

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT WILLIAM MOREDA,

Defendant and Appellant.

A098565

(San Mateo County
Super. Ct. No. 43987)

I. INTRODUCTION

Robert Moreda (Moreda) was convicted by a jury of attempted premeditated and deliberate murder (Pen. Code, §§ 664 and 187, subd. (a)¹), and assault with a deadly weapon (§ 245, subd. (a)). The jury also found true enhancement allegations that one or both offenses involved firearm use (§ 12022.5, subd. (a)(1)), domestic violence resulting in great bodily injury (§ 12022.7, subd. (d)), and discharge of a firearm (§ 12022.53, subd. (d)). Moreda was sentenced to an indeterminate term of life in prison with the possibility of parole and a consecutive determinate term of 25 years to life.

Moreda contends the judgment must be reversed for three independent reasons: (1) the trial court refused to suppress evidence recovered during a protective sweep of Moreda's apartment; (2) evidence relating to Moreda's experience as a hunter was

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III A and B.

¹ Unless otherwise indicated all statutory references are to the Penal Code.

irrelevant and prejudicial; (3) the judge who ruled on Moreda's motion for a new trial was not the same judge who presided over the jury trial. We affirm.

II. STATEMENT OF FACTS

In August 1997, Natalya Ivanova and her young son immigrated from Kazakhstan to the United States. Shortly thereafter, Ivanova met Moreda when she moved into the apartment complex in Redwood City where he lived. Moreda taught her to drive and helped her look for a job. The two became romantically involved but Ivanova had misgivings about the relationship. In November 1997, she attempted to clarify that she was not and would not become Moreda's girlfriend. Moreda declared his love but Ivanova insisted she would only be a friend. Ivanova began working in December and became busy. Moreda was hurt and upset that she could not spend time with him every day.

In late February 1998, Ivanova lost her temper when Moreda continued to press for a romantic relationship and she told him to leave her alone. Moreda became so angry he called her a "Russian slut," and then went out on his balcony and shouted this accusation out to the neighborhood. He told Ivanova to move out of her apartment or he would make her life miserable. Ivanova did not move.

In March 1998, Moreda had surgery to repair ongoing neck and back problems caused by a prior work-related injury. Ivanova visited him in the hospital once. While Moreda was still recovering at home, Ivanova agreed to cook and shop for him when his mother was busy elsewhere. Moreda became angry because Ivanova did not want him to accompany her to the store and because she did not purchase the things he wanted. Ivanova suggested they not be friends or see each other anymore. Moreda responded that he would tell everyone he loved her and then became angry and said that "Russians should be killed." The next day, Moreda went to Ivanova's work to apologize and take her to lunch. When Ivanova said she was not free, Moreda accused her of not caring about him and said he would come back the next day. Ivanova was so frightened by

Moreda's behavior that she made emergency arrangements with the security officer at her work.

Ivanova began trying to avoid Moreda but he often approached her when she was in the apartment complex, doing laundry or watching her son at the pool. He attempted to talk to her but she would not respond. Nor would she talk to him on the phone. One day in June 1998, Ivanova noticed that Moreda was following her to work. She turned her car around and drove home. Moreda parked near by and began shouting: "When are you going to pay me back? Russians should die." Ivanova went to her apartment, called 911 and filed a report with the police. Ivanova also talked with Moreda's mother, Barbara Romag, who managed the building where Ivanova and Moreda lived. The two women agreed that if there were further problems, Ivanova would call Romag and she would intervene.

In September 1998, Moreda got out of his truck as Ivanova and her son arrived at their apartment. Moreda was very angry; he screamed "Russians should die," and demanded to know whether Ivanova was "f'ing" her neighbor. Ivanova contacted Romag. A few days later, Moreda arrived at Ivanova's door late at night to apologize. Ivanova accepted the apology but would not open the door. Moreda left, but returned five minutes later and asked whose car was parked outside the building and whether Ivanova had someone in her apartment with her. When Moreda left but returned a third time, Ivanova stayed calm, explained it was late and convinced Moreda to leave. On another occasion that month, Ivanova and her son stayed out late with a visiting relative. When they arrived home, Moreda was in the carport and tried to tell the man about his relationship with Ivanova.

