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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ASHANTI LOGIE,

Defendant and Appellant.

B279240

(Los Angeles County
Super. Ct. No. TA140069)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed and remanded for further proceedings.

Mark S. Devore, 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, Senior Assistant Attorney General, Steven D. Mathews, Supervising Deputy Attorney General, Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Ashanti Logie¹ (defendant) of one count of assault with a semi-automatic weapon (Pen. Code, § 245, subd. (a)(2)²; count 2), finding he personally used a firearm in the commission of the offense, and of two counts of carrying a loaded, unregistered handgun in public (§ 25850, subd. (a); counts 3 and 4). On appeal, defendant contends the trial court erred in (1) admitting the victim's out-of-court statements concerning the crime after determining he was feigning memory loss, (2) advising the jury defendant's videotaped statements to the codefendant were adoptive admissions, (3) admitting into evidence that defendant was a member of the Rolling 30's Harlem Crips criminal street gang, and (4) failing to stay imposition of the sentence on one of two counts of carrying a loaded, unregistered firearm. Defendant also seeks a remand to permit the trial court to exercise its discretion to strike the firearm enhancement.

We affirm the judgment, but remand the matter for the limited purpose of allowing the trial court to consider whether to exercise its discretion under section 12022.5, subdivision (a) to strike or dismiss the firearm enhancement in furtherance of justice (§ 1385).

FACTUAL BACKGROUND

Defendant was charged with offenses committed on May 9, 2016. His trial began October 24, 2016. By that time, the victim,

¹ Zhaed Ibn Zahir was a codefendant, but is not a party to this appeal.

² All undesignated statutory citations are to the Penal Code.

Bnii Wise, no longer had any recollection of crimes. The trial court found Wise was feigning memory loss and permitted the investigating officers to relate the victim's account.

They testified Wise and his former girlfriend, Ishane Wilson, lived together for a time, but she moved out in April 2016. In early May 2016, Wise saw a photograph of Wilson on Facebook in the arms of another man. The photo convinced Wise to end his relationship with Wilson. Wise recognized the man in the photograph as someone he knew as "Little DS" from the Harlem Crips who drove a white Audi.

Wilson telephoned Wise on May 9, 2016, and told him she wanted to return some of his belongings. During the call, a male identified himself as Wilson's current boyfriend, claimed to be a member of the Harlem Crips, and threatened Wise over the telephone. Later that same morning, Wilson appeared at Wise's home, but she did not have any of Wise's property. Wise met her outside and the two went into the home so Wilson could use the bathroom. Standing outside the bathroom, Wise heard Wilson on the phone asking someone, "Where you at?"

Soon thereafter, Wise and Wilson walked out of the house together. Wise spotted a white Audi parked up the street and recognized it from the Facebook photo. Wise had seen the Audi in his neighborhood earlier that morning.

Wise walked towards the Audi, and two men stepped out of the car and walked in his direction. The driver pointed a gun at Wise and began shooting. Wise recognized the shooter as the man in the Facebook photo with his arms around Wilson.

Police arrived to investigate and take Wise's statement. A short time later, an officer saw a white Audi at a gas station near

the scene of the shooting. Defendant and Zahir both ran, but were soon apprehended.

Two handguns—a 9-millimeter Beretta and a Colt .45—were retrieved from the rear passenger floor board of the Audi. The Beretta had one round in the chamber and two in the magazine; the Colt’s chamber was empty, but the gun had six rounds in its magazine. The Beretta was registered to a person unrelated to the crime; the Colt was unregistered. Bullet casings retrieved from the scene of the Wise shooting were matched to the Beretta.

Defendant and Zahir were driven together from one police station to another. The transporting officer activated the vehicle’s video recorder. The video was played for the jury. Zahir was videotaped asking defendant, “[H]ow many times did you crack^[3]?” Defendant’s response was inaudible. Zahir responded, “I know, bro (inaudible) why you shoot. I understand.” Defendant said, “I think that people are snitching.”

