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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.

JOSE LUIS BRITO,

Defendant and Appellant.

B266208

(Los Angeles County
Super. Ct. No. BA428760)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Reversed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jason Tran and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Jose Luis Brito, of permitting a person to carry a loaded firearm in a vehicle. (Pen. Code, § 26100, subd. (a).)¹ The jury found true an allegation the offense was committed for the benefit of a criminal street gang. (§ 186.22, subd. (d).) The jury acquitted defendant of a crime alleged to have occurred on an earlier date, assault with a semiautomatic firearm. (§ 245, subd. (b).) Defendant was sentenced to two years in state prison. Because testimonial hearsay was erroneously admitted, and because this federal constitutional confrontation clause error was not harmless beyond a reasonable doubt, we reverse the judgment.

II. Section 26100

Section 26100, subdivision (a) provides, “It is a misdemeanor for a driver of any motor vehicle . . . knowingly to permit any other person to carry into or bring into the vehicle a [loaded] firearm” (*People v. Gonzales* (2015) 232 Cal.App.4th 1449, 1453 [conviction requires proof defendant knew firearm was loaded]; but see contra, *In re Ramon A.* (1995) 40 Cal.App.4th 935, 937, 942 [former § 12034, subd. (a)].) The jury was instructed in part, “To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant drove a vehicle that contained a loaded firearm; [¶] 2. At the time he did so, he knowingly permitted another person to carry,

¹ Further statutory references are to the Penal Code unless otherwise noted.

or to bring, that firearm into that vehicle.” Section 26100, subdivision (a) is intended to deter drive-by shootings. (*In re Ramon A.*, *supra*, 40 Cal.App.4th at pp. 940-941.) It contains an express knowledge element—the driver knew his passenger had a loaded gun in the car. (*People v. Gonzales*, *supra*, 232 Cal.App.4th at p. 1463.) The knowledge element may be established by circumstantial evidence. (*Ibid.*)

III. THE EVIDENCE

A. Defendant’s Arrest

Defendant was under surveillance by law enforcement officers in connection with the charged firearm assault. As noted above, the jury acquitted defendant of that offense. Officers observed defendant drive away from a residence in gang territory with a fellow gang member, George Barrera, in the front passenger seat. The officers followed as defendant drove north through rival gang territory to a freeway, after which they executed a traffic stop. Defendant was taken into custody. Defendant admitted he was a gang member.

Defendant’s Lexus was a small, sporty, compact model. The driver’s and front passenger’s seats were very close to each other. Officers found a loaded 9-millimeter Baretta semiautomatic pistol partially concealed under the front passenger seat. The gun’s handle was protruding from beneath the seat.

B. The Gang Evidence

Defendant was a member of a violent Hispanic gang. The gang's primary activities included murder, attempted murder, robbery and drive-by shootings. Narcotics sales and robberies were the gang's primary sources of income. Moreover, the gang was engaged in constant, violent turf battles with neighboring Black and Hispanic gangs. The violence included shootings.

Officer Brendy Ponce testified as a gang expert. Officer Ponce explained the importance, financially and otherwise, of a gang's territory. Gangs conduct business and recruit new members within their territories. They instill fear in community members so gang members may act without apprehension of arrest. And because control over territory is important, gangs resist encroachment by other gangs.

In response to a hypothetical question tracking the facts of the present case, Officer Ponce concluded the crime—permitting a person to carry a loaded firearm in a vehicle—was committed for the gang's benefit. He opined the two gang members knew the loaded gun was in the car. This gave them the means to: assault rival gang members; retaliate if assaulted in rival gang territory; and commit crimes if the opportunity arose. In addition, being known to carry a gun in a car would elevate their status within the gang.

Officer Ponce also testified a gang member would know if other gang members in a car were armed: "I've spoken to many gang members where they have told me it's important for any gang member in a vehicle with other gang members to let them know there's a gun in the car for many reasons. One may be there are gang members that are on probation or parole and don't

want to go to jail. Or, if they know there's a gun in the car they can run away from the situation so they won't get arrested. Also, it's important for one gang member to let the other know there's a gun in the car in case they have to defend themselves from rival gangs or a rival gang member. If the opportunity arises, they all know there's a means of . . . lashing out with violence."

