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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH SCOTT,

Defendant and Appellant.

2d Crim. No. B271651
(Super. Ct. No. NA099058-01)
(Los Angeles County)

Kenneth Scott appeals a judgment following conviction of possession of a firearm by a felon, and unlawful possession of ammunition. (Pen. Code, §§ 29800, subd. (a)(1), 30305, subd. (a)(1).)¹ We modify the judgment to stay sentence regarding unlawful possession of ammunition, but otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

Barbara Smith and her children lived near Veterans Park in Long Beach, an area popular with neighborhood children for

¹ All further statutory references are to the Penal Code unless otherwise stated.

its basketball courts and sports activities. Smith preferred that her children not visit the park, however, because of “gang activity” occurring there. On April 22, 2014, Smith’s daughter, J.M., and Smith’s son played basketball at the park without her permission.

As J.M. played basketball, she noticed a red automobile in the adjacent parking lot. Scott, wearing a lime-green and orange-striped construction safety vest, left the passenger side of the automobile.² J.M. then heard loud voices shouting the gang name, “20s Crip.” Nevertheless, she continued to play basketball.

Meanwhile, Smith drove to the park to retrieve her children. As she drove into the parking lot, she noticed a red Pontiac Grand Prix automobile enter the lot. Smith saw Scott, who wore a construction safety vest, leave the passenger side of the red automobile. He was “digging in his pocket” to extricate an object. Smith then saw that Scott “for sure” held a firearm. At trial, Smith demonstrated Scott’s motions in “pulling something out of [his right pocket].”

Smith sounded the horn of her automobile and shouted to her children, “Come on, he has a gun.” Smith’s children eventually ran to her automobile and she drove away. Smith informed J.M. that she thought Scott had a gun. As Smith drove from the park, she noticed a group of approximately 10 men, including Scott, moving toward the park’s restroom. J.M. saw that Scott held an object in his right hand and gestured with his left hand. J.M. heard loud voices, including Scott’s voice, shouting “20s Crip.” J.M. then telephoned for police assistance as

² At sentencing, Scott’s attorney stated that Scott was employed as a crane operator.

her mother drove away from the park. At trial, the prosecutor played the recording of J.M.'s emergency call.

Jordan Littlejohn drove to the park that afternoon to pick up his children who were enrolled in after-school sports. Littlejohn saw Scott wearing a distinctive construction vest standing near the red automobile and later walking among a group of men who appeared to be arguing or disagreeing - "a little commotion" that "was going to get a little rough." Littlejohn did not see Scott holding a firearm, however, but informed a police officer that he saw Scott run quickly toward the red automobile and either drop an object inside or retrieve an object from the vehicle.

Within several minutes of J.M.'s police call, Long Beach Police Officer Alexander Saldana arrived at Veterans Park. The men who had gathered near the park restroom looked at Saldana and began "spreading out." Saldana detained Scott based upon the construction safety vest he was wearing as described by J.M. during her police call.

Smith and her children then returned to the park area where police officers had detained Scott. During her continuing telephone call with the police dispatcher, J.M. identified Scott as the man who held an object that her mother believed was a gun.

Scott denied possessing a firearm and questioned why he was detained. Officers found the keys to a red Pontiac Grand Prix automobile in Scott's pocket and requested his permission to search his automobile. Scott appeared nervous and began to cry, but granted permission to the officers to search the vehicle, stating: "Yeah, go ahead. I don't have anything illegal."

Officer Jose Flores then used Scott's keys to open the locked passenger door of the Grand Prix automobile. Under the

front passenger seat, Flores discovered a loaded and operable revolver.

At trial, Smith identified Scott as the man wearing the construction safety vest in the park that day. The parties also stipulated that Scott was convicted of a felony on May 11, 2012.

Veterans Park Surveillance Video-Recording

Two of the Long Beach police officers who responded to J.M.'s emergency telephone call were aware that Veterans Park had surveillance cameras. Nevertheless, the officers did not review the recordings which were deleted after 30 days. Scott was arraigned approximately three weeks following his arrest and his attorney requested discovery of the park's video-recordings nearly one year later. The park did not have surveillance cameras, however, in the particular area where the officers detained Scott. Prior to trial, Scott moved to dismiss the prosecution due to the police failure to preserve the surveillance video-recordings. (*Arizona v. Youngblood* (1988) 488 U.S. 51; *California v. Trombetta* (1984) 467 U.S. 479.) The trial court denied the motion.

