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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS MUNOZ,

Defendant and Appellant.

B275732

(Los Angeles County
Super. Ct. No. BA358733)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

Victor J. Morse 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Marcos Munoz appeals from the judgment entered on his conviction for first degree murder, with firearm and gang enhancements, contending the trial court violated his constitutional right to due process by allowing the prosecution to admit hearsay evidence, and insufficient evidence supported the gang enhancement finding. We conclude the trial court erred in admitting hearsay but the error was harmless beyond a reasonable doubt. We reject Munoz's contention that the gang enhancement was unfounded. Therefore, we affirm.

BACKGROUND

On August 17, 2004, Paul Plascencia, Munoz's cousin and a member of the Alley Tiny Criminals street gang, a subset of the Harpys street gang, was shot and killed by an unknown assailant. Munoz told police Plascencia may have been killed by a Harpys member.

On September 28, 2004, Munoz, himself a member of the Rockwood street gang, drove around in Los Angeles for two hours in his Chevrolet Astro van, looking for members of Harpys, whom he intended to shoot in retaliation for the killing of Plascencia. When Munoz turned eastbound from Catalina Street onto 23rd Street he saw standing on the south side of the street men he took to be Harpys. He stopped, exited the van, and fired six rounds at the men with a .38 Colt revolver, killing Michael Castillo. Munoz shouted, "That's what you get for fucking with us, motherfucker," then got back in the van and drove eastbound to the end of 23rd and turned left onto Vermont Avenue, getting away.

Police found two expended lead, .38 caliber, non-hollow point bullets at the scene but no shell casings.

Munoz ultimately left the vehicle at 14808 Studebaker Road in Los Angeles, where it was seen a month later by Los Angeles Police Detective Stanley Evans.

Nearly five years later, on July 4, 2009, Los Angeles Police Officer Abel Barboa observed Munoz hovering around a security screening area at Los Angeles International Airport. Munoz said he believed his ex-wife was being held hostage, and he was going to be killed. Barboa took Munoz to Harbor General Hospital, where he was held two days for psychiatric observation pursuant to Welfare and Institutions Code section 5150 (a "5150 hold").

Munoz was released from Harbor General on July 6, 2009. Three hours later, Los Angeles Police Officer Shauna Saliz encountered him as he ran through traffic in the middle of the street outside the hospital. He was disoriented and panicking, waving his arms and yelling. He said, "They're trying to kill me. There's a black SUV. The Mexican Mafia is out to kill me." Saliz saw no SUV. Munoz rambled to himself and pointed to a Cadillac and said there might be people armed with guns inside. Saliz took Munoz back to Harbor General, where he was readmitted for psychiatric observation.

The next day, on July 7, 2009, Munoz was again released. He then went to a police station and confessed to the Castillo murder and two other shootings.

Munoz first told Detective Julian Pere he committed a murder in October or November of 2004 on Beverly Boulevard and Normandie Avenue in Los Angeles, shooting an 18th Street gang member five times with a .38 caliber Smith & Wesson revolver. He said he committed another murder around the same time at 25th Street and Vermont Avenue, firing six rounds at a Harpys member and striking him once. Finally, Munoz told Pere

that in December 2004 he fired four rounds with a nine-millimeter handgun at 18th Street members at Bonnie Brae and Third Street.

Police were able to confirm that a shooting had occurred on Beverly in October 2004, as Munoz described, but were unable to confirm a shooting occurred on Bonnie Brae in December 2004. As to the shooting on 25th Street around the same time, police inferred Munoz meant the Castillo murder.

The Castillo case was assigned to Detectives Charles Geiger and Vince Carreon who, having no prior knowledge of the case, familiarized themselves with the circumