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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN IBN SCOTT,

Defendant and Appellant.

B284693

Los Angeles County

Super. Ct. No. BA433593

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed and remanded.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant and defendant Kevin Ibn Scott was accused of shooting into a car containing two victims, killing one and wounding the other. His first trial ended in a mistrial when the jurors were unable to reach a verdict. He was retried and convicted of murder, attempted premeditated murder, shooting at an occupied vehicle, and possession of a firearm by a felon. The trial court sentenced him to 75 years to life in prison, plus an indeterminate life term with a minimum parole period of seven years. On appeal, he argues: (1) the trial court committed reversible error by admitting irrelevant and prejudicial gang evidence; (2) the court committed reversible error by allowing into evidence taped phone calls made by the surviving victim from jail; (3) the cumulative effect of allowing the gang evidence and taped jail calls deprived Scott of his right to due process; (4) insufficient evidence supported the murder conviction; and (5) the case must be remanded so the trial court can exercise its discretion to strike firearm enhancements. We remand for the limited purpose of allowing the trial court to exercise its discretion to strike the firearm enhancements. We otherwise affirm.

PROCEDURAL BACKGROUND

An information charged Scott with murder (Pen. Code, § 187, subd. (a); count one),¹ attempted premeditated murder (§§ 664/187, subd. (a); count two), shooting at an occupied vehicle (§ 246; count three), and possession of a firearm by a felon

¹ All undesignated statutory references are to the Penal Code.

(§ 29800, subd. (a)(1); count four). The information also contained additional firearm use allegations.

Scott's first trial occurred in January and February 2017 and – as noted above – ended in a mistrial when the jury was unable to reach a verdict. In May 2017, after a second trial, a jury found Scott guilty of all counts. The jury also found true the allegations that, during the commission of counts one through three, Scott personally and intentionally discharged a firearm, causing great bodily injury or death. (§ 12022.53, subd. (d).) As also noted above, the court sentenced him to 75 years to life in state prison, plus an indeterminate life term with a minimum parole period of seven years. The sentence consisted of 25 years to life for the murder, a consecutive term of life with parole for the attempted murder, and two consecutive terms of 25 years to life for two of the firearm enhancements. Pursuant to section 654, the court stayed sentencing for shooting at an occupied vehicle, possession of a firearm by a felon, and the third firearm enhancement.

Scott timely appealed.

FACTUAL BACKGROUND

A. Synopsis

We begin with this brief summary of the facts. Because Scott's appeal focused on claimed evidentiary errors and alleged insufficiency of the evidence, we follow with a more detailed recitation of the trial evidence.

Around 1:00 a.m. on November 8, 2014, gang member Douglas Baskin and his girlfriend Tamela Hemphill left a strip club called Sam's Hofbrau in Downtown Los Angeles and began walking to their car. Baskin and Hemphill did not realize it, but

appellant, Kevin Scott, also a gang member (gang moniker “Casper”), had recognized Baskin in the strip club.² Scott left the strip club before Baskin and waited in the parking lot next to the white Range Rover he was driving that night. Video footage showed Scott waiting in the parking lot for approximately 30 minutes for Baskin to leave the club.

When Baskin and Hemphill left the club, Scott got in the Range Rover alone and exited the parking lot in the direction they were walking. Video footage from the strip club and various other establishments showed the Range Rover follow Baskin and Hemphill. Baskin and Hemphill got in their car and began driving. A few blocks from the club, their car was struck by a hail of bullets fired from a car traveling in the lane next to them. Hemphill was shot in the back and killed. Baskin was shot in the hand and survived. Although there was no video footage of the actual shooting, Scott emerged as a suspect. When interviewed by police, Scott denied ever having driven a Range Rover, even though video footage showed him doing so.

At trial, Baskin testified he did not know who shot him. In January 2017, however, while Baskin was in jail for a burglary conviction, he made several phone calls that were recorded and admitted into evidence at Scott’s second trial. These calls were not admitted in Scott’s first trial because the prosecution did not become aware of them until after the first trial was completed. During these phone calls, Baskin indicated he was a gang member, and the reason for the shooting was Baskin had vouched for a friend and fellow gang member, Eldwin “Emacc” Mauldin,

² Scott and Baskin were members of different Crips subsets. Baskin was associated with the Acacia Blocc Crips and Scott was a member of the Underground Crips.

who other gang members believed was a snitch. Also during the phone call, Baskin stated he and Scott were in jail together, and they had a conversation in which Scott apologized to him for the shooting.