Forensic Evidence

Forensic examination of the revolver did not yield any latent fingerprints. The firearm contained a low level of DNA from which Scott was excluded as a contributor. The forensic expert witness testified at trial, however, that it is possible to touch an object and leave no detectable DNA on the object.

The jury convicted Scott of possession of a firearm by a felon (count 1) and unlawful possession of ammunition (count 2). (§§ 29800, subd. (a)(1), 30305, subd. (a)(1).) In a separate proceeding, Scott admitted that he served a prior prison term within the meaning of section 667.5, subdivision (b). The trial

court sentenced Scott to a prison term of three years for each count to be served concurrently; it declined to impose a one-year term for the prior prison term enhancement. The court also imposed a \$300 restitution fine, a \$300 parole revocation restitution fine (suspended), a \$40 court security assessment, and a \$30 criminal conviction assessment, and awarded Scott 52 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Scott appeals and contends that: 1) the trial court erred by not dismissing the prosecution for police failure to preserve the park video-recording; 2) the trial court abused its discretion by permitting evidence that J.M. heard the name of a criminal street gang shouted during the confrontation; 3) the prosecutor committed misconduct during summation; 4) the asserted errors in combination denied him a fair trial and due process of law; and 5) section 654 precludes sentencing for count 2, possession of ammunition.

DISCUSSION

I.

Scott asserts that he was denied a fair trial and due process of law because police officers did not gather and preserve the park surveillance video-recordings. (*People v. Alvarez* (2014) 229 Cal.App.4th 761, 777 [police officer and prosecutor "acknowledged the potential usefulness" of video-recording but failed to preserve it].) He points out that two responding officers were aware of the existence of the surveillance cameras which are maintained by the Long Beach police department. Scott argues that the trial court's error in denying his dismissal motion is structural error compelling reversal.

The United States Supreme Court has held that law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta, supra*, 467 U.S. 479, 488.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at p. 489.) It is the defendant's burden to establish that the evidence had exculpatory value. (*People v. Alexander* (2010) 49 Cal.4th 846, 878-879.)

The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood, supra*, 488 U.S. 51, 57.) In such cases, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58.) We review a trial court's ruling on a *Trombetta/Youngblood* motion for substantial evidence. (*People v. Montes* (2014) 58 Cal.4th 809, 837.)

Here Scott did not establish that the video-recordings were materially exculpatory rather than "potentially useful." (*Illinois v. Fisher* (2004) 540 U.S. 544, 549.) The police cannot be expected to gather every item that might eventually prove useful to the defense. (*People v. Montes, supra*, 58 Cal.4th 809, 837.) Thus, Scott was required to establish that the police acted in bad faith in failing to preserve the recordings, i.e., that they were

aware that the recordings had exculpatory value and allowed their destruction. (*Ibid.*) This Scott failed to do. At worst, the officers' actions were negligent, but negligence does not amount to bad faith. Moreover, the location where the officers *detained* Scott had no surveillance cameras. Substantial evidence supports the trial court's implied finding that the officers did not act in bad faith.

II.³

Evidence of Criminal Street Gang – "20 Crip"

Scott argues that the trial court abused its discretion by permitting J.M. to testify, over defense objection pursuant to section 352, that she heard the name "20 Crip" shouted by Scott and others in the parking lot and near the park restroom. Scott contends that this evidence is irrelevant, unduly prejudicial, cumulative, and denied him due process of law pursuant to the United States Constitution. He points out that J.M. related the gang name to the police dispatcher and also testified to the name at trial.

Section 210 defines relevant evidence as evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The trial court has broad discretion pursuant to section 352 to exclude even relevant evidence if the court determines that the probative value of the evidence is substantially outweighed by its possible prejudicial effect. (*People v. Jones* (2017) 3 Cal.5th 583, 609; *People v. Merriman* (2014) 60 Cal.4th 1, 74.) We review the trial court's ruling regarding the admissibility of evidence for an abuse of discretion. (*Ibid.*)

³ All statutory references in II. are to the Evidence Code.