A gang expert, Los Angeles Police Department Officer George Marquez, testified defendant admitted he was a member of the Rolling 30’s Harlem Crips criminal street gang, with a moniker of “Little Dirt Soldier” or “Little DS.” The gang is often referred to as either the “Rolling 30’s” or the “Harlem Crips.” It was established in the late 1960’s and currently had approximately 700 members. The prosecution showed the jury a photograph of defendant displaying gang signs related to the Rolling 30’s. According to the expert, a persons who testified against a gang member risked gang retaliation against them or their families.

³ An officer testified “crack” is street vernacular for “shoot.”

The jury found defendant not guilty of attempted murder, but convicted him of the other charges and found he personally used a firearm. The trial court sentenced defendant to state prison for a term of 13 years, eight months, consisting of a term of 9 years (the upper term) for assault with an automatic weapon (count 2), a consecutive term of 4 years for the section 12022.5, subdivision (a) firearm use enhancement, and a consecutive eight-month term (one-third the midterm) on count 3, one of the carrying a loaded firearm counts. The trial court imposed a two-year sentence on count 4, the second count for carrying a loaded firearm, but stayed that sentence pursuant to section 654. Nothing in the information, verdict form or the trial court's statements at sentencing indicated which firearm—the Beretta or the Colt—was the subject of which count, either 3 or 4.

DISCUSSION

Wise's Feigned Loss of Memory Permitted the Admission of his Out-of-Court Statements

Wise was a reluctant witness. The prosecution issued a subpoena for Wise to testify at trial. He ignored it, missed one court date, and was taken into custody. Wise was released from custody the day before he testified in defendant's trial. After being sworn, testifying that Wilson was his former girlfriend, and confirming he had been taken into custody because he failed to honor the subpoena, Wise said he couldn't remember the crime because he had been in two car accidents. At that point, defense counsel asked to approach, and the trial court and attorneys met at sidebar.

Defense counsel stated he was "certain counsel is going to want to impeach [the victim] on his prior statements, and . . . I'd

object.” When the trial judge remarked that defense counsel could explore the genuineness of the victim’s memory loss on cross-examination, defense counsel said, “By then it’s too late if I can’t do it on voir dire because [the prosecutor has] already impeached him.”

The trial court agreed with defense counsel. Outside the jurors’ presence, both defense counsel and the prosecutor examined the victim about the claimed car accidents and memory loss. After the attorneys indicated they had no more questions, the trial court advised it was “satisfied the People have laid sufficient foundation” to find Wise was “evasive.” The trial court found the victim’s testimony concerning the accidents and memory loss to be “almost unbelievable.” Defense counsel did not object to this finding.

The jurors then returned to the courtroom and the prosecution asked Wise a series of questions covering the entire sequence of events. Wise did not remember speaking with Wilson on the telephone before she came to his house, her visit to his home, seeing the white Audi, identifying the shooter as the same person in the photograph on Wilson’s Facebook page, dodging bullets by hiding behind a parked car, or speaking with the investigating officers after the shooting. When shown a photograph of Wilson, Wise could not even be sure it depicted his former girlfriend.

Wise did remember being driven in a police car to a police station after the shooting. But he did not remember a second interview there. Wise did admit knowing defendant “from jail,” but could not remember if defendant was the person who shot at him.

With the jurors present, defense counsel reprised his cross-examination of Wise concerning the car accidents and his memory loss. Wise testified he was not afraid to be in court and, but for the memory loss as the result of two car accidents, would testify if somebody had tried to shoot him. The investigating officers then testified concerning Wise's statements to them.

The record amply supports the trial court's credibility finding and conclusion that the victim's claimed memory loss was untruthful. Defendant argues the trial court should have done more to satisfy itself that the victim was not being truthful, suggesting, for example, the prosecution "could have called [the victim's] mother . . . to testify that her son was lying if in fact his testimony was false." But the trial court and trial counsel, all in a position to observe the victim and assess his credibility, were satisfied.⁴ The trial court did not err in permitting investigating officers to testify as to Wise's out-of-court statements to them. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220 ["When a

⁴ Defendant's trial counsel shared the trial court's view. Outside the jurors' presence, he noted he had "no idea" whether Wise had even been in any car accidents. During his closing argument, defense counsel discussed Wise's claimed memory loss in the context of arguing for a not guilty verdict on the attempted murder count: "Even though the alleged victim Mr. Wise has amnesia suddenly which I don't think anyone cold believe he really doesn't remember. He doesn't want to cooperate. But remember I asked him very specifically, look, man, if somebody was really trying to kill you or someone really shot at you, you'd be mad. You'd want to come into court and you'd want to tell us who did it. And he said yeah. And I said you would do that. And he said yeah, I would. He knew this wasn't an attempt[ed] murder. He knew they were just trying to scare him. And that's why he didn't want to testify."

witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper"].)