On the morning of October 5, 1998, Ivanova and her son left together for work and school at their usual time. When Ivanova opened her front door Moreda walked toward her and asked, in a demanding tone, who she had been with the night before. Ivanova told Moreda not to approach her and threatened to tell Romag. Moreda became more angry and warned her to never talk to his mother. A neighbor escorted Ivanova to Romag's apartment but she was not home. Ivanova went to work and called Romag.

On the afternoon of October 5, Ivanova arrived home from work and parked in her assigned parking spot. As was her habit, she went to get her mail. While walking across the driveway, she heard a noise that sounded like a firecracker. She looked up and saw Moreda standing on his balcony with a rifle in his hand. Ivanova's first thought was that Moreda was trying to scare her. She stood still and looked up at him. He fired the rifle a second time but did not hit her. Ivanova realized that Moreda was pointing the gun at her, that he "was pointing for a few seconds," that it was "not a joke," and she turned to run away. Then she felt something heavy hit her and spread throughout her body. There was another shot and she fell. Ivanova felt heavy, paralyzed and helpless in the warm puddle beneath her.

Moreda shot Ivanova with a .22 Winchester magnum rim fire caliber semi-automatic rifle that was equipped with a telescopic sight. He used hollow-point bullets which expand and fragment upon impact. Moreda fired a total of four shots. Although Ivanova had three external wounds in her neck and back, one of them may have been an exit wound. Ivanova survived her injuries and was the primary prosecution witness at Moreda's trial.

When Moreda was arrested he told police that Ivanova was his ex-girlfriend, that the two had been having problems for months, that they had not been getting along that day and that he shot at her to scare her "because she 'pissed him off' so many times." Moreda also told police he had taken an overdose of pills and would soon be dead. Paramedics administered Narcan and charcoal which caused Moreda to regurgitate some pill fragments. At trial, the prosecution presented blood test results and other evidence suggesting that Moreda had not ingested an appreciable amount of narcotics.

Moreda testified at trial that he had experienced unusually bad and worsening pain in his back and neck during the weekend prior to October 5, he had taken a lot of pain medication, was sad, had not slept well and had contemplated suicide. At one point, he loaded his rifle and lay down on his bed with it. Moreda also testified that he had an interaction with Ivanova on the morning of October 5 which angered him. That day, the pain was worse and he took about twenty pain pills hoping he would fall asleep and die

and then sat with his rifle and contemplated shooting himself. Moreda testified that he took the rifle outside, stuck it in his mouth and pulled the trigger but it misfired. After he chambered another cartridge, Moreda saw Ivanova in the parking lot and fired four or five times. Moreda testified that he pointed the rifle toward Ivanova but “kind of like over her head.” He wasn’t aiming at anything in particular and was not trying to hit Ivanova but only to scare her. Moreda also testified that he thought the gun was pointed at the bushes. He claimed he never looked through the scope on the rifle and did not intend to hit Ivanova at all. He only intended to scare Ivanova because she had made him mad earlier.

III. DISCUSSION

A. *The Motion to Suppress*

Moreda argues the trial court committed reversible error by denying his motion to suppress evidence found in his apartment on the day of the shooting. According to Moreda, the evidence was obtained during a warrantless search which exceeded the boundaries of a legitimate “protective sweep.”

We evaluate the legality of the challenged police conduct under federal constitutional standards. (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 862.) “We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]” (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

1. *Background*

At approximately 6:15 p.m. on October 5, 1998, Redwood City Police Sergeant Paul Sheffield received a call summoning him to Ivanova’s apartment building. While on route, the dispatcher told Sheffield that a resident of the building may have shot somebody. He arrived at the scene at 6:20 p.m. and found Ivanova lying in the driveway bleeding profusely. People were screaming and pointing up toward apartment 28 on the second floor. The scene was hectic. People were saying “up there, up there.” Somebody told Sheffield that “Bobby” had shot the victim.

Sheffield heard people yelling “don’t do it” and a female voice screaming “don’t do it, Bobby don’t do it.”² As Sheffield proceeded toward the voices he looked up and saw people in the threshold of apartment 28. A man then came out of the unit holding a scoped rifle but quickly dropped the weapon when ordered to do so. Sheffield took the rifle and he and another officer entered the apartment. Moreda was sitting in a reclining chair. Sheffield handcuffed Moreda and left him in the chair. He did not know whether there were other victims or suspects involved in the shooting. He “quickly secured the perimeter of the residence” by keeping everyone outside the unit except the paramedic and other police and then by “ma[king] sure that nobody was in the back rooms.”