In prosecutions not involving a gang enhancement allegation, evidence of gang membership is potentially prejudicial and should be excluded if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) However, evidence of gang membership is often relevant to and admissible regarding the charged offense. (*Ibid.*) "Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid.*)

The trial court did not abuse its discretion by permitting evidence of the “20 Crip” declarations. This evidence, as the court expressly determined, was relevant to explain why J.M.’s attention was drawn to Scott as well as to Scott’s motive in carrying a loaded firearm. (*People v. Hernandez, supra*, 33 Cal.4th 1040, 1049.) The court properly instructed that the evidence was admitted only for the limited purposes of witness credibility and Scott’s motive. (CALCRIM No. 1403, as modified.) J.M. was a percipient witness to the incident and her perceptions were questioned and in issue at trial. The evidence also was relevant to explain the otherwise inexplicable event of 10 to 15 adult men gathering and arguing in the restroom area of the park -- “a little commotion” as witness Littlejohn testified.

The evidence was not cumulative and its prejudicial effect did not outweigh its relevance. J.M.’s references to “20 Crip” were brief and the prosecutor presented no evidence of gang activity or gang membership by Scott or the other men in the park. Although the trial court’s analysis pursuant to section 352

was not as comprehensive as Scott prefers, it permits sufficient review. (*People v. Williams* (1997) 16 Cal.4th 153, 213-214 [ruling pursuant to section 352 need only reflect that trial court understood and fulfilled its responsibilities].) At trial, Scott argued that the evidence was inflammatory and unduly prejudicial; we presume the trial court understood and correctly applied the law in its ruling that the evidence was not precluded by section 352. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.)

III.

Prosecutor Misconduct

Scott argues that the prosecutor committed misconduct during summation by 1) misstating the law of constructive possession; 2) improperly vouching for the police officer witnesses; and 3) denigrating defense counsel. He points out that he objected in each instance, but the trial court overruled his objections. Scott contends that the misconduct is prejudicial pursuant to any standard of review.

The standards governing review of claims of prosecutorial misconduct are well settled. (*People v. Adams* (2014) 60 Cal.4th 541, 568.) When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the misconduct violates the United States Constitution. (*Ibid.*) Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the court or jury. (*Ibid.*)

To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable

likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Centeno* (2014) 60 Cal.4th 659, 667; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269.) A prosecutor possesses wide latitude, however, to vigorously argue his case and to make fair comment upon the evidence. (*Caldwell*, at p. 1269.) In our assessment of prosecutorial misconduct, we do not lightly infer that the jury drew the most damaging rather than the least damaging inferences from the prosecutor's statements. (*Centeno*, at p. 667.) Although a defendant singles out words and phrases of claimed misconduct, we view the statements in the context of the whole argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Scott complains that the prosecutor misstated the law of constructive possession by his argument that "as long as [Scott] knew that gun was [in his car], as long as he knew that gun was there, the law does not even require he personally place it there. . . . As long as he knows it's in his car, as long as he knows it's in the car, he is constructively possessing that gun" Scott asserts that this statement suggests that simple knowledge that a weapon was in his car, without more, is sufficient to establish constructive possession. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 [crime of unlawful possession of a firearm requires that defendant had actual possession of or right to control firearm].)

Prior to the parties' summations, the trial court correctly instructed with CALCRIM No. 2511 regarding the law of constructive possession: "Two or more people may possess something at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or

through another person.” During summation, the prosecutor described constructive possession: “What that means is that . . . factors, or circumstances surrounding, are such that the person has dominion or control. . . . If you have dominion and control over that item, the law says it’s as though it’s in your hands. So both of the aspects of possession were proven in this case. . . . If . . . you can demonstrate that there is more than one person [who] has dominion and control over an item, they both equally possess it.” Viewing the prosecutor's statements as a whole, he properly stated each element of constructive possession. (*People v. Dennis*, *supra*, 17 Cal.4th 468, 522 [prosecutor's statements must be viewed in context of entire summation]; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [elements of constructive possession].)

Scott also claims that the prosecutor impermissibly vouched for the credibility of the police officer witnesses by this statement: “[I]t is absolutely appropriate that [police officers] be examined and scrutinized like any other witness. . . . Those officers who took [the] stand, they were conscientious, they were hard working. . . . They were doing their job. . . . They're humans like us, but they're doing their job.”

