Filed 8/14/17 P. v. Saucedo CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO SAUCEDO, Defendant and Appellant.	B271364 (Los Angeles County Super. Ct. No. KA109528)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Remanded and Affirmed.

Robert L.S. Angres, 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, Victoria B. Wilson, Shawn McGahey Webb and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Armando Saucedo of second degree murder (Pen. Code, § 187, subd. (a)),[1] and found true allegations that he intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c), & (d)) and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)). He was sentenced to state prison for 40 years to life. He appeals from the judgment, contending: (1) the trial court erred in precluding his trial counsel from cross-examining a jail informant about compensation he received in other cases, and (2) that under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), the case must be remanded for defendant to make a record for a later youthful parole suitability hearing. We disagree with the first contention, and agree with the second. Therefore, we remand the matter for a *Franklin* hearing, but otherwise affirm the judgment.

BACKGROUND

A. *Prosecution Evidence*

1. *The Killing of Jimmie Adams*

Around 4:45 a.m. on April 16, 2011, Shon Bell was walking his bicycle with his friend, Jimmie Adams, on Holt Avenue in Pomona when a silver or gray car stopped near them. Two Hispanic men got out and approached as the car left. One of the men asked Bell and Adams, who were black, "Where you all n…s from?" Bell, a former gang member known by the nickname "Brains" or "No Brains," construed the question

---

[1] All undesignated section references are to the Penal Code.

as a gang challenge, because there was a rivalry between Hispanic and African-American gangs in Pomona.

Adams told Bell that they should leave. Bell began running alongside his bicycle. Adams started to run, but within a few steps was struck by bullets and collapsed. At that point, Bell noticed that one of the two Hispanic men was holding a gun. Bell went over to Adams. He was still breathing but unable to speak. The two Hispanic men ran off.

Bell went to a nearby motel to try to find Adams's girlfriend, but was unable to find her. He told a friend's stepson to call 911.

Amanda Sanchez witnessed the shooting sitting in a parked car near Holt and Palomares. She saw two Caucasian or Hispanic men wearing white T-shirts approach an African-American male walking eastbound on Holt. Seconds later she heard gunshots. The African-American man fell to the ground, and the other two men ran away. Sanchez called 911.

Pomona Police Officer Edward Escobar responded to the scene of the shooting and observed Adams on the sidewalk on Holt Avenue. Officer Escobar checked for vital signs, but Adams was deceased. An autopsy later revealed that Adams had suffered two gunshot wounds to the chest, each of which was fatal.

A couple of days after the shooting, Pomona Detective Andrew Bebon showed Bell a photographic lineup. Bell selected defendant's photograph and identified him as the shooter. At defendant's preliminary hearing, Bell also identified defendant as the shooter. However, at trial, when asked if he recognized anyone in the courtroom as the gunman, Bell testified that he did not remember. He

acknowledged being threatened after the preliminary hearing, and admitted he was afraid to testify at trial.

2. *Defendant's Confession to the Confidential Informant*

In 2011, defendant was charged with the Adams killing, but after the preliminary hearing, the prosecution dismissed the case and defendant was released. However, in December 2013, defendant was in county jail on an unrelated parole violation. Coincidentally, also in custody was a confidential informant (CI), who had been arrested for receiving stolen property or theft, and who had a prior working relationship as an informant with Sergeant Kevin Lloyd of the Los Angeles County Sheriff's Department. Sergeant Lloyd arranged for the CI to be placed in the same two-person cell as defendant. The CI was defendant's cellmate for three or four days. On the second or third day, he was given a recording device and recorded portions of their conversations. An edited CD of the recorded conversations was played for the jury and a transcript was provided.

Before the CI was given a recording device, defendant told him that he was known as "Risky" from "PMR," which stands for the Pomona Michoacan Rifa street gang. He said that he had gotten away with a murder he committed in 2011. He had been charged with it, but the charges were dropped.

At one point, after the CI was given the recording device, defendant was removed from the cell and interviewed by Pomona Police Detective Greg Freeman, who was investigating a rash of killings involving Hispanic and African-American gangs. He questioned

defendant about one such murder, which had occurred on October 23, 2013 at a donut shop. Defendant denied involvement.