B. The Shooting and Scott's Arrest

As briefly described above, around 1:45 a.m. on November 8, 2014, Douglas Baskin and Tamela Hemphill left Sam's Hofbrau, a strip club located near the intersection of Alameda Street and Olympic Boulevard. They got in their car and headed toward the Santa Monica freeway. A few blocks from the club, their car was struck by bullets fired from a car traveling in the lane next to them. Baskin was shot in the hand. Hemphill was shot in the back and killed.

At least seven shots were fired into Baskin and Hemphill's car. Los Angeles Police Department (LAPD) officers found two .45 caliber expended shell casings and a bullet fragment near Alameda and 14th Street. Detective Calzadillas concluded, based on the trajectories and the bullet fragments and casings found on the street, that the shooting occurred on Alameda at the intersection of 14th Street.

LAPD Detectives obtained hours of surveillance video recorded at the club on the night of the shooting. Ra Kim, the club manager on duty the night of the shooting, walked LAPD through the surveillance videos showing the victims and Scott the night of the shooting. The video showed Scott arriving at the club in a white Range Rover. Detective Calzadillas noticed Scott's Range Rover because the surveillance video showed it "drove out

of the parking lot and tracked [the victims'] movement." Scott emerged as a suspect in the shooting.

Police gathered more surveillance video footage from businesses neighboring the club. By piecing together the time-stamped surveillance video clips, police created a video record of Scott leaving the club, waiting in the parking lot next to his white Range Rover, and driving in the direction the victims went when they came out of the club and walked to their car. The video showed Scott waited for the victims to leave the parking lot, got in the Range Rover alone, then made several turns and U-turns in order to catch up with and follow the victims in their car to where they were shot a few blocks from the club. He caught up to Baskin's car near the intersection of Alameda and 14th Street, less than half a block from where the bullet fragment and casings were found. The surveillance video footage stopped short of where the shooting occurred, however.

Kim, the club manager, knew Scott as a regular at the club, and recalled Scott was in the club the night of the shooting. Nataliya Sandic, who worked as a dancer at the club, spoke with Scott the night of the shooting, and Scott identified himself as a Crip.

Police began looking for Scott and his Range Rover. The license plate number of the Range Rover led police to the leaseholder, Morteza Hadian. Hadian told police he subleased the Range Rover to Derrick Armstrong. The Range Rover was equipped with a GPS tracking system. On November 18th, police set out to track the Range Rover, using its GPS location signal. But the detectives found they were actually following the signal of a black Jeep Cherokee, driven by Derrick Armstrong. They

approached Armstrong as he parked the Jeep at his destination, and he agreed to be interviewed at the police station.

When questioned about the night of the shooting, Armstrong identified the driver of the Range Rover only as “Casper,” and said he had loaned the Range Rover to him. (As noted above, Scott’s gang moniker was “Casper.”) Armstrong told detectives “Casper” returned the Range Rover to him on Sunday, November 9, 2014, the day after the shooting. Armstrong had the car detailed and shampooed.

Armstrong said he and “Casper” grew up in a part of Los Angeles known as “the Neighborhood.” Armstrong and “Casper” were from “the Hundreds” neighborhood. The Neighborhood Crips were a criminal street gang and Armstrong was a member. “Casper” belonged to the Underground or U.G. Crips. Neighborhood and Underground Crips got along most of the time because both gangs were part of the larger Rolling 100’s Crips.

Detectives arrested Scott for the shooting. When Scott was arrested, he was driving a Bentley provided to him by Armstrong. Detective Calzadillas and his partner, Detective Torres, interviewed Scott on February 6, 2015. Scott waived his Miranda rights and agreed to talk to the detectives. Scott said he had been to Sam’s Hofbrau “plenty of times.” He denied ever driving a Range Rover.

Detective Calzadillas interviewed Douglas Baskin a second time, after Scott’s arrest. He did not tell Baskin that Scott had been arrested for the shooting. Baskin was not cooperative, and did not want to talk to the detectives. Considering a possible gang-related motive for the shooting, detectives questioned Baskin about a gang member named Eldwin “Emacc” Mauldin.

During the interview, Baskin denied knowing Mauldin even though the two of them had been arrested for the same burglary.

C. Recorded Phone Conversations

In January 2017, Baskin was jailed for burglary. Around this time, Scott's first trial was taking place. While Baskin was in jail, he made several telephone calls to his friends, and in particular his new girlfriend. In those calls, he talked about "Casper," (i.e., Scott), the upcoming trial, and whether Scott was responsible for the shooting. The calls were recorded and transcribed, and excerpts were played for the jury at Scott's second trial.