Sheffield testified that he looked in each room in the one-bedroom unit to see if there was anyone else in the apartment. In the bedroom, he observed a rifle standing in the corner “that was just all out in the open.” Sheffield also saw a bullet with live ammunition on the bedroom dresser. Sheffield also noticed a hunter’s club license on a table within graspable reach of where Moreda was sitting. After Moreda was removed from the apartment, law enforcement officers took photographs of the interior of Moreda’s apartment including the items Sheffield had noticed.

2. *Analysis*

Moreda maintains that evidence of the second rifle, the bullet and the hunting license should have been suppressed because Sheffield did not have a search warrant and exceeded the constitutionally permissible scope of a protective sweep.

“A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” (*Maryland v. Buie* (1990) 494 U.S. 325, 327 (*Buie*)). The warrantless search is justified by the “interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who

² After the shooting, Moreda was found in his apartment pointing the rifle at himself. A neighbor heard him say he had killed Ivanova and wanted to kill himself.

are dangerous and who could unexpectedly launch an attack.” (*Id.* at p. 333.) Indeed, in *Buie*, the United States Supreme Court acknowledged that “[t]he risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter.” (*Ibid.*)

The *Buie* court articulated two “level[s] of justification” for evaluating whether a warrantless protective sweep of a home falls within the parameters fixed by the Fourth and Fourteenth Amendments. (*Buie, supra*, 494 U.S. at p. 327.) First, as incident to an arrest, officers may “as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” (*Id.* at p. 334.) Second, however, to legitimately move beyond the immediate surroundings, “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” (*Ibid.*)

Moreda contends that none of the evidence to which he objects was properly observed by Sheffield under either of these levels of justification. We disagree. The hunting license was in plain view on a table within reachable distance from the chair Moreda was sitting in when he was arrested. Thus, it was clearly within the space immediately adjoining the place of arrest. Sheffield needed no justification for looking on the table to assure himself there were no weapons or other dangerous items there.

The second rifle and the bullet were both in a different room. Moreda does not dispute those objects were in the plain view of a person standing in that room. Instead he contends Sheffield should not have gone into the bedroom. Again, we disagree. Sheffield’s description of the one-bedroom apartment suggests it was a relatively small unit. For example, the table on which the hunting license was found was referred to as both the kitchen table and the dining room table and was reachable from the living room chair where Moreda sat. Further, Sheffield could see the bedroom door from the spot where Moreda was arrested. Thus, the bedroom may well have been a “space[] immediately adjoining the place of arrest from which an attack could be immediately

launched” in which case Sheffield could have looked in the room “as a precautionary matter and without probable cause or reasonable suspicion” (*Buie, supra*, 494 U.S. at p. 334.)

Even if the apartment was larger than we envision, there were articulable facts to justify Sheffield’s decision to look into the bedroom to assure himself it did not harbor a dangerous individual. Sheffield arrived at the scene to find a victim of a shooting who was so seriously wounded she appeared dead. The scene was “really hectic” and many people were screaming. Sheffield observed several people in and around Moreda’s apartment unit and one man who exited the apartment holding a rifle. Although individuals at the scene had indicated that “Bobby” was the shooter, Moreda did not identify himself as Bobby Moreda until after Sheffield completed his sweep of the apartment. Furthermore, Sheffield testified that he did not know how many suspects or victims were involved when he conducted the sweep of the apartment. Under the circumstances, Sheffield was justified in going into the bedroom to see if anyone else was in the apartment.

B. *Evidence of Hunting Activities*

Moreda next contends that, even if his motion to suppress was properly denied, the trial court committed prejudicial error by admitting evidence of his hunting-related activities which included not just the second rifle and the hunting license, but also evidence that he had a mounted deer head in his apartment.

1. *Background*

Prior to trial, Moreda sought to exclude evidence of his hunting license on the ground that his membership in a hunting club was protected First Amendment activity and was not relevant to the issues at trial. The prosecutor argued the license was relevant to show Moreda’s familiarity with and ability to accurately operate a weapon and that the shooting was not accidental or inadvertent. The trial court ruled that evidence of the license was admissible.