When defendant returned to the cell, the CI recorded their conversation. Defendant told the CI that the police had questioned him about a murder at a donut shop, and that he had denied any involvement. The CI then asked if the police had questioned him about his involvement in the 2011 killing he had earlier mentioned. Defendant said there were no questions about that case, as the police had "shut that one out." The CI asked appellant if he had gotten rid of the gun he used. Defendant said he had burned it with a torch, melting it into a puddle. Defendant described the gun as a snub-nose .38 millimeter revolver.

When the CI asked defendant about the details of the 2011 murder, defendant said the shooting had occurred "[o]n Holt—on Holt the main street. Right on the corner." Defendant said that the only witness was the victim's "homie," who was from the Trey Five Seven gang. Defendant referred to him as "No Brains" or "Sean [*sic*] Bell," and said that Bell was the one who had "snitched" on defendant. The CI asked where Bell was located when he saw defendant approaching. Defendant replied, "Just across the street from him." The CI said, "Oh, so he seen you good, huh?" Defendant said, "Yeah. Well they were crossing the street on this side and they were going like that way. And his homie he had seen me [unintelligible]. They were both freaked out. I seen his homie just telling him—I don't know what he was doing [unintelligible] gun. I had to tell the homie, like, shoot these n….rs,

dog. [Unintelligible] fucking fools [unintelligible] and I just got out of prison and I was like oh, it's money then, dog."

Defendant said that Bell was lucky he did not get shot as well. Defendant tried to shoot both the victim and Bell because he did not want to leave any witnesses. He said he shot the victim once in the chest and once in the head from close range. He fired a total of four shots, and no casings were found at the scene, because he used a revolver.

The CI asked, "Why do you guys kill all the black guys anyway?" Defendant replied, "It's racism in Pomona." African-Americans were being targeted even if they were not affiliated with gangs. The CI asked defendant if he ever felt bad about killing the man in 2011. Defendant said that he did not.

3. *Gang Evidence*

According to Detective Bebon, on defendant's "Myspace" account he listed his moniker as "Risky." He also had many gang-related photographs and depictions of graffiti. Based on the Myspace account, as well as listening to defendant's recorded conversations with the CI, Detective Bebon opined that defendant was a member of Ghetto Side Pomona (a tagging crew), and that he also affiliated with members of various criminal street gangs in Pomona, including Pomona Michoacan Rifa (PMR), Pomona 12th Street, and Ghetto Fame or Ghetto Family.

According to Detective Bebon, Hispanic Sureño gangs must be approved by the Mexican Mafia. To gain approval, the gang's members typically must earn money for the Mexican Mafia. In contrast, a

tagging crew like Ghetto Side Pomona lacks Mexican Mafia approval as a gang. Rather, it serves as a "farm club" or "minor league baseball team" for other gangs. Members of a tagging crew who show a willingness to "put in work" or commit crimes will often become members of gangs.

In Pomona, there have been racial tensions between African-American gangs and Hispanic gangs dating back to 1985. Many non-gang members also have been harmed by gang members due to these racial tensions. Gang members instill fear in the community by committing crimes. A gang with a reputation for killing people may cause reluctance to cooperate with the police or testify in court. When presented with a set of hypothetical facts based on the evidence in this case, Detective Bebon opined that the shooting was committed for the benefit of Hispanic gangs in the City of Pomona that operated under the umbrella of the Mexican Mafia. Committing such a crime allowed Hispanic gangs to operate through fear and intimidation, and made people less willing to report crimes.

B. *Defense Evidence*

Defendant testified on his own behalf. He denied any involvement in the shooting. He spent the evening of Friday, April 15, 2011, hanging out with his friends, Salvador, Victor, and Jovany. They first went to a birthday party, but after police arrived they left (defendant was on parole at the time and did not want to go back to jail). They then went to Jovany's house where they played video games and

smoked marijuana. Defendant did not leave Jovany's house until Sunday, and never went to Palomares and Holt.

Defendant was 19 years old on the date of the shooting. When he was in middle school, he joined a tagging crew known as Ghetto Side Pomona. The crew was not violent and its activities were limited to tagging. He knew about gang activity and racial problems in Pomona. After his release from prison in 2011, he no longer participated in any gang-related activities. He had never shot anyone or been present when anyone was shot.

