOU TO QUIZ THE WITNESS ON THAT SUBJECT OF PHOTOGRAPHIC LINE-UPS.

BUT THE MORE GENERAL SUBJECT OF THE ABILITY OF EYEWITNESSES TO REMEMBER AND MAKE ACCURATE IDENTIFICATION IS NOT WITHIN THE DIRECT EXAMINATION, AND THAT WOULD BE RULE 16 MATERIAL, IF YOU WANTED TO USE IT, SO THAT IS NOT -- THAT'S OFF LIMITS FOR THIS WITNESS.