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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.

JUSTIN DIJON BROWN,

Defendant and Appellant.

B282871

(Los Angeles County
Super. Ct. No. TA139595)

APPEAL from judgment of the Superior Court of Los Angeles County, Laura Walton, Judge. Reversed.

John L. Staley, under appointments 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. Matthews, Supervising Deputy Attorney General, Nikhil Cooper, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Justin Dijon Brown guilty of felon in possession of a firearm in violation of Penal Code section 29800, subdivision (a)(1)¹ in count 2, and found that the offense was committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1)(A). The trial court declared a mistrial as to count 1 (§ 211 [robbery]), in which it was also alleged that Brown personally used a firearm (§12022.53, subd. (b)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). In a bifurcated proceeding, the trial court found true the allegations that Brown had served three prior prison terms within the meaning of section 667.5, subdivision (b), had been convicted of a serious felony within the meaning of section 667, subdivision (a)(1), and had been convicted of a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)–(i), 1170, subds. (a)–(d)).

The trial court sentenced Brown to 6 years in prison in count 2 (the upper term of 3 years, doubled pursuant to the three strikes law), a consecutive term of 4 years for the gang enhancement, and two consecutive 1-year terms for the prior prison term enhancements, for a total sentence of 12 years.

Brown contends that the trial court committed constitutional error by failing to give a unanimity instruction in count 2, and that the evidence is insufficient to

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

establish that he possessed a firearm or that he possessed the firearm for the benefit of a criminal street gang.

We agree that under the specific circumstances of this case the trial court erred in failing to instruct the jury that it must unanimously agree as to which of two incidents formed the basis of its finding that Brown was in possession of a firearm before it could find him guilty. We therefore reverse the judgment.

TRIAL PROCEEDINGS: FACTS, ARGUMENT, AND DELIBERATIONS²

Prosecution

The Robbery

The victim, Phillip Clark, was a campus security officer who made money on the side buying and re-selling cell phones. On March 8, 2016, Clark made arrangements over text message to purchase phones from former codefendant Barry Denman, who used the alias “Chris” for the transaction. Clark first spoke with Denman to arrange a meeting at about 3:00 p.m. Denman said he could not meet Clark in a public area because he was taking care of a child, so Clark agreed to go to Denman. At approximately 11:00

² Because we reverse the judgment in its entirety based upon the trial court’s failure to give a unanimity instruction, we discuss only the facts relevant to resolution of that issue.

p.m., Clark sent Denman a text message asking if they could meet to make the exchange. Denman agreed and asked him to come to an address in Compton, which Clark did.

Clark called Denman when he arrived. Denman said he would be right out. Clark got out of his car and stood by the trunk. After a few minutes, Denman came around the corner. He asked Clark if he had the money. Denman then said he was going to get the phones and come right back. He disappeared around the side of the house for two to three minutes.

When Denman returned he was carrying a plastic bag. He told Clark his “homie” must have taken the phones. Clark said it was no problem and told Denman to let him know when he had more phones available. Clark walked over to the driver’s side door, and was reaching to open it when Denman approached him. Denman had a gun, which he held to Clark’s temple. Clark was not familiar with guns, but thought it was a .40 or .45 caliber firearm.

Clark opened the car door. Denman asked Clark where the money was and hit him in the head with the gun. Clark saw a person he later identified as Brown approaching from across the street. The man pointed a gun at Clark. Clark retrieved his wallet from the middle console of the car. Denman took the keys out of the ignition, and held the gun to Clark’s face.

The other man aimed his gun at Clark’s car. Clark handed his wallet to Denman. The other man then ordered Clark to get down on his knees, and Clark complied. Clark

thought the man was also holding “a .40 or .45” caliber gun. The man repeatedly said he wanted to “pop” Clark. He seemed eager to shoot. Denman tried to get into Clark’s car, but all the doors other than the front driver’s side door were locked. Denman told the other man not to shoot Clark because they had what they wanted and should go. The two of them fled the scene.

The Investigation

An officer showed Clark two photographic lineups. Clark identified Denman as the person who initiated the robbery and struck him on the head with the firearm. He identified Brown as the person who ordered him to get on his knees and said that he wanted to pop Clark.

Deputy Sheriff Edgar Solano interviewed Denman following his arrest. Denman denied participating in the robbery. Deputy Solano also interviewed Brown, who denied any involvement in the crime as well.