In a recorded telephone call Baskin made on January 3, 2017, Baskin talked to his girlfriend about going to court to testify against Scott. Baskin told her he was reluctant to testify against Scott. He said he was worried he would try to hurt Scott if he saw him. His girlfriend reminded him he was the victim, the police had video evidence of the shooting, and there was nothing else the police needed. She advised him to finish his jail term and deal with the situation with Scott afterward. Baskin talked about people "trying to spoil" his name. His girlfriend said people would know Baskin was not telling on Scott, and she did not see how Scott could say Baskin was cooperating with prosecutors. Baskin explained Scott was "a big deal" in the gang world. Baskin's girlfriend said she knew that because Scott was her brother's good friend. She and Baskin discussed whether she should talk to her brother about Scott but decided against it.

In a recorded call made on January 6, 2017, Baskin told his girlfriend he had talked to "her brother's homie" (i.e., Scott) in

jail. Baskin and Scott were in the same custody area after leaving court. Baskin referred to Scott as a “[r]eal real real nice dude” and swore “on Crip” the conversation occurred. Scott sought to relate details of the encounter but cautioned, “You know the walls talk.” He said Scott “tried to look out for [him],” but Baskin told him he did not need anything. Baskin said he alluded to when he would be out of prison and told Scott, “Imma just call you and we gonna talk about it”

In a recorded call made on January 7, 2017 (numbered 1483776381), Baskin explained to his girlfriend that he had vouched for Emacc when fellow gang members questioned his loyalty. Baskin explained gossip within the gang arose because Emacc was not charged with crimes Baskin and “Bam” were charged with. Baskin told others the rumors about Emacc were false, but the rumors persisted because some cases against Baskin and Emacc were rejected by the district attorney. Baskin told his girlfriend Emacc’s “homies” were going to kill him until Baskin vouched for him. Baskin further explained, “They thought Emacc was paying me to keep us quiet”

In a conversation recorded on January 15, 2017, Baskin and his girlfriend again discussed Emacc. Specifically, they talked about how other gang members mistrusted Emacc after his cases were rejected by the district attorney even though he was “caught dead bang” committing crimes. Baskin explained Emacc and Bam had been caught committing crimes in Baskin’s car, but none of them were prosecuted for the crimes. That led to speculation Emacc was paying Baskin and Bam “to not tell the homies he was snitchin” Emacc stayed away from the neighborhood, which made matters worse, but Baskin vouched for Emacc.

In a recorded call made on January 20, 2017, Baskin spoke to a friend named Tiffany about Scott. He told her he “bumped into him” Tiffany warned Baskin not to be a snitch. Baskin denied being a snitch. He also said he “kept it solid” for Casper (i.e., Scott), which meant he did not incriminate Scott.

In a recorded call made on January 23, 2017, Baskin told his girlfriend he “had a real conversation” with Scott earlier that day. Scott and Baskin had been placed in the same holding cell in jail that day. Baskin said talking to Scott “confirmed a lot of [things] that [he] kind of knew but didn’t know for sure.” Baskin said he was surprised when Scott apologized for shooting him. Baskin said, “I didn’t expect it, for [him] to apologize and ask me to forgive him and [say] ‘I hope you forgive me, bro’” Baskin acknowledged Scott stood to gain from Baskin’s forgiveness, but maintained, “[A]ll this [stuff] that I was telling you . . . he confirmed a lot of [things] so I know he’s not just bluffing.”

D. Testimony of Baskin and Other Witnesses at Second Trial

Baskin testified very reluctantly at Scott’s trial. He denied being a gang member. He said he was “associated with” the Acacia Blocc gang when he was younger. He and Emacc had been friends for several years. At the time of trial, he was in custody for a burglary he committed before he was shot. He did not want to testify against Scott. Baskin said he drank liquor at the club that night, and also used marijuana and Ecstasy. He did not have any disagreements with Scott, or anyone in the club. He did not remember seeing a white Range Rover that night. Baskin testified that when he was interviewed in the hospital after the

shooting, he told police some things but left some things out, because he wanted to solve the crimes himself. When he was interviewed by detectives the second time, a few months later, he was not happy to see them. They showed him many pictures he had already seen, and he did not recognize anyone, or any vehicles in them. He did not identify Scott, the man shown near the vehicle in the video.

Baskin was conducting his own investigation, he said, but did not want to talk to police detectives who were also investigating the crimes. He did not know what he was going to do to the person who shot him and killed Hemphill. He believed the shots were fired from a burgundy or red car traveling next to his car.³ Approximately a week after talking to Scott in jail, on January 30, Baskin mentioned the burgundy car for the first time.