A few days after Adams was killed, defendant was interviewed by the police. He said he was not involved and gave a detective the names of the three men he was with on the evening of the murder (a recording of the interview was played for the jury).

While in jail on the parole violation, defendant was placed in a cell with the CI. He testified at trial that, in order to boost his standing in jail and appear hardened, he told the CI that he was involved in the 2011 shooting of Adams. He knew details about the crime because he had previously had been charged with the offense and there had been a preliminary hearing. But his claim of involvement to the CI was a lie. Defendant acknowledged that whenever "roll calls" were passed around the jail by members of the Mexican Mafia, he wrote down that he was a member of the PMR gang. He did so even though he realized it was dangerous to falsely claim membership in a gang.

Jovany Barba, Salvador Infante, and Victor Reyna all testified in corroboration of defendant's alibi.

C. *Rebuttal Evidence*

When Detective Bebon interviewed defendant about this case, defendant said he was at his friend Jovany's house on the night of the murder. Defendant said he did not know Jovany's last name. Defendant gave Detective Bebon the name and phone number of his friend "Chava," who turned out to be Infante. Detective Bebon tried to contact Infante and left a message for him, but Infante never called him back.

Detective Bebon used police department resources to determine that Donna Rojas, with a date of birth of April 21, 1991, lived in Pomona, about a half mile away from Jaycee Park. Just before midnight on April 16, 2011 (a Saturday night), the police received a noise complaint concerning Rojas's residence.

When defense investigator Richard Beeson interviewed Reyna, Barba, and Infante, they each said that the party they attended with defendant was on the evening of Saturday, April 16, 2011.

DISCUSSION

I. *Cross-Examination of the CI*

Defendant contends that the trial court violated his Sixth Amendment right to confrontation by precluding his attorney from cross-examining the CI about payments he received from law enforcement in the past. We disagree.

A. *Proceedings*

On direct examination by the prosecutor, the CI testified that at the time of his arrest for receiving stolen property or theft, for which he was in custody when he recorded defendant's confession, he was on probation for multiple cases and had received suspended prison sentences. Because of that, the new receiving stolen property case would likely result in prison time. He agreed to record his conversations with defendant because he was hoping for leniency in his own pending cases, although he had not been given any promises. Ultimately, he pleaded guilty to his new charge and was granted probation with a suspended prison sentence of 11 years. He avoided a prison sentence because the Los Angeles County Sheriff's Department and the Pomona Police Department wrote letters on his behalf, asking for leniency in light of his cooperation in this and other cases.

In his cross-examination of the CI, defendant's counsel elicited testimony that in 2008, the CI pled guilty in two separate cases to burglary (for which he was granted formal probation) and receiving stolen property (for which he received probation and a 4-year suspended sentence). In 2009, he was convicted of robbery and sent to state prison. In 2012, he was convicted of car theft. That year, he began working for Sergeant Lloyd of the Los Angeles County Sheriff's Department as an informant. Later, he received another suspended sentence for the car theft conviction (his fourth felony conviction).

When he recorded his conversations with defendant, the CI was in custody on an arrest for receiving stolen property, which the CI characterized as theft of cargo from an 18-wheeler. He had already

acted as an informant for Sergeant Lloyd on more than five cases. He acted as an informant in defendant's case and others in the hope that he would receive a lenient sentence on his own pending open and probation cases—on the suspended sentences alone, he was facing at least seven, and perhaps up to 17 years in prison. He had not received any promises. Ultimately, in 2014 (after he recorded defendant in Dec. 2013), the CI pled guilty to the pending receiving stolen property case.

At that point, the court adjourned for the day. The next morning, outside the presence of the jury, the prosecution moved to preclude defense counsel from questioning the CI regarding money he had been paid in the past. The prosecutor confirmed for the court that the CI had been paid in the past not by state or local authorities, but by federal law enforcement. Defense counsel conceded that the CI had not been paid any money in the instant case, but wanted to ask the CI "about the sum in excess of $61,000 that he's received, regardless where it came from as long as it was law enforcement, and on what cases."