Deputy Solano obtained a warrant and searched Brown’s residence on March 18, 2016. A .40 caliber firearm was found in an upstairs bedroom under a trash bag. Deputy Solano was told that the bedroom was not Brown’s, and he found no evidence to suggest otherwise. Brown’s cousin, Christopher Metcalf, lived at the same address. Metcalf claimed he owned the firearm. Metcalf was later convicted of receiving stolen property for possession of the

gun. Deputy Solano was unable to establish that the stolen gun Metcalf received was used in the robbery of Clark.

An officer discovered .40 caliber ammunition in a closet in Brown's bedroom, which was located on the first floor. The deputies did not find any of Clark's personal property at the residence.

Defense

Denman, who was incarcerated at the time, testified on Brown's behalf. Denman pleaded guilty to the robbery in exchange for an eight-year sentence. Another individual assisted him in the crime, but he did not know that person's name. Brown did not participate in the robbery. Denman and Brown had been friends since childhood.

Robert Royce, a licensed private investigator, testified about his interview of Denman. Denman told Royce that Brown did not participate in the robbery. Denman admitted he had an accomplice but would not provide the accomplice's name.

Closing Arguments

In closing, the prosecutor argued that Clark's testimony proved Brown possessed a gun on March 8 during the robbery. The prosecutor further argued that a gun like the one described by Clark was later found in Brown's home during the March 18 search. Although the prosecution

conceded that Brown's cousin, Metcalf, claimed to be the owner of the gun recovered, the prosecutor argued the evidence supported that Brown could have used that same gun in the March 8 robbery.

Defense counsel's argument with respect to March 8, the date of the robbery, was a defense of identity: that the second person who assisted Denman was not Brown (and therefore Brown was not the person holding a gun). Defense counsel also argued that the evidence failed to show that Brown possessed the ammunition or gun found in the search on March 18, contending there was insufficient proof Brown had any knowledge of the gun and ammunition, and alluding to the evidence that Metcalf claimed he owned the gun.

In rebuttal argument, the prosecutor did not clarify that he was only relying on the March 8 possession during the robbery, and not the March 18 recovery of a gun during the search, as a basis for the alleged possession by Brown.

Jury Deliberations and Instruction

During deliberations, the jury asked, "Is it considered possession if the weapon was found in the home but someone else was charged or convicted of possessing it?" The trial court responded, "Two or more people may possess something at the same time" without objection from the prosecutor.

The jury returned a verdict of guilty on count 2, possession of firearm by felon, and found true the allegation

that the offense was committed in association with a criminal street gang. The jury hung on count 1, second degree robbery.

DISCUSSION

Unanimity Instruction

Brown contends the trial court erred by failing to instruct the jury that it must unanimously agree as to whether the March 8 robbery or the March 18 search formed the basis of its finding that Brown was in possession of a firearm. We agree, and reverse the judgment.

“As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.) There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one . . . transaction’ (*People v. Crandell* (1988) 46 Cal.3d 833, 875), or ‘when the statute contemplates a continuous course of conduct or a series of acts over a period of time’ (*People v. Thompson* (1984) 160

Cal.App.3d 220, 224). There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. (*People v. Carrera* (1989) 49 Cal.3d 291, 311–312.)” (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

Here, as its basis for the felon in possession of a firearm count, the information specified only that “on or about March 8, 2016”—the same date as alleged for the robbery—Brown possessed a firearm. However, due to the presentation of evidence about Brown’s access to a gun and ammunition on March 18 during the search, and counsel’s arguments over this evidence, the jury was led to consider Brown’s alleged possession of a firearm on both the date of the search and the date of the robbery. The jury made clear it was considering possession on both dates when they asked, “Is it considered possession if the weapon was found in the home but someone else was charged or convicted of possessing it?” The trial court’s response—that “[t]wo or more people may possess something at the same time”—indicated to the jury that it could find possession based on Brown’s access to a gun on March 18, the date of the search, or during the March 8 robbery. The jury was hung on the robbery count (to which Brown mounted an identity defense), which indicates that at least some of the jurors must have accepted the March 18 search as the sole basis of Brown’s felon in possession of a firearm count. The jurors who found that Brown did not commit the robbery could not

have found Brown possessed a gun on the basis of the March 8 possession.

On appeal, the Attorney General does not argue that the prosecutor relied on only one of the two acts as the basis for count 2, nor do we believe the People could successfully do so in light of the prosecutor's failure to object to the trial court's response to the jury's question. The trial court was therefore required to give a unanimity instruction unless an exception to the rule applies. The People argue that the exception applies here both because possession of a firearm by a felon is a continuing offense and because the acts were part of a single continuous transaction.

