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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS TREJO,

Defendant and Appellant.

B195184

(Los Angeles County  
Super. Ct. No. VA093677)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Larry S. Knupp, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jason Tran and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

A jury convicted Marcos Trejo of two counts each of attempted voluntary manslaughter and assault with a firearm. Trejo raises two arguments on appeal. First, he contends the trial court should not have admitted evidence of threats against a witness. Second, he challenges the trial court's imposition of upper terms based on facts found by the court, not the jury. We reject both arguments. The trial court properly admitted evidence of witness intimidation because it reflected on the witness's credibility. The trial court permissibly imposed upper terms based on a recidivism-related factor.

## **BACKGROUND AND PROCEDURAL HISTORY**

Gabriel Herrera and Jimmy Rosales drove to a liquor store on the afternoon of January 4, 2006. Trejo approached them near the store entrance and asked them where they were from. Both Herrera and Rosales said they did not "bang," and Rosales added that he was from "nowhere." Trejo persisted and said he was from the Garden View Locos. Herrera and Rosales ignored him and went into the store. When they came out, Trejo was still outside, riding his bicycle in circles. As Herrera and Rosales drove away, Trejo pulled a gun from his pocket and shot at their car several times.

Based on descriptions that Herrera and Rosales gave police, authorities identified Trejo as a suspect from among known members of the Garden View Locos gang. Both Herrera and Rosales picked Trejo's picture out of a photographic array before trial.

A jury convicted Trejo of two counts of attempted voluntary manslaughter, as a lesser included offense of attempted murder, and two counts of assault with a firearm. The jury found that Trejo had personally used and fired a gun in the commission of the attempted voluntary manslaughter (Pen. Code, § 12022.53, subs. (b) and (c)), and personally used a gun in the commission of the aggravated assaults (Pen. Code, § 12022.5, subd. (a)). The court sentenced Trejo to 16 years 4 months in prison.

## DISCUSSION

### **1. The court properly admitted evidence that Rosales was afraid because people had approached him at home and at court about the case.**

Trejo contends the trial court improperly admitted evidence of threats and intimidation against Rosales. Trejo argues that this evidence was irrelevant and that its admission violated his rights to due process and a fair trial.

Before trial, both Rosales and Herrera identified Trejo as the shooter. Neither victim identified Trejo at trial, however. Both victims also tried to backpedal from their selection of Trejo's picture from the photographic lineup. Rosales testified he could not remember picking a photograph from the array, and he denied circling any photograph. At most, he said, he may have told police that one of the men *might* be the perpetrator. Rosales admitted he wrote his initials on and signed a copy of the lineup. However, Rosales claimed he did this only because the officer told him to do it.

The prosecutor asked Rosales if he was frightened "to be here." Rosales admitted he was and explained, "I don't like problems." The prosecutor asked whether anyone had visited Rosales's house. The court overruled defense counsel's relevance objection. Rosales testified some men and women had come to his home twice. Some of them had been there in court the day before. After these visits, Rosales was worried about "coming to court." During one of the visits, Rosales spoke to two of the women; both of them had attended the trial the day before Rosales testified. When Rosales appeared in court on Trejo's case a couple of months earlier, a woman said something to him that frightened or worried him. She looked like one of the women who came to his house and was there at trial. On that earlier occasion, Rosales called Officer Derek O'Malley. Rosales was "scared every day." He believed the people might have some connection to Trejo's case because at some point they asked him if he was going to court. No one ever told him not to go to court, but he perceived what was said to him when he was in the courthouse a few months earlier as a threat.