Moreda also objected to evidence that he had a second rifle in his apartment because there was no evidence he used that weapon on the day of the shooting. The

prosecutor argued the evidence was relevant to prove intent because the second rifle was not operative and did not have a scope on it. The prosecutor maintained that the fact that Moreda chose the operable weapon with the scope tended to show that Moreda actually intended to fire the weapon and to hit Ivanova. The court admitted into evidence a photograph of the second rifle.

Moreda objected to evidence that a deer head was mounted on the wall in his apartment on the ground that hunting was a protected activity and that the evidence was highly prejudicial. The prosecutor argued the evidence was relevant and supportive of expected testimony by Moreda's father that he taught Moreda to hunt, that Moreda hunted regularly with the rifle he used to shoot Ivanova and that he was an excellent marksman. After Moreda's father testified at trial, the court admitted into evidence a photograph of the deer head in Moreda's apartment.

2. *Analysis*

In this court, Moreda continues to maintain that all of this hunting-related evidence was irrelevant. He further contends that any arguable relevance was outweighed by countervailing factors because the challenged evidence relates to constitutionally protected activity and was highly prejudicial. Although Moreda alludes to a variety of legal doctrines, his basic contention is that the evidence should have been excluded under Evidence Code section 352. Thus, we consider whether the court abused its discretion by admitting this evidence. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

At trial, the prosecutor had the burden of proving both premeditation and intent to kill. Moreda disputed both of these material issues. The challenged evidence was relevant to these issues. Moreda had two rifles in his apartment, but chose to use the rifle that had a scope attached to it. Further, the rifle he chose was his target practice weapon. As Moreda's father testified, Moreda was an experienced hunter and a good marksman with that particular weapon. The hunting club card and deer head corroborated that testimony regarding Moreda's experience and expertise. Moreda's experience as a hunter and familiarity with the weapon he used to shoot Ivanova was relevant to show both that

Moreda went out on his balcony with a preconceived plan to shoot Ivanova and that Moreda had the intent to kill.

The evidence was also relevant to rebut the defense theory presented at trial. Moreda affirmatively challenged the prosecution claim that he planned and intended to kill Ivanova. The defense theory was that Moreda was not waiting for Ivanova to come home from work but just happened to see her while he was out on the balcony. He had the loaded rifle in his hand when he saw Ivanova because he had just tried to kill himself with it but failed because the weapon jammed. When he saw Ivanova, the defense maintained, Moreda fired the rifle over her head intending to scare her but not to kill or even hit her. The challenged evidence was relevant to rebut the defense evidence because Moreda's expertise as a hunter and his familiarity with the weapon he used tended to disprove his claim that he did not plan or intend to shoot or kill Ivanova.

Moreda contends this evidence was prejudicial because it portrayed him as a "hunter who stalked his human prey."³ In fact, the prosecutor did analogize Moreda's conduct to stalking activity. She also suggested that he used his hunting skills to attempt to kill Ivanova. However, there was evidence to support these theories. The fact that prosecution theories are not flattering to the defendant does not mean evidence supporting those theories is unfairly prejudicial.

Moreda contends evidence of the hunting club card was unfairly prejudicial because his membership was protected First Amendment activity and should not have been used to make him look like a bad person. First, Moreda's reliance on *Dawson v. Delaware* (1992) 503 U.S. 159 is misplaced. In that case, the trial court erred by admitting evidence at the penalty phase of a murder trial that a white defendant who was

³ Moreda also contends that evidence he was a hunter was bad character evidence that was inadmissible under Evidence Code section 1101. Since this argument is unsupported by meaningful discussion or analysis, we assume it is based on the premise that this evidence is not relevant to prove a disputed issue other than character. As our relevancy analysis illustrates, this evidence was relevant to several issues other than character including intent, state of mind and knowledge about and familiarity with the weapon used to commit the charged offenses.

convicted of murdering a white victim was a member of a white racist prison gang because that fact was not relevant to any issue in the case. Here, by contrast, Moreda's hunting club membership was relevant because his hunting expertise tended to prove that the shooting was neither spontaneous nor unintentional. Second, the hunting club membership did not make Moreda look like a bad person but only a good marksman. Since Moreda's skill and ability to shoot accurately were relevant, evidence of the membership card was also relevant.