C. The Prior Similar Incident Evidence

Officer Ponce testified defendant was previously arrested under circumstances very similar to the present case—driving a car with a fellow gang member as passenger and a gun in the vehicle: "Q. Now, are you familiar with an individual by the name of Andres Granados? [¶] [Officer Ponce]: Yes, I arrested him during a search warrant. He was also a suspect in an attempted murder case. [¶] . . . [¶] Q. . . . Do you have an opinion as to whether Andres Granados is [a member of defendant's gang]? [¶] A. Yes. [¶] . . . [¶] . . . I believe Mr. Granados is a gang member [¶] . . . [¶] Q. . . . Officer, are you aware of an occasion where our defendant here in court, Jose Brito, was arrested in a car with Andres Granados? [¶] A. Yes. [¶] Q. Are you aware of who was driving the car? [¶] A. I believe according to the report it was Mr. Brito. [¶] Q. Was there a firearm in the vehicle? [¶] A. Yes, there was. [¶] Q. Did Mr. Granados have that firearm? [¶] . . . [¶] A. I'm not sure who had the firearm. I know there was a firearm in the car while Mr. Brito and Mr. Granados were in the same vehicle."

IV. DISCUSSION

A. Testimonial Hearsay

Defendant challenges admission of the prior similar occurrence evidence. We conclude the evidence was testimonial hearsay admitted in violation of defendant's Sixth Amendment confrontation rights. (U.S. Const., 6th Amend.) We further hold the error was not harmless beyond a reasonable doubt.

1. The trial court did not strike the evidence

Preliminarily, we reject the Attorney General's claim the trial court struck the prior similar incident testimony. When Officer Ponce testified about defendant's arrest with Mr. Granados, defendant's trial attorney, Nicholas Rosenberg, objected on hearsay and Sixth Amendment confrontation rights grounds. The trial court overruled the objection. During subsequent testimony, Deputy District Attorney Robert Britton referred to a prior arrest. Mr. Britton, said, "Another criteria is Mr. Brito has been arrested with - -" Mr. Rosenberg objected. Following a sidebar discussion, the trial court instructed the jury not to consider the fact defendant had been *arrested* in the past, "Ladies and gentlemen, the reference to the defendant's arrest for a crime not charged in this case is stricken and you're not to consider the fact that he was arrested in the past for any purpose." The trial court did not specifically direct the jury to disregard the testimony about defendant and Mr. Granados traveling in a car with a gun. We conclude the trial court did not

strike the prior similar occurrence evidence and the jury *did* consider it.

2. It was error to admit the evidence

Officer Ponce told the jury about the prior arrest involving defendant and Mr. Granados as one basis for his opinion defendant was a gang member. In doing so, Officer Ponce relied on a “report.” Officer Ponce testified: “Q. . . . Officer, are you aware of an occasion where our defendant here in court, Jose Brito, was arrested in a car with Andreas Granados? [¶] A. Yes. [¶] Q. Are you aware of who was driving the car? [¶] A. I believe *according to the report* it was Mr. Brito.” (Italics added.) It is a fair inference Officer Ponce was relating the contents of a police arrest report prepared by another officer. The report reflected the facts of a completed crime. The report was prepared to establish events potentially relevant to a subsequent prosecution. The police report was not admitted into evidence and is not a part of the present record. The officer who prepared the report did not testify at trial. There was no showing the officer who wrote the police report was unavailable or that defendant had a prior opportunity to cross-examine the officer. Officer Ponce had no independent knowledge of the prior arrest. He was not present when defendant and Mr. Granados were apprehended. If he had been, he would have said so.

