Filed 6/12/17 P. v. Noriega 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAYMOND NORIEGA,<br><br>Defendant and Appellant. | B266388<br><br>(Los Angeles County Super. Ct. No. BA431516) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry Bork, Judge. Affirmed in part, reversed in part.

Maggie Shrout, 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, Scott A. Tarlyle, Mary Sanchez, and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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Raymond Noriega appeals from the judgment after his jury conviction of carrying a loaded unregistered handgun for the benefit of a criminal street gang. Since the gang enhancement is premised on case-specific hearsay testimony regarding appellant's gang membership, it must be reversed.

## FACTUAL AND PROCEDURAL SUMMARY

Close to midnight on November 15, 2014, two police officers saw appellant driving a stolen SUV in the Lincoln Heights area of Los Angeles. A passenger in the back seat was seen ducking down, and one of the officers recognized appellant from a police flyer. When the officers made a U-turn, the SUV sped up, running a stop sign, and briefly disappeared. When the officers saw it gain, the SUV ran a red light and eventually crashed into a retaining wall. Upon exiting the SUV, appellant and the front passenger, Jeremy Padilla, dropped loaded handguns and ran. One of the back passengers, Jovani Avalos, ran holding onto his waistband. Soon, all three were detained; a fourth occupant of the SUV was not.

By separate information, appellant was charged with carrying a loaded unregistered handgun, with the added allegation that the crime was committed for the benefit of a criminal street gang. (Pen. Code, §§ 25850, subd. (a); 186.22, subd. (b)(1)(A).)

At his jury trial, the gang expert, Officer Bojorquez, testified he was familiar with the gangs of the Lincoln Heights area. He testified Padilla and Avalos were Eastlake gang members, based on his own prior contacts with those individuals, who had admitted their gang membership to him. However, Officer Bojorquez testified that he had had no contacts with

appellant before his arrest in this case. Officer Bojorquez stated that, on the day of the arrest, he had come in contact with appellant, and his partner had filled out an FI card. But he did not testify to the contents of the card, nor did he say that he heard appellant admit his gang membership or give out a moniker.

Officer Bojorquez testified that appellant was a member of the Eastlake gang who went by the moniker "Kid" but used other monikers as well, as reflected in field identification (FI) cards. He opined that appellant belonged to the Eastlake gang based on his "associating with gang members, . . . frequenting the area, self admitting that you are a gang member, giving us the monikers." His testimony was based on conversations with other officers and FI cards filled out by others. Some of the earlier FI cards had been prepared during appellant's pedestrian stops for jaywalking. Officer Bojorquez also testified about a photograph taken several months after appellant's arrest, which pictured tagging on a wall that included one of appellant's claimed monikers, "Kid," along with Padilla's and Avalos' gang monikers.

Officer Bojorquez recounted the ongoing rivalry between the Eastlake and Clover gangs. Clover recently had defaced graffiti in Eastlake territory. On the day of appellant's arrest, Clover had held a fundraiser carwash near the place of the crash. When asked a hypothetical based on the facts of this case, Officer Bojorquez opined that appellant's crime, committed in association with other Eastlake gang members in rival gang territory, was for the benefit of the Eastlake gang.

Appellant was convicted as charged and the gang enhancement was found to be true. He was sentenced to five

years in prison, of which two were for the substantive crime and three for the gang enhancement.

This appeal followed.

## DISCUSSION

Following *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), appellant argues that the expert's testimony about his gang membership violated state hearsay rules and his federal confrontation rights. Respondent's forfeiture argument is not persuasive since failure to object in the trial court is excused when the objection would have been futile under then-existing law. (See *People v. Black* (2007) 41 Cal.4th 799, 810-811.) *Sanchez* represented a significant change in the law. In that case, the court disapproved of precedent that at the time of appellant's trial allowed experts to testify about case-specific facts based on hearsay, on the assumption the testimony was not offered for its truth. (*Id.* at p. 686, fn. 13.) Under the circumstances, objection to the gang expert's trial testimony would have been futile. (See *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7, review granted Mar. 22, 2017, S239442.)

*Sanchez*, *supra*, 63 Cal.4th 665 made clear that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay" and only admissible if they fall within a hearsay exception. (*Id.* at pp. 684, 686.) If the out-of-court statements constitute testimonial hearsay, there is a confrontation clause violation, absent a showing of unavailability and either a prior

opportunity for cross-examination or forfeiture through wrongdoing. (*Id*. at p. 686.)

"Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) An expert may not supply such facts absent personal knowledge of them, even though the expert may supply generalized background information to help jurors understand the significance or meaning of case-specific facts. (*Ibid.*) For example, the fact "[t]hat an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Id.* at p. 677.)

Respondent argues inconsistently that, the gang expert, Officer Bojorquez, "based his opinion primarily on his own personal contacts with appellant," in which appellant admitted his gang membership and nickname, and that the officer "conveyed to the jury the contents of F.I. cards describing police encounters with appellant of which the expert had no personal knowledge." The record does not bear out respondent's claim that Officer Bojorquez had multiple personal contacts with appellant outside the arrest in this case. Nor does it show what, if anything, appellant admitted on the day of his arrest, or whether Officer Bojorquez personally heard any admission that his partner may have included in the FI card on that day.