Moreda's strongest argument is that admitting evidence of a weapon that was not used in the charged offenses was unduly prejudicial. As a general rule, evidence of weapons found in the defendant's possession which are not alleged to have been used in the crime are not relevant to prove the defendant committed the charged crime. (*People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649; *People v. Neely* (1993) 6 Cal.4th 877, 896.) Indeed, in *People v. Henderson* (1976) 58 Cal.App.3d 349, a case upon which Moreda expressly relies, the court observed that "[e]vidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons -- a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*Id.* at p. 360.)

We accept and agree with this general rule, but find that the present case is a clear exception. Here, evidence of the second weapon was not used to improperly suggest that Moreda is the kind of person who surrounds himself with deadly weapons. Rather, the evidence was used to show that Moreda had a choice as to what weapon to use and that he chose the more deadly weapon. Evidence that Moreda had this choice was relevant to rebut the defense theory and to show that Moreda planned and intended to kill Ivanova by shooting at her from his balcony.

For all of these reasons, we find the trial court did not commit error by refusing to exclude the challenged evidence relating to Moreda's hunting activities.

C. *The New Trial Motion*

Moreda contends the judgment must be reversed because he was denied his statutory and constitutional right to a “meaningful consideration” of the claim in his new trial motion that the findings and verdicts of the jury were contrary to the evidence.

1. *Background*

The jury returned its verdicts on April 25, 2000. On July 28, Moreda filed a pro per motion for new trial. Moreda raised a variety of issues but did not argue that the verdicts were against the weight of the evidence. On July 31, 2000, the trial court granted Moreda’s motion for substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. Almost a year later, on July 27, 2001, Moreda’s new counsel filed a motion for new trial on the following grounds: (1) admission of prejudicial prior hunting activity evidence; (2) denial of the right to be mentally as well as physically present at trial; (3) ineffective assistance of counsel; and (4) the verdicts were contrary to the law and evidence.

On August 31, 2001, Moreda filed a motion to disqualify the trial judge, the Honorable Barbara Mallach. Defense counsel contended that Judge Mallach was biased against him because she disapproved of the methods he used to investigate the defense claim that Moreda was denied the right to be mentally present at trial which included, among other things, interviewing court staff. On October 31, 2001, the motion to disqualify Judge Mallach was granted after she declined to testify at a hearing on the matter. On December 13, 2001, the case was assigned to the Honorable Carl Holm.

On January 28, 2002, Moreda filed a supplemental brief in which he argued that he was “denied his right to a judicial reweighing of the evidence pursuant to the ‘13th juror’ function of Penal Code section 1181 (6) [and] (7)[⁴] by the disqualification of the

⁴ Section 1181 sets forth the grounds pursuant to which the court may grant a new trial. Subdivisions (6) and (7) of section 1181 both authorize the court to grant a new trial when “the verdict or finding is contrary to law or evidence.” In addition, these

judge who presided at his trial and [he was] therefore entitled to a new trial.” Moreda’s position was that Judge Holm could not rule on the merits of his claim that the verdicts were not supported by the evidence. Moreda argued that, since Judge Holm was not present during trial, he was unable to appropriately exercise his power and duty to consider the sufficiency of the evidence, to weigh conflicts and inconsistencies and to evaluate the credibility of witnesses.

On March 14, 2002, the trial court ruled that Moreda was not entitled to a new trial on the ground that the judge who presided at trial was unavailable to rule on his new trial motion. Subsequently, the court rejected the other grounds for seeking a new trial, including the claim that the verdicts were not supported by the evidence, and therefore denied Moreda’s motion.

2. Analysis

Moreda argues that the denial of his motion for a new trial constituted a violation of due process. Moreda’s theory is that section 1181 confers upon the criminal defendant a procedural liberty interest in having the trial judge who presided at trial determine whether the verdict was against the weight of the evidence and due process precludes the state from arbitrarily depriving Moreda of this right.

a. Due process

Moreda rests his due process argument on *Hicks v. Oklahoma* (1980) 447 U.S. 343 (*Hicks*). In that case, an Oklahoma state court jury found the defendant guilty of unlawfully distributing heroin and imposed a mandatory 40-year prison term pursuant to an habitual offender statute then in effect in Oklahoma. (*Id.* at pp. 344-345.) The defendant appealed after the habitual offender statute was declared unconstitutional in a different case. The criminal appeals court affirmed the conviction and sentence notwithstanding the fact that the sentencing statute had been found invalid “reasoning that the petitioner was not prejudiced by the impact of the invalid statute, since his

provisions authorize the court to modify the verdict in specified ways to comport with the evidence as an alternative to granting a new trial.

sentence was within the range of punishment that could have been imposed in any event.” (*Id.* at p. 345.)