The Attorney General's first argument appears to assume that if a crime is a continuing offense a unanimity instruction is never required. The argument relies on *People v. Mason* (2014) 232 Cal.App.4th 355 (*Mason*), which is factually distinguishable from the case before us, and resolved a different legal issue.

In *Mason*, the court considered whether the defendant could be convicted of four separate counts of felon in possession of a firearm where he was charged with possessing the same gun on multiple occasions, and "there was no evidence that [the defendant's] possession of the firearm was anything but continuous." (*Mason, supra*, 232 Cal.App.4th at p. 366.) The *Mason* court explained that possession of a firearm by a felon is a continuing offense: "[A] continuing offense is marked by a continuing duty in the defendant to do an act which he fails to do. The offense

continues as long as the duty persists, and there is a failure to perform that duty.” [Citations.] Thus, when the law imposes an affirmative obligation to act, the violation is *complete* at the first instance the elements are met. It is nevertheless not *completed* as long as the obligation remains unfulfilled. “The crime achieves no finality until such time.” (*Wright v. Superior Court* (1997)] 15 Cal.4th [521,] 525–526, fn. omitted.) [¶] ‘In the case of continuing offenses, only one violation occurs even though the proscribed conduct may extend over [an] indefinite period.’ (*People v. Keehley* (1987) 193 Cal.App.3d 1381, 1385 (*Keehley*); see *People v. Davis* (2002) 102 Cal.App.4th 377, 381 (*Davis*).)” (*Id.* at p. 365.) The *Mason* court held that when a defendant is charged with possessing the same firearm on multiple dates and there is no evidence to suggest that he did not possess the firearm continuously, the defendant March only be convicted of the offense once. (*Id.* at p. 367.) In reaching its decision, it specifically distinguished the facts before it from those in *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*), in which the court held a unanimity instruction was required where the defendant was charged with a single count of possession of a firearm but the evidence showed he simultaneously possessed four different firearms. (*Mason, supra*, at p. 366, fn. 12.)

Mason does not address the question of whether a unanimity instruction may be required where more than one event could form the basis for the continuing offense of felon in possession of a firearm. To the contrary, California case

law repeatedly demonstrates that there are instances in which a unanimity instruction is required, as *Mason* itself recognized. (*People v. Hernandez* (2013) 217 Cal.App.4th 559 (*Hernandez*) [unanimity instruction required where circumstances surrounding each instance of multiple possessions were significantly different, separated in time and space, and defendant offered different defenses to each instance of possession]; *Correa, supra*, 54 Cal.4th 331 [unanimity instruction required where defendant was charged with one count of possession of a firearm but the evidence showed he simultaneously possessed four different firearms]; *People v. Wolfe* (2003) 114 Cal.App.4th 177 (*Wolfe*) [unanimity instruction required where defendant was charged with one count of possession of a firearm but evidence showed defendant possessed as many as eight firearms on different dates]; *People v. Crawford* (1982) 131 Cal.App.3d 591 (*Crawford*) [unanimity instruction required where defendant was charged with possessing multiple weapons in different locations and defendant's defenses to the charges were different].) The argument that a unanimity instruction is never required for continuing offenses is without merit.

We likewise reject the Attorney General's second argument that a unanimity instruction was not required because the two instances of possession involved the same gun, and were so closely connected in time as to form a single continuous transaction. We agree with Brown that *Hernandez, supra*, 217 Cal.App.4th 559, is directly on point.

In *Hernandez*, the defendant was charged with a single count of possession of a firearm by a felon based upon two separate acts. The prosecution presented evidence that he was in possession of a gun that he fired at his girlfriend's house, and that he was in possession of a gun the police discovered hidden under the hood of his Camry, which he was driving two hours later. (*Id.* at pp. 564, 566.) An officer had searched the Oldsmobile that the defendant was riding in with a friend just before the shooting incident and had not found a firearm or any ammunition. (*Id.* at pp. 563–564.) The defendant's girlfriend gave conflicting testimony regarding the gun allegedly fired at her house. At one point she claimed it was the same gun as the one found in the vehicle, but later she testified that she did not see the gun, only a flash of metal. (*Id.* at p. 564.) After the shooting, the defendant switched cars and began driving the Camry, which was the subject of the later search in which a firearm was discovered. (*Id.* at p. 566.)