No Adoptive Admission Instruction Was Given

Defendant contends the trial court prejudicially erred when it admitted the videotape, including defendant's inaudible response to the "How many times did you crack" question, as an adoptive admission. This argument is based on a misreading of the record, however.

Off the record, before the videotape was played for the jury, both counsel agreed it was admissible. The prosecution urged it qualified as an adoptive admission; defense counsel objected to that characterization. At that time, the trial court did opine it qualified as an adoptive admission, but would consider modifying the adoptive admission jury instruction, CALCRIM No. 357, to advise the jurors the response presented a question of fact for them to resolve.

The issue became moot, however, after an off-the-record discussion concerning jury instructions. Back on the record, the trial court noted the parties agreed not give CALCRIM No. 357, which the prosecution then withdrew.

Consistent with the decision to withdraw the request for CALCRIM No. 357, the prosecutor did not argue defendant's inaudible response constituted an admission: "Zahir says to [defendant] 'how many times you crack?' And you heard from two different officers crack means fired shots. How many shots did you fire? Now, you can't really hear [defendant]'s response,

but you're a smart group of people. So [Zahir] wouldn't be asking [defendant] that question if he didn't know the defendant fired the weapon." Defense counsel also advised the jurors they could consider the videotaped conversation and argued it demonstrated defendant did not have the intent to murder the victim. There was no error.

***The Gang-Related Evidence Was Properly
Admitted For a Limited Purpose***

Defendant next complains the admission of gang evidence was more prejudicial than probative and faults the trial court for failing to give adequate limiting instructions. Again, the argument is based on a misreading of the record.

During voir dire, the trial court advised the prospective jurors, "this case does not have what we call a gang allegation. I mean, it's not alleged it was committed in the course to benefit a gang or anything along those lines; however, I do expect we are going to hear testimony as it relates to gang membership and alleged gang nicknames and gang participation and so forth. I expect we're going to hear testimony alleging that [defendant] may have been a member at one point in time or currently a member of the rolling 30's Harlem Crips Gang." The trial court then added, "It's important that all of you understand during the course of the trial evidence comes in for a limited purpose and this is one of those instances when the evidence is coming in just for limited purpose of either trying to establish that there was a motive for [defendant] to have done certain things, allegedly have done certain things, or that the evidence will assist the trier of fact in identifying [defendant] as the person who committed the offense. But it's not coming in for any other purpose. So you

can't consider this evidence and say, well, I'm going to conclude because I've heard this evidence alleging that he's a member of a gang that he's a person of bad character or that he has a predisposition to commit crime. You cannot do that. Even if there is evidence that he either was a member of a gang or is a member of a gang, that's not against the law. And he's still entitled and you give him the presumption of innocence."

During trial—and over defense counsel's objections—the trial court permitted a gang expert to testify defendant was an admitted member of the Rolling 30's Harlem Crips with the moniker "Little Dirt Solder" or "Little DS" and to provide background information concerning that gang, e.g., the territory, activities, and rivals. A photograph of defendant flashing a gang sign was admitted into evidence. The expert also explained an individual who testifies against a gang member is a "snitch" and could face "repercussions for coming to court testifying"—"you could get killed. You could get jumped. Or they go after your family as well."

At the end of the case, the court instructed the jury with CALCRIM Nos. 303⁵ and 1403. The latter instruction advised that "evidence of gang members and behavior was admitted for a limited purpose. You may consider that evidence to show identity, motive, or the state of mind of the victim in evaluating his credibility or believability. You may not consider this evidence for any other purpose. [¶] You may not conclude from

⁵ CALCRIM No. 303 provides, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”⁶

A challenge to the admissibility of evidence as a violation of Evidence Code section 352 is analyzed under an abuse of discretion standard. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.) Trial courts have broad discretion in weighing probative value against “the risk of undue prejudice, consumption of time or confusion.” (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1145.) We find no abuse of discretion.