The *Hicks* court vacated the judgment and remanded the case to the Oklahoma court. (*Hicks, supra*, 447 U.S. at p. 347.) It first rejected the state court’s factual conclusion that the defendant had not been prejudiced by the application of the invalid statute. Pursuant to applicable provisions of the Oklahoma statute, the defendant was entitled to have his punishment fixed by the jury and, if the jury had been properly instructed, it could have imposed “any sentence of ‘not less than ten . . . years.’” (*Id.* at pp. 345-346, quoting Okla. Stats. 1971, tit. 21, § 51(A)(1).) Since there was a “substantial” possibility the jury would have returned a sentence of less than 40 years, the court erred by concluding the defendant was not prejudiced. (*Id.* at p. 346.)

The *Hicks* court also rejected the contention that only state procedural rights were implicated by the improper application of the invalid sentencing statute to the defendant. (*Hicks, supra*, 447 U.S. at p. 346.) The court reasoned that where “a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant’s interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Citations.]” (*Ibid.*) The court found that the denial of the defendant’s state law right to a jury sentence “simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision” was “an arbitrary disregard of the petitioner’s right to liberty” and a “denial of due process of law.” (*Ibid.*)

Moreda contends that *Hicks* supports his claim that “it was a denial of due process to allow another judge to rule on the aspect of the new trial motion based on section 1181, paragraphs 6 and 7.” Since *Hicks* holds that the arbitrary deprivation of a state-conferred liberty interest violates federal constitutional due process, Moreda must show

that he has a right under California law to have the judge who presided at trial hear his new trial motion. Moreda cannot make this showing.

b. Section 1181

Moreda contends that section 1181, subdivisions (6) and (7), confer on criminal defendants a liberty interest in having the judge who presided at trial determine whether the verdict is contrary to the evidence.

Section 1181, subdivisions (6) and (7), give the criminal defendant the right to move for a new trial on the ground that the “verdict or finding is contrary to law or evidence” However, section 1181 does not contain any language requiring or even suggesting that the motion must be decided by the judge who presided at trial. Thus, in contrast to the *Hicks* defendant, Moreda has no express statutory basis for claiming a constitutionally-protected liberty interest in this case. Nevertheless, Moreda maintains his right to have the judge who presided at trial resolve his new trial motion is established by case law construing section 1181.

According to Moreda, case law establishes that “a criminal defendant is essentially entitled to two decisions on the weight of the evidence, one by the jury and one by the trial judge.” Moreda urges that the trial court, in contrast to an appellate court, has the obligation to independently weigh the evidence and to determine whether there is sufficient credible evidence to support the jury’s verdict. (See *People v. Robarge* (1953) 41 Cal.2d 628, 633-634; *People v. Serrato* (1973) 9 Cal.3d 753, 761 disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583; *People v. Redmond* (1969) 71 Cal.2d 745, 759-760.) Moreda maintains that only the trial judge who presides at trial and sees the witnesses and hears their testimony can competently discharge the obligation to independently weigh the evidence and determine whether there is sufficient credible evidence to support the verdict.

Moreda misperceives the trial court’s role when reviewing the sufficiency of the evidence pursuant to a new trial motion. “It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does not mean, however, that the court should disregard the

verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. [Citations.]” (*People v. Robarge, supra*, 41 Cal.2d at p. 633.)

The second decision on the evidence to which the defendant is entitled pursuant to section 1181 is fundamentally different from the jury’s decision. The trial court “exercises a supervisory power over the verdict,” (*People v. Robarge, supra*, 41 Cal.2d at p. 633; *People v. Taylor* (1993) 19 Cal.App.4th 836, 843, 853; *People v. Watson* (1983) 150 Cal.App.3d 313, 317, disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991), it is guided by “a presumption in favor of the correctness of the verdict and proceedings supporting it,” (*People v. Davis* (1995) 10 Cal.4th 463, 524), and its reviewing function is “strictly circumscribed by the authority granted by statute.” (*People v. Watson, supra*, 150 Cal.App.3d at p. 318.) That statute, section 1181, “clearly contemplates review will be confined to what the ‘evidence shows’ (§ 1181, subd. (6)).” (*Id.* at p. 319.) Thus, although the trial court has broad discretion in this area, that discretion is abused when the court exceeds the bounds of its supervisory capacity over the jury’s function by, for example, considering facts or evidence outside the record. (*Ibid.*)