Under Evidence Code section 352, the trial court ruled that because the CI had not been paid with respect to the instant case, and had admitted his motive in cooperating against defendant was to receive a lenient sentence on his pending cases, any evidence that he received payments in the past was "far more prejudicial than probative."

Following the ruling, defense counsel resumed his cross-examination. He elicited testimony that the CI acted as an informant because he hoped that the Sheriff's Department would help him get a

lenient sentence. After he pled guilty in 2014, the CI was released from custody and placed on informal probation.

B. *Analysis*

"In ruling on the question whether evidence is substantially more prejudicial than probative, the trial court enjoys broad discretion. [Citation.] '[T]he latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" (*People v. Ayala* (2000) 24 Cal.4th 243, 282.)

Here, the CI had not been paid any money to act as an informant in defendant's case. Rather, he had been paid in the past by federal law enforcement for unrelated cases. When he recorded his conversations with defendant, he was facing a substantial prison sentence on his own pending cases, and readily admitted that he did so in the hope that he would receive lenient treatment. Further, he admitted that he later received no custody time and informal probation. Given the strength of this evidence of bias, and the absence of any payments in the instant case, it was well within the discretion of the trial court to conclude that the probative value of the proposed cross-examination—questioning about payments made in the past by federal law enforcement, and about the particular unrelated cases— was "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." (Evid. Code, § 352.)

In any event, any error was harmless. "Although defendant asserts the standard of review is the 'harmless beyond a reasonable doubt' standard prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24, we have held the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]." (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.) Here, defendant's incriminating statements were recorded and played for the jury. Thus, the CI's credibility was, at most, collateral, because it had little or no relationship to the incriminating value of that evidence. Indeed, in his testimony, defendant did not deny that he confessed to the CI; rather, he sought to explain away the import of his confession, testifying that it was false and motivated so as to make him appear hardened while in custody. To the extent the CI's credibility was in issue, the jury had a firm basis to evaluate his potential bias: the CI admitted that he cooperated in the hope of obtaining leniency on his own cases and avoiding a potential lengthy prison sentence, a result that he ultimately achieved. Evidence that he had been paid in unrelated past cases by federal law enforcement (and any resulting inference that he might have had an additional bias in the hope of being paid for defendant's case) would have added little to an assessment of his credibility. Thus, had such evidence been admitted, it is not

reasonably probable that a different result would have been reached. (*Watson, supra,* 46 Cal.2d 818.)[2]

II. *Remand Under Franklin*

Defendant was 19 years old when he committed the murder in this case. Under *Franklin, supra,* 63 Cal.4th at page 284, he contends that his case must be remanded to the trial court so that he can make a record of information relevant to his eventual youthful offender parole hearing, as contemplated by sections 3051 and 4801. We agree.

A. *Proceedings*

At the sentencing hearing on March 24, 2016, the court noted that defendant had been convicted of second degree murder, with true findings on a firearm enhancement and a gang enhancement. The court stated that appellant had requested a speedy sentencing, and that all parties agreed that the sentence mandated by law was the only sentence that could be given in this case. The prosecutor and defense counsel confirmed their agreement. The court then remarked, "So there's not a—there's no point really in delaying it or looking for anything extra." The court added that it had received and read the probation report as well as the People's sentencing memorandum. Defense counsel did not submit a sentencing memorandum.

After the court denied the defense motion for a new trial, the court asked if there was any legal cause why sentence should not be imposed,

---

[2] On the same reasoning, even were *Chapman* the appropriate standard, we would conclude that any error was harmless beyond a reasonable doubt.

and defense counsel replied there was none. The court stated that the sentence was determined by law, and imposed a term of 15 years to life for murder, plus 25 years to life for the gun enhancement (§ 12022.53, subd. (d)). The court further stated that unless state law were to change, defendant would get a parole hearing in 25 years. At that point, defense counsel stated, "It is important that the record reflect because it is a five-year-old case that he was 19 years old at the time of the offense." The court replied, "Right. He was under the age of 23. He was certainly over the age of 18."