At trial, Baskin admitted talking to Scott about this case when they found themselves in custody together. Baskin denied that Scott apologized for shooting him, however. Instead, Baskin said, Scott “felt sorry for what happened that night.” Baskin denied being called a snitch, or that he was shot for being a snitch. According to Baskin, Scott apologized for tarnishing Baskin’s name in the neighborhood, not for shooting him and Hemphill.

Reginald Foreman, one of two men who accompanied Scott at the club the night of the shooting, testified that he knew Scott as “Casper” and had been his friend since they were teenagers.

³ He testified he did not mention the burgundy car during either of his interviews with police, or during his preliminary hearing testimony in July 2015, because he wanted to conduct his own investigation.

Foreman was a member of the Neighborhood Crips when he was younger. He could not say whether Scott was a fellow gang member. On the night of the shooting, Foreman and his friend Chad Keil joined Scott at the club, arriving in the black Jeep Cherokee on loan from Derrick Armstrong.

E. Gang Expert Testimony

Two law enforcement officers testified as experts at trial. LAPD Officer Cruz testified as an expert on the Neighborhood Crips criminal street gang. Officer Cruz explained snitching is not tolerated in criminal street gangs, and would make a member not “welcome back in the hood.” Officer Cruz knew of instances where snitches were killed. Snitching includes testifying in court.

According to Officer Cruz, gang members do not want law enforcement involved in their “politics,” preferring to handle disagreements and revenge on their own. Gang members “play[] dumb” with law enforcement, but utilize information gained from crime investigations to further their own interests.

Gang members check public court records – known as “paperwork” – for evidence that a fellow gang member is cooperating with law enforcement. If a gang member says, “My paperwork is good in the hood,” he is saying he is not a snitch. Gang members notice if a fellow gang member is arrested, and pay attention to whether that person may have agreed to cooperate with authorities in return for leniency in his own cases.

Officer Cruz considered a hypothetical situation in which a gang member stood up for a person believed to be a snitch, and was rumored to have been paid by the snitch for his support. He concluded that gang member would “have a target on their back.”

Detective Joshua Whiting of the Los Angeles County Sheriff's Department also testified as a gang expert. Detective Whiting was assigned to investigate crimes committed by Rollin 100's Crips in South Los Angeles. Members of various Crip subsets would pay attention to accusations of snitching because they were members of the same community. He explained that if a gang member defends someone accused of being a snitch, his character would be questioned. Gang members do not want to have "papers."

Detective Whiting reviewed 10 photographs of Scott's body, showing his tattoos, and concluded Scott's tattoos were related to membership in the Underground Crips. Detective Whiting had never seen a person with an Underground Crip tattoo who was not a member of the gang.

DISCUSSION

1. The Trial Court Properly Admitted Gang Evidence

Over defense counsel's objection, the trial court allowed the prosecution to introduce evidence that Scott and Baskin were gang members and the shooting was gang-motivated. Scott argues the gang evidence was irrelevant and therefore inadmissible under Evidence Code section 350.⁴ He further argues the evidence was inadmissible under Evidence Code section 352 because its probative value was substantially

⁴ Evidence Code section 350 provides: "No evidence is admissible except relevant evidence."

outweighed by the danger of it creating undue prejudice.⁵ We disagree with both contentions.

With respect to Evidence Code section 350, the evidence was relevant to show Scott's motive for the shooting and to help the jury assess Baskin's credibility. Turning to Evidence Code section 352, although we recognize gang evidence is inherently prejudicial, in this case it was highly probative. It explained the motive for the shooting and why Baskin might not want to testify truthfully against Scott. We find no abuse of discretion. (*People v. Wall* (2017) 3 Cal.5th 1048, 1069 ["A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion, and it will not be disturbed unless there is a showing that the trial court acted in an arbitrary, capricious, or absurd manner resulting in a miscarriage of justice."].)

Scott takes issue with the fact that gang evidence was not introduced during the first trial but was introduced at the second trial, arguing the trial court changed its mind "without real explanation." Scott's characterization of the trial court's decision to admit the evidence in the second trial is inaccurate and misleading. As the People correctly point out, the reason the gang evidence was not admitted in the first trial was because the prosecutor was not yet aware of the phone calls Baskin made from jail. Those phone calls occurred between January 3 and January 23 of 2017, and Scott's first trial began on January 25,

⁵ Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

2017. The prosecution first became aware of the phone calls in the time between the first and second trials.

We also reject Scott's contention that the admission of gang expert testimony deprived him of his constitutional right to due process. His truncated argument hinges on his assertion that the evidence was inadmissible. As discussed above, however, the trial court was well within its discretion to admit the gang evidence. The court's decision to do so was lawful both under state law and federal constitutional law.