Certainly, a judge’s first-hand observations of the demeanor of a witness could be useful when ruling on a motion for new trial. However, since the court functions in a supervisory capacity and its review must be limited to what the evidence shows, we believe that, at least in most cases, a court can effectively rule on a motion for new trial by reviewing the transcripts of the proceedings and thereby determining whether the jury’s verdict, and the weight of evidence and credibility determinations upon which that verdict rests, are supported by the evidence. Thus, we disagree that section 1181 implicitly confers on criminal defendants the right to demand or expect that the judge who presided at trial also rule on his or her post-trial challenge to the sufficiency of the evidence.

3. *Section 1053*

As discussed above, the *Hicks* defendant was denied a procedural right that was expressly conferred by a state statute. (*Hicks, supra*, 447 U.S. at pp. 345-346.) Indeed, in that case, “[t]he State concede[d] that the petitioner had a statutory right to have a jury fix his punishment in the first instance” (*Id.* at p. 347.) Here, by contrast, California statutory law is inconsistent with Moreda’s claimed right.

Section 1053 states: “If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial The judge or justice authorized by this section to proceed with and complete the trial shall have the same power, authority, and jurisdiction as if the trial had been commenced before that judge or justice.”

Rather than address the express language of section 1053, Moreda takes the position that this provision must be construed so as not to conflict with the constitutionally-protected liberty interest conferred on the criminal defendant by section 1181. As we have already explained, section 1181 does not confer on the criminal defendant the right to have a new trial motion decided by the judge who presided at trial. A judge who did not preside at trial can perform its supervisory function under section 1181 by independently reviewing the trial record in order to determine whether the evidence supports the verdict. Thus we reject Moreda’s invitation to ignore the express language of section 1053.

Case law construing section 1053 further undermines Moreda’s position. It establishes that the substitution of a judge during a criminal trial does not require the consent of the defendant and does not violate the defendant’s due process rights. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1211-1212.) There is also authority that section 1053 authorizes a judge who did not preside at trial to rule upon post-trial motions including a motion for new trial. (*People v. Holzer* (1972) 25 Cal.App.3d 456, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 867, *People v. Burgener* (1990) 223

Cal.App.3d 427, 436; see also *People v. Clifton* (1969) 270 Cal.App.2d 860, 862.) In fact, in *People v. Holzer*, the court rejected essentially the same argument Moreda makes here. (25 Cal.App.3d at p. 464.) In that case, the judge who presided at trial died before ruling on the defendant's motion for new trial. On appeal, the *Holzer* defendant argued that "[s]ince the judge who ruled on defendant's [new trial] motion was not in a position to consider the demeanor of witnesses, defendant was in effect denied his right to have the evidence reweighed" under section 1181, subdivision (6). (*Ibid.*) The *Holzer* court disagreed, finding that the defendant had the benefit of a full jury trial, that he had not advanced any reason why the verdict was contrary to the law or evidence and that, in any event, "there is no error in having another judge hear and rule on the motion for a new trial when the trial judge dies before the motion can be heard." (*Ibid.*)

Moreda contends that cases construing section 1053 are distinguishable. In contrast to published decisions authorizing a different judge to rule on a new trial motion, in this case Moreda's new trial motion squarely raised credibility and weight of the evidence issues. We acknowledge this distinction. Moreda did expressly argue in the court below that the verdict was against the weight of the evidence and that the jury misjudged his credibility regarding the issue of intent. However, we reject Moreda's assumption that this distinction is outcome-determinative.

We simply do not accept Moreda's premise that personally observing the demeanor of a witness while on the stand at trial is an essential component of the trial court's review function under section 1181. A credibility dispute or conflict in the evidence significant enough to effect the outcome of a trial would have to be manifest in the record of the trial proceedings. In other words, a judge does not have to have been present at trial in order to determine whether the jury resolved a material credibility dispute or weighed conflicting material evidence. By reviewing a transcript of the proceedings, the judge can reconsider the jury's resolution of such matters; he or she can make credibility determinations and weigh the evidence and then determine whether the evidence supports the verdict.