Officer Bojorquez opined that appellant belonged to the Eastlake gang based on his "associating with gang members, . . . frequenting the area, self admitting that you are a gang member, giving us the monikers." His general reference to "self admitting that you are a gang member, giving us the monikers" as a basis for his opinion does not show that the opinion was based on his personal knowledge of the predicate facts. To the contrary, the record shows Officer Bojorquez was asked to testify that appellant was an Eastlake gang member based on his conversations with other officers and FI cards he had reviewed. He was not asked about his personal knowledge of appellant's gang membership.

There is no evidence that appellant had made an admission of his gang membership to the gang expert, had made any gang-related signs or statements during the car chase or arrest, or had any gang-related tattoos, and no other witness testified to his gang membership. The fact that the name "Kid" appeared in gang graffiti after appellant's arrest cannot be related to appellant without resort to the expert's hearsay testimony based on a FI card, which stated that appellant had claimed that moniker.

There also is no evidence supporting the generalization that appellant was a gang member because he frequented gang hangouts and associated with gang members outside the facts of this case. Although appellant's companions Padilla and Avalos had admitted their gang membership to Officer Bojorquez, his testimony about their out-of-court admissions of gang membership is case-specific hearsay under *Sanchez*, *supra*, 63 Cal.4th 665, 677, and is inadmissible absent a hearsay exception. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 589.) Respondent, as

the proponent of this testimony, has the burden of establishing a hearsay exception for it, but it does not attempt to do so, thus forfeiting the issue. (See *People v. Stamps* (2016) 3 Cal.App.5th 988, 997 & fn. 7.)[1]

Instead, respondent argues that any error was harmless. The erroneous admission of nontestimonial hearsay is a violation of state statutory law and is subject to the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Stamps*, *supra*, 3 Cal.App.5th at p. 997.) Under that standard, reversal is required only if it is reasonably probable that a result more favorable to the defendant would have been achieved if not for the error. (*Watson*, at p. 836.) The erroneous admission of testimonial hearsay in violation of a defendant's right to confront witnesses against him is an error of constitutional magnitude and requires reversal unless the error is harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at p. 698; see *Chapman v. California* (1967) 386 U.S. 18, 24.)

Appellant has the burden to affirmatively show a violation of his constitutional rights; on appeal, a violation cannot be

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[1] To establish admissibility under the exception for declarations against penal interest, the proponent has the burden of showing a sufficiently reliable declaration of an unavailable declarant that was against the declarant's penal interest when made. (*People v. Geier* (2007) 41 Cal.4th 555, 584, overruled on another ground by *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305.) It is questionable whether admission of gang membership is against a declarant's penal interest since mere gang membership is not a crime. (*People v. Mesa* (2012) 54 Cal.4th 191, 196.) Even if it were, there is no evidence that Padilla and Avalos were unavailable as witnesses.

presumed. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 585–586.) Under *Sanchez*, *supra*, 63 Cal.4th 665, an FI card describing a police contact with a gang member is testimonial "[i]f the card was produced in the course of an ongoing criminal investigation." (*Id*. at p. 697.) Appellant claims the FI cards were prepared during the ongoing investigation of the Eastlake gang. But police day-to-day casual interactions with gang members are not necessarily part of an ongoing criminal investigation. (See *Ochoa*, at p. 586, citing *People v. Valadez* (2013) 220 Cal.App.4th 16, 36.) The record indicates some of the FI cards regarding appellant were prepared during pedestrian stops for jaywalking, which is an infraction and a public offense. (See Veh. Code, §§ 21955, 40000.1; Pen. Code, §§ 16, 17; *People v. Sava* (1987) 190 Cal.App.3d 935, 939; *People v. Hamilton* (1986) 191 Cal.App.3d Supp. 13, 18.) It is unclear under what circumstances Officer Bojorquez contacted Padilla and Avalos.

Nevertheless, whether reviewed under the lower state or higher federal standard for prejudice, the admission of hearsay testimony in this case requires reversal of the true finding on the gang enhancement. The enhancement was premised on Officer Bojorquez's testimony that appellant, Padilla, and Avalos were self-admitted Eastlake gang members. The hypothetical presented to the officer assumed the presence of "three self-admitted gang members from the same gang" inside a rival gang territory. The officer's expert opinion that the crime was committed for the benefit of a gang cannot be separated from the hearsay evidence that supplied the premise for the hypothetical the expert answered. Respondent relies on Officer Bojorquez's general testimony regarding the rivalry between the Eastlake and Clover gangs. But absent admissible evidence that any

occupant of the SUV was a member of the Eastlake gang, the background information about the rivalry between the Eastlake and Clover gangs loses its relevance.

Since the admission of hearsay expert testimony on the gang enhancement was not harmless, the true finding on the enhancement must be reversed.[2]

## DISPOSITION

The judgment is reversed insofar as it is found on a true finding as to the gang enhancement. The trial court is directed to modify the abstract of judgment to delete that enhancement. In all other respects, the judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.

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[2] Appellant does not challenge his conviction of the substantive crime, and since we reverse the gang enhancement, we need not address whether he was additionally prejudiced by the testimony that his face appeared on a police flyer or that his claimed moniker appeared on a wall months after his arrest.