The gang-related evidence was properly admitted for the limited purpose of showing identity, motive, and the state of mind of the victim to permit the jury to evaluate Wise’s credibility and believability: “In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citations.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. 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.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Defendant’s argument that he and the victim were two-thirds of a “love triangle” may be accurate, but it misses the mark in the Evidence Code section 352 analysis. Defendant threatened Wise over the telephone by proclaiming himself as a

⁶ The trial court also invited defense counsel “to tailor the [limiting] instruction”

gang member. The trial court and trial counsel believed Wise concocted the two car accidents/memory loss story to avoid being labeled as a snitch in a trial involving a gang member. This evidence was probative as to defendant's identity as the perpetrator and Wise's state of mind as the victim. The prejudice did not outweigh the probative value.

Defendant's contention that CALCRIM No. 303 was inadequate as a limiting instruction fails. In both the opening and reply briefs, defendant entirely ignored CALCRIM No. 1403. Together they provided adequate limiting instructions.

***Sufficiency of the Evidence to Support Conviction
for Carrying the Colt***

Defendant contends there was insufficient evidence to support his conviction for possession of the unregistered but loaded Colt firearm in public. We disagree.

Defendant concedes he was driving the Audi and "Zahir had been sitting [on the passenger-side of the Audi] at all relevant times" Shortly after the shooting, the police found two firearms—the Colt and the Beretta—on the passenger-side rear floorboard of the Audi. This evidence was sufficient to convict defendant of violating section 25850, subdivision (a). (*People v. Gant* (1968) 264 Cal.App.2d 420, 423 [firearm found under the passenger seat floormat was "in the joint possession of [the passenger] and [the driver]—they were readily accessible to each and in the exclusive possession of neither"]; *People v. Arzate* (2003) 114 Cal.App.4th 390, 400 ["the offense of 'carrying a concealed firearm' in a vehicle does not require any action on the defendant's part beyond merely having the gun *available* for use"].)

***The Trial Court Did Not Err in Imposing
Sentence on Both Carrying Counts***

Neither the information nor the verdict forms identified which weapon—the Beretta or the Colt—was associated with which count, 3 or 4. Without linking a firearm to a specific count, the trial court imposed a consecutive eight-month term on count 3 and a two-year term, stayed, on count 4, pursuant to section 654.

The Beretta was used in the shooting, but both weapons were found in defendant’s vehicle sometime later when defendant was arrested. The trial court did not find that the assault charge and the weapons’ carrying charges constituted a single act or an indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592). The trial court stayed execution of the sentence imposed on count 4 because it found both firearms were “discovered” at the time the officers located defendant and the acts comprising those two counts constituted “the same course of conduct.”

Nonetheless, without citing any authority, defendant maintains the “Beretta possession count’ should merge with [the] sentence on count 2 [assault with a semi-automatic firearm] under section 654. . . . [¶] . . . [and] [t]he trial court should then be instructed to hold a new sentencing hearing with directions that any sentence imposed as to the ‘Beretta possession count’ be stayed pursuant to 654.” But the record establishes the police did not determine defendant was carrying the firearms until well after the assault.

Substantial evidence supported defendant’s conviction on both counts. Sentences were imposed on both, but stayed as to one. There was not error.

***Remand for Resentencing Under
Section 12022.5, Subdivision (a)***

Before this year, trial courts had no discretion to strike or dismiss a jury's true finding as to a section 12022.5, subdivision (a) firearm use enhancement. Effective January 1, 2018, trial courts now have that discretion if the sentence reduction would be "in furtherance of justice." (§ 1385.) Defendant seeks a remand for the trial court to consider this option.

Defendant has not suggested to this court how striking the enhancement would satisfy the requisites of section 1385 and be "in furtherance of justice," but we nonetheless conclude remand is appropriate. The Legislature vested the trial court in the first instance with the discretion to strike firearm enhancements in the furtherance of justice. The trial court has not yet had the opportunity to do so, and we remand for that limited purpose. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

DISPOSITION

The judgment is affirmed. The matter is remanded to permit the trial court to consider whether to exercise its discretion to strike defendant's section 12022.5, subdivision (a) enhancement in furtherance of justice.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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