Moreda's contrary position is based on the unlikely proposition that a judge's percipient observation of the demeanor of a witness would, *by itself*, support a decision to grant a new trial. Frankly, we cannot conceive of such a case particularly since the trial court must be able to articulate *facts* to support its determination that a verdict is not supported by credible evidence. (*Cf. People v. Taylor, supra*, 19 Cal.App.4th at pp. 847-848.) If, however, the trial record presents an evidentiary conflict which so troubles a trial judge that his or her failure to personally observe a witness precludes him or her from finding that a verdict is supported by the evidence, it seems to us that the judge could properly grant the defendant a new trial. In this regard, we note that the present case clearly did not pose such a problem for the trial court.

Though not directly on point, our Supreme Court's resolution of an analogous issue reinforces our conclusion in this case. (See *People v. Espinoza* (1992) 3 Cal.4th 806 (*Espinoza*)). *Espinoza* was a murder case in which the court affirmed a death judgment. The court held, among other things, that the defendant's rights were not violated by the fact that a motion to modify the death verdict was adjudicated by a judge who did not hear the entire guilt phase trial. (*Id.* at pp. 828-831.) The judge who presided when the guilt phase commenced became too ill to continue and a different judge was appointed pursuant to section 1053. The defendant objected to the mid-trial substitution on several grounds including that the second judge could not properly rule on the motion to modify the jury's death verdict. (*Id.* at p. 829.) The defendant expressly argued that, because the second judge did not personally hear the testimony of a crucial material witness, he could not possibly evaluate the witness's credibility and thus "could not fully exercise his independent judgment of the evidence" for purposes of ruling on the motion. (*Ibid.*) The *Espinoza* court disagreed. It acknowledged that, when ruling on a motion to modify a death judgment, the trial court conducts an "independent review" of the evidence; the judge must "assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence." Notwithstanding this procedure, the *Espinoza* court rejected the defendant's contention that "the requisite assessment can be made only by a judge who has personally heard the testimony

presented at the guilt phase of the trial.” (*Id.* at p. 830.) The *Espinoza* court reasoned that the trial court was not to make an “independent and de novo penalty determination.” Rather, the trial court was required to make an independent judgment as to whether the weight of the evidence supports the jury verdict. The court rejected the contention that the second judge could not fully exercise that independent judgment by reviewing the transcripts of the trial proceedings that took place before his substitution. (*Ibid.*)

The post-verdict review conducted by the trial court in *Espinoza* is comparable to the review that a trial court performs when ruling on a motion for new trial challenging the sufficiency of the evidence. In both contexts, the court undertakes an independent analysis, weighs the evidence, and makes credibility determinations, but does not substitute its own judgment for that of the jury. Thus, the Supreme Court’s holding in *Espinoza* applies in this context. It confirms our conclusion that a judge who did not personally hear testimony at trial may nevertheless make an adequate independent assessment of the evidence in the record in order to determine whether the weight of the evidence supports the jury’s verdict.

Moreda’s final contention is that a “better-reasoned approach” to the issue he raises is “demonstrated by a set of cases from Florida.” This contention is irrelevant since the very premise of Moreda’s claim is that he has been deprived of a right conferred by California law. However, regarding the law in other jurisdictions, a recent publication noted that “[i]t has been held by the decided majority of the cases passing on the question that a judge who is substituted in the place of the presiding judge after the verdict of the jury has been returned may hear and determine a motion for new a trial or in arrest of judgment” (Bateman, *Substitution of Judge in State Criminal Trial* (1997) 45 A.L.R.5th 591, 612.)

In summary, we reject Moreda’s argument that he was entitled to a new trial solely because the judge who ruled on his motion for new trial did not preside at the trial. Moreda did not have a right to demand or expect that the same judge who presided at trial would rule on his new trial motion. Furthermore, the fact that Judge Holm did not preside at trial did not preclude him from competently performing his supervisory

function under section 1181, subdivisions (6) and (7), to review the evidence and determine whether it supported the verdicts. Finally, since Moreda did not have a state conferred right to obtain a ruling on the section 1181, subdivisions (6) and (7), motion from the judge who presided at trial, the resolution of that motion by Judge Holm did not violate Moreda's due process rights.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Lambden, J.

Trial Court: Superior Court of San Mateo County

Trial Judge: Hon. Barbara J. Mallach

Attorney for Appellant

James Kyle Gee

By appointment of the Court of Appeal under the First District Appellate Project
Independent Case System

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