O'Malley testified that in May he received a call from Rosales, who told him that he was at the courthouse and someone was threatening him. O'Malley went to the courthouse to meet Rosales, who appeared terrified. Rosales told him that a woman sitting behind him made a telephone call, and he left the courtroom because he had a bad feeling. The woman followed him out and told him to "watch what he [said] in court." O'Malley identified the woman as Trejo's girlfriend. O'Malley also spoke to Rosales when he appeared for trial. Rosales told him that in August two men and a woman came to his home. The woman approached Rosales and asked if he had received a subpoena and whether he was going to court. Rosales pointed the woman out to O'Malley. O'Malley spoke to her and discovered she was Trejo's sister. She and Trejo's girlfriend were in court on the first day Rosales testified at trial, and Rosales appeared to be frightened. His lips shook when he spoke.

Trejo waived his constitutional claims by failing to raise them in the trial court. (*People v. Williams* (1997) 16 Cal.4th 153, 208, 250; *People v. Thomas* (1992) 2 Cal.4th 489, 520.) He objected to the intimidation evidence only on relevance and hearsay grounds. Trejo also waived what appears to be an argument that the court should have excluded the testimony under Evidence Code section 352. Trejo now says that the evidence consumed undue time and created risks of confusing and prejudicing the jury.

Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to his credibility and therefore is admissible. (Evid. Code, § 780; *People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) An explanation of the basis of the witness's fear also is admissible, in the court's discretion. (*Ibid.*) The prosecution does not need to show that the witness's fear is directly linked to the defendant. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1142.)

Rosales's trial testimony contradicted his earlier identification of Trejo. Rosales admitted he was afraid to testify in the case because of the people who had come to his house and spoken to him at court. So the evidence that Rosales had been approached at his home and at court was highly relevant to his credibility. It was unnecessary to prove

that Trejo had authorized the intimidation efforts. The trial court did not abuse its discretion by admitting this testimony.

**2. The trial court properly imposed upper terms on the basis of recidivism-related factors.**

The trial court imposed the upper terms for one count of assault with a firearm (count 3) and the Penal Code section 12022.5, subdivision (a) enhancement for that count. It explained that it found that the crime involved great violence and the potential for great bodily harm, the victims were particularly vulnerable and did nothing to provoke the attack, Trejo was “engaged in a serious pattern of violent conduct which indicates a serious danger to society,” he was on probation or parole when he committed the crime, and his performance on probation or parole was unsatisfactory.

Citing *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [127 S.Ct. 856] (*Cunningham*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), Trejo contends the imposition of the upper terms violated due process, because it was based on facts found by the court, not the jury.

*Apprendi, supra*, 530 U.S. 466, essentially requires that any fact -- other than a prior conviction -- that increases the penalty for a crime beyond the prescribed statutory maximum be charged, submitted to a jury, and proved beyond a reasonable doubt. (*Id.* at p. 490.) *Apprendi* explained that recidivism is different from other matters used to increase a sentence because (1) sentencing courts traditionally have used recidivism to increase the length of a sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial procedural protections. (*Id.* at p. 488.) Many courts have deemed the recidivism exception to *Apprendi* to extend beyond the mere fact of a prior conviction to include closely related matters, such as the nature of the prior conviction. (*People v. McGee* (2006) 38 Cal.4th 682, 702-707; *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.)

Even if -- in choosing upper terms -- the trial court's reference to the victims' vulnerability and the degree of violence involved in the crime was *Cunningham* error that was not harmless, we affirm the sentence based on the recidivism exception. Trejo was on probation in two cases when he committed these crimes. He had committed a misdemeanor while already on formal felony probation in an earlier case. He had earlier misdemeanor convictions as well; in one of those cases, the court had revoked Trejo's probation and sent him back to jail. Trejo's status on probation and his poor performance on probation are recidivism-type factors. (*People v. Yim* (2007) 152 Cal.App.4th 366, 371.) The court can determine these factors by looking at court records of Trejo's earlier cases and convictions. (*Ibid.*) Trejo's record of failure on probation amply supported a finding that he had performed poorly on probation. "[A]s long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 812.) Accordingly, the trial court permissibly imposed upper terms.

### DISPOSITION

The judgment is affirmed.

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EGERTON, J.\*

We concur:

COOPER, P. J.

RUBIN, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.