Although the prosecutor argued that either incident could form the basis for the firearm possession count, the trial court did not give a unanimity instruction. (*Hernandez, supra*, 217 Cal.App.4th at pp. 567–568.) With respect to the possession that allegedly took place during the shooting, the defendant argued that he did not have a gun when he was at his girlfriend's house. (*Ibid.*) As for the other alleged possession, the defense argued “that there was no proof that defendant owned the Camry, no evidence was submitted as to how long defendant had been driving the Camry, how

often he drove it, or who else drove it. . . . [D]efendant's fingerprints [and] DNA were not on the gun. . . . [He] did not have sufficient dominion and control of the weapon." (*Id.* at pp. 567.)

The *Hernandez* court held that it was error not to give the unanimity instruction because the evidence presented "was not indicative of one discrete act." (*Hernandez, supra*, 217 Cal.App.4th at p. 571.) Reasonable jurors could have been divided over which possession formed the basis for the felon in possession of a firearm count, which was the very situation a unanimity instruction is designed to prevent. (*Ibid.*) The *Hernandez* court held that the continuous course of conduct exception was inapplicable. The court reasoned, "a continuous course of conduct exists when the same actor performs the same type of conduct at the same place within a short period of time, such that a jury cannot reasonably distinguish different instances of conduct. . . . [T]he exception is applicable when a defendant proffers the same defense to multiple acts because the return of a guilty verdict indicates that the jury rejected the defendant's defense in toto." (*Id.* at p. 573.) The court explained that in the defendant's case there was a possibility of two different possessions "separated by time and space," the testimony as to whether the gun was the same was equivocal, and the defense offered two distinct defenses to the possessions. (*Id.* at pp. 574–575.) It held that the failure to give a unanimity instruction was error. (*Id.* at p. 575.)

The instant case closely parallels *Hernandez*, and the facts are even more compelling. Like *Hernandez*, the testimony regarding whether Brown possessed the same gun in both instances was equivocal. The gun found in the upstairs bedroom was a .40 caliber. Clark testified that he knew very little about guns and indicated that the gun he saw could have been a .40 or .45 caliber firearm. He could not provide a more definitive identification, and the prosecution did not question him as to whether the gun he saw was the same or similar to the gun that was confiscated in the search. Whereas in *Hernandez* the two events were separated by two hours, here there was a gap of 10 days between the shooting and the search of Brown's residence, providing even more doubt that the gun was the same and that Brown had continuous possession. In *Hernandez*, the firearm was found concealed in a vehicle that defendant was driving alone when stopped by police. Here, the possible possession was more attenuated—the firearm was found in a bedroom on a different level of the house than Brown's bedroom; Brown's cousin who also lived in the house claimed that the gun was his; and the cousin was later convicted for possession of the firearm, which was stolen property; and the investigating officer conceded law enforcement was unable to establish that the gun recovered from Metcalf was the gun used in the robbery. There was significant room for reasonable doubt regarding whether the gun found in the search was in Brown's possession, let alone his continual possession. Finally, Brown relied on different defenses to

each of the events. He claimed that he was not present during the robbery (and thus was not the person holding a gun), and that his cousin had sole possession of the gun discovered in the search. In light of these facts, we conclude that the trial court erred in failing to give a unanimity instruction.

With respect to the effect of the error, there is a split of authority in the appellate courts concerning whether the erroneous failure to give a unanimity instruction must be harmless under the standard articulated in *Chapman* or the one articulated in *Watson*.³ (*Hernandez, supra*, 217 Cal.App.4th at pp. 576–578 [discussing split of authority]; compare *Wolfe, supra*, 114 Cal.App.4th at pp. 185–188 [*Chapman*]; *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545 [*Chapman*]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472 [*Chapman*]; with *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [*Watson*].)

In the present case, we need not decide the appropriate standard for harmless error because we conclude that the error is not harmless under either standard. The jury was

³ *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) [“before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt”]; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [under the California constitution “a ‘miscarriage of justice’ should be declared only when . . . it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error”].)

hung as to the robbery count, and the only defense to that count was mistaken identity. Either Brown was present and wielded a firearm or he was not. Clearly, some jurors determined that Brown was not involved in the robbery, and thus could not have possessed a weapon in connection with that event, whereas others believed he was involved and did use a gun in the commission of that crime. It is also evident that if the prosecutor had selected a single event to support the charge, it would have been the March 8 event that was charged and argued at trial. Had the prosecutor chosen the March 8 robbery as the basis for the felon in possession count, a mistrial would have been declared as to that count as well. Under the circumstances, it is reasonably probable that the result would have been more favorable to Brown had the jury been properly instructed.

DISPOSITION

The judgment is reversed.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIM, J.*

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