The court then asked, "Do you wish to be heard further?" There was no response from defense counsel. The prosecutor replied, "No, Your Honor." The trial court then made the following statement:

"THE COURT: I will note the victim died because he was Black. He was walking down the street. This was clearly gang related. No question about it. The defendant in his confession in the cell flat out admitted what we know, having worked out here, it's the race issue and problems in the City of Pomona, that is Hispanic versus Black. And as you pointed out very well, [defense counsel], Black versus Hispanic as well. It is not just a one-way street. But two Black men were walking down the street, early morning hours, and one man was gunned down simply because of that fact. This was a car parked down the street. Defendant and his compatriot got out of the car, according to the independent witness, ran to the victims, confronted the victims, and then gunned them down in cold blood. This was an adult crime, adult motives. There was nothing—there was no hallmarks of the crime being either motivated for or influenced by any youthful reasoning

whatsoever. But in spite of that, the state legislature in their wisdom, a term I use loosely, has determined at this point at least the defendant will be entitled to a parole hearing at age 25 [*sic*]. However, for our purposes, it is 40 to life."

After discussing various matters including, inter alia, custody credits, fines, and restitution, the court asked if either attorney had any further comment concerning the sentence. The prosecutor and defense counsel both replied in the negative.

B. *Analysis*

In *Franklin, supra*, 63 Cal.4th 261, the defendant received a mandatory sentence of 50 years to life for offenses committed at age 16. (*Id.* at p. 268.) The Supreme Court rejected the argument that the sentence constituted cruel and unusual punishment; that argument was made moot by new provisions in sections 3051 and 4801, effective in 2014, that provided for the possibility of parole after 25 years. (*Id.* at pp. 276–277; §§ 3051, subd. (b)(3); 4801, subd. (c).)

Although no resentencing was required, *Franklin* concluded that a remand was in order to determine whether the defendant received sufficient opportunity "to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing," i.e., hallmark "youth-related factors, such as [the defendant's] cognitive ability, character, and social and family background at the time of the offense," considered in light of "any subsequent growth and increased maturity." (*Franklin, supra*, 63 Cal.4th at pp. 269, 277, 284; accord, §§ 3051, subd. (f)(1), (f)(2), 4801, subd. (c).) If, on remand, the

trial court determines the defendant was denied a sufficient opportunity, he "may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates [his] culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Id.* at p. 284; see *People v. Jones* (2017) 7 Cal.App.5th 787, 819–820 (*Jones*).) "The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Franklin, supra*, 63 Cal.4th at p. 284.)

Here, it appears that defense counsel recognized the significance of defendant's age at the time of the crime, but made no effort to place on the record any evidence that might be relevant at defendant's future youthful parole hearing. Because the sentencing hearing predated *Franklin* (although it was after the relevant amendments to §§ 3051 and 4801), it is unlikely that counsel fully appreciated the need to make an adequate record for the youth parole hearing defendant would receive after 25 years in prison.

A very similar issue arose in *Jones, supra*, 7 Cal.App.5th 787, in which the court explained: "Prior to *Franklin,* . . . there was no clear indication that a juvenile's sentencing hearing would be the primary

mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future. *Franklin* made clear that the sentencing hearing has newfound import in providing the juvenile with an opportunity to place on the record the kinds of information that 'will be relevant to the [parole board] as it fulfills its statutory obligations under sections 3051 and 4801.'" (*Jones, supra*, 7 Cal.App.5th at p. 819, citing *Franklin, supra*, 63 Cal.4th at p. 287.)

As in *Jones*, this record yields no indication that defendant's counsel understood the importance of, or contemplated "the need and the opportunity to develop the type of record contemplated by *Franklin*." (*Jones, supra*, 7 Cal.App.5th at p. 820.) Accordingly, we remand the matter to the trial court to conduct a hearing to conduct a hearing at which the parties may address and submit evidence bearing on relevant youth–related factors for defendant's eventual parole hearing. (*Franklin, supra,* 63 Cal.4th at pp. 284, 286–287.)

DISPOSITION

The matter is remanded for the limited purpose of providing the parties the opportunity to make a record of defendant's characteristics and circumstances at the time of the offenses as set forth in *Franklin, supra*, 63 Cal.4th 261. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.