A prosecutor may comment upon the credibility of a witness based upon facts contained in the record and any reasonable inferences therefrom, but may not vouch for the credibility of a witness based upon personal belief or by referring to evidence outside the record. (*People v. Redd* (2010) 48 Cal.4th 691, 740.) “Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper ‘vouching,’ which usually involves an attempt to bolster a witness by reference to

facts *outside* the record." (*People v. Medina* (1995) 11 Cal.4th 694, 757.)

The comments here regarding police officer witnesses were based upon facts established by their testimony -- long work hours and busy work shifts. (*People v. Redd, supra*, 48 Cal.4th 691, 741; cf. *People v. Turner* (2004) 34 Cal.4th 406, 433 [prosecutor improperly referred to his prior experience with the expert witnesses].) The comments referring to officers "doing their job" did not refer to evidence outside the record. (*Redd*, at p. 741 [prosecutor's comments that police officer "doing her job" and another officer "do[ing] [his] job[] properly" not improper vouching].) Indeed, the prosecutor here later stated that police officers are "human like us" and sometimes make mistakes. In addition, the prosecutor commented that the officers' testimony was corroborated by the percipient witnesses. Thus, the prosecutor relied upon evidence at trial and reasonable inferences therefrom, rather than his personal knowledge or belief in the officers' credibility.

Finally, Scott asserts that the prosecutor denigrated his attorney and argued irrelevant evidence outside the evidence at trial by responding to defense arguments referring to the nonexistence of a video-recording of the park incident: "We are bound by the evidence in this case. . . . I have a lady [witness] from the neighborhood who knows that area who came in and sat in that chair and told you she saw that man with a gun. If there was a video that showed [Scott] running to the car, do you think suddenly [defense counsel] would stand up and say, 'now he's guilty.' You think she would do that? Of course, she wouldn't. . . . Because the defense's job is to fight the case."

A prosecutor commits misconduct by attacking the integrity of defense counsel or by casting aspersions upon counsel's character. (*People v. Redd, supra*, 48 Cal.4th 691, 734-735.) The prosecutor's comments here fell within the prosecutor's wide latitude to point out the deficiencies in defense counsel's tactics. (*Id.* at p. 735) The comments were aimed at the persuasive force of the defense argument and not counsel personally. (*People v. Charles* (2015) 61 Cal.4th 308, 328-329.) Moreover, the prosecutor reminded the jury that it was "bound by the evidence in this case." The prosecutor's arguments, interpreted in context, focused the jury's attention upon the evidence presented at trial and did not denigrate defense counsel.

IV.

Cumulative Error and Due Process

Scott argues that the combined prejudice arising from the asserted erroneous rulings denied him due process of law and compels reversal of the judgment. We have concluded that the trial court's rulings discussed herein were proper and also, there was no prosecutorial misconduct. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1017 [statement of general rule regarding cumulative error].) There is no prejudicial error, cumulative or otherwise.

V.

Sentencing on Count 2

Scott contends that the three-year sentence for possession of ammunition (count 2) must be stayed pursuant to section 654 and *People v. Lopez* (2004) 119 Cal.App.4th 132, 138 [multiple punishment for possession of firearm and possession of ammunition precluded where defendant only possessed

ammunition within loaded firearm].) The Attorney General concedes.

The trial court declined to impose a *consecutive* sentence for counts 1 and 2, stating: "The objectives of count 1 and count 2 do not appear to be independent. They appear to arise out of a single act that took place at the same time and place." This finding also precludes imposition of a term to be served concurrently for possession of ammunition; no evidence exists that Scott had different or multiple objectives in possessing the loaded firearm and the ammunition within the firearm. (*People v. Sok* (2010) 181 Cal.App.4th 88, 100.) Moreover, there is no evidence of ammunition found other than that contained within the firearm found under the front passenger seat of the automobile. This error is correctible on appeal whether the issue was raised in the trial court. (*Id.* at p. 100, fn. 11.)

The three-year sentence for count 2, unlawful possession of ammunition, is stayed pending finality of the judgment and service of sentence on count 1, such stay to become permanent upon completion of sentence on count 1. The trial court shall prepare an amended abstract of judgment accordingly and forward the certified amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Halim Dhanidina, Judge
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