The earlier similar occurrence evidence was inadmissible hearsay. (*People v. Sanchez* (2016) 63 Cal.4th 665, 676, 682-686; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1176.) Officer Ponce related case-specific facts—facts about defendant—as to which he had no personal knowledge. The facts were offered as true. And

no hearsay exception applied. Moreover, the prior similar incident evidence was inadmissible testimonial hearsay. (*People v. Sanchez, supra*, 63 Cal.4th at pp. 687-688, 694-695; *People v. Lara* (2017) 9 Cal.App.5th 296, 336-337; *People v. Meraz, supra*, 6 Cal.App.5th at p. 1176.) Officer Ponce related as true facts derived from a police report compiled by another officer during police investigation of a completed crime. The primary purpose of the report was to record events potentially relevant to a subsequent prosecution. The evidence's admission violated defendant's rights under the confrontation clause of the federal constitution. (*Ibid.*)

The trial court gave a limiting instruction. It instructed the jury Officer Ponce's testimony about the prior incident was admitted for the limited purpose of proving, in Officer Ponce's opinion, that defendant was a gang member: "During the trial, certain evidence was admitted for a limited purpose. [¶] As an example, Officer Ponce testified that on March 7, 2011, the defendant and a gang member were in a vehicle which contained a handgun. This evidence was admitted for the sole purpose of proving that, in the expert's opinion, the defendant is a gang member. [¶] . . . [¶] You may consider all such evidence only for the limited purposes that I have identified and for no other." This limiting instruction did not avoid the hearsay and confrontation problems with Officer Ponce's testimony. (*People v. Sanchez, supra*, 63 Cal.4th at p. 684; *People v. Stamps* (2016) 3 Cal.App.5th 988, 995.) There is no denying the facts were offered to the jury as true. (*Ibid.*)

3. The error was not harmless beyond a reasonable doubt

The error is reversible unless it was harmless beyond a reasonable doubt. (*People v. Sanchez, supra*, 63 Cal.4th at pp. 671, 698; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 586; *People v. Meraz, supra*, 6 Cal.App.5th at p. 1176.) We cannot conclude the error was harmless. The pivotal issue at trial was whether defendant knew Mr. Barrera had a gun in the car. There was circumstantial evidence to that effect. Defendant's gang was known to engage in drive-by shootings. The gang was involved in a violent turf war. Defendant and Mr. Barrera drove through gang and rival gang territory on their way to the freeway. Further, defendant's vehicle was compact, and the gun was protruding from underneath Mr. Barrera's seat when officers discovered it. In addition, Officer Ponce testified gang members typically know when another gang member is armed in a vehicle. And there were multiple reasons why two gang members such as defendant and Mr. Barrera would have a gun in the car. But it is unknown how or when the gun was placed in the car, whether either defendant or Mr. Barrera carried it there, or whether it was already in the vehicle. It is unknown whether the gun handle was protruding from underneath the passenger seat while defendant was driving the car. The additional evidence defendant and Mr. Granados, a fellow gang member, had on a prior occasion been in a vehicle together with a gun likely would have been very persuasive. The earlier occurrence mirrored the facts of the present case. The jury would have had a greater tendency to believe defendant knew Mr. Barrera had a gun in the car based on the prior similar incident evidence. Under these circumstances, we cannot conclude beyond a reasonable doubt the

jury would have convicted defendant had the prior similar incident evidence been properly excluded. As a result, defendant's conviction must be reversed.

B. Defendant's Peace Officer Personnel Record Disclosure Motion

Defendant has requested we independently consider the record of the trial court's in camera hearing for review of peace officer personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.) On April 6, 2015, defendant filed a peace officer personnel record disclosure motion. The motion sought misconduct complaints against six law enforcement officers relating to: false arrest; fabrication of charges; evidence fabrication; unreasonable or illegal searches and seizures; dishonesty; and excessive force use. In his declaration in support of the motion, defendant's trial attorney, Mr. Rosenberg, declared on information and belief the named officers made false statements. The false statements concerned the circumstances surrounding the victim's identification of defendant. In addition, the false statements concerned defendant's admission of his gang membership. Mr. Rosenberg subsequently withdrew the request for excessive force complaints. On May 5, 2015, the trial court conducted an in camera hearing and found there was one discloseable complaint. We have read the transcript of the in camera hearing. No abuse of discretion occurred. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209; *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

V. DISPOSITION

The judgment is reversed.

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TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.