2. The Trial Court Properly Admitted Baskin's Telephone Calls from Jail

Before the second trial, the prosecutor indicated he would seek to introduce tape recordings of the phone calls Baskin made while he was in jail. Defense counsel objected on hearsay grounds and under Evidence Code section 352. The trial court overruled the objections.

With respect to the hearsay issue, the court found the tapes admissible on two grounds. First, the court explained the statements Scott made to Baskin in prison were party admissions. Second, the court stated if Baskin were to testify and deny the truth of the statements he made during the phone calls, the contents of those calls would be admissible as prior inconsistent statements. When Baskin did testify, he denied the truth of the statements made during the phone calls.

On appeal, Scott argues the contents of the tapes were inadmissible hearsay. We disagree. In the phone conversations, Baskin referred to Scott by his gang moniker, "Casper." Baskin told his new girlfriend he and Scott spoke in jail, and that Scott apologized to him for the shooting. Baskin's statement was double hearsay – what Baskin told his girlfriend about what

Scott told him. But each level of hearsay came within an exception to the hearsay rule, making the statement admissible. (Evid. Code, § 1201; *People v. Anderson* (2018) 5 Cal.5th 372, 403.) Scott's statements to Baskin came within the exception for party admissions. (Evid. Code, § 1220; *People v. Horning* (2004) 34 Cal.4th 871, 898.) Baskin's phone call statements about what Scott told him in jail came under the exception for prior inconsistent statements. (Evid. Code, § 1235; *Anderson, supra*, 5 Cal.5th at p. 403.) "[M]ultiple hearsay consisting of a prior inconsistent statement and an admission of the defendant" is admissible. (*People v. Zapien* (1993) 4 Cal.4th 929, 953.) All of Baskin's other statements in his phone conversations were also admissible because they fell within the prior inconsistent statements exception.

Scott also argues the statements Baskin's girlfriend made to him in the phone conversations were inadmissible hearsay and that their admission requires reversal. We disagree. The trial court did not admit the girlfriend's statements for their truth, but rather to provide context for the conversations. The court was well within its discretion to do so. (*Wall, supra*, 3 Cal.5th at p. 1069.)

We also reject Scott's contention that the recordings were inadmissible under Evidence Code section 352. The recordings were highly probative of Scott's guilt, his intent and motive, and Baskin's credibility at trial. We find no abuse of discretion. (*Wall, supra*, 3 Cal.5th at p. 1069.)

Finally, we reject Scott's argument that the admission of the recordings violated his constitutional rights to due process and confrontation. There was no due process violation because the tapes were lawfully admitted. And there was no confrontation

clause violation because Scott was afforded the opportunity to confront and cross-examine Baskin when he testified at trial. (U.S. Const., 6th Amend.)

3. There Was No Cumulative Error

Scott argues the cumulative effect of the admission of the gang evidence and tape recordings violated his right to due process. As discussed above, the trial court did not err in allowing the gang evidence or tape recordings. It follows logically there was no cumulative error, and Scott's right to due process was not violated.

4. Substantial Evidence Supported Scott's Conviction for The Murder of Tamela Hemphill

We reject Scott's argument that there was insufficient evidence he intended to kill Tamela Hemphill. Scott watched Hemphill and Baskin get in their car and drive away. He followed them in his car, gradually closing the distance between them. When the cars were stopped side by side, he shot Hemphill at close range, firing approximately seven gunshots at her as she sat in her car. Scott admitted the shooting was intentional and apologized to Baskin for it. On these facts, the jury could reasonably infer Scott intended to kill Hemphill. (*People v. Smith* (2005) 37 Cal.4th 733, 741 ["The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill'] citations omitted.) Scott's argument falls considerably short of satisfying the "massive burden" he bears in claiming insufficient evidence. (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.)

5. Firearm Enhancements

Scott argues, and the People agree, that the case should be remanded to allow the trial court to exercise its discretion whether to strike the firearm enhancements under section 12022.53, subdivision (h). We agree with the parties. We express no opinion about how the trial court should exercise its discretion on remand.

DISPOSITION

The matter is remanded for the limited purpose of allowing the court to exercise its discretion under section 12022.53, subdivision (h). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

WE CONCUR:

MANELLA, P. J.

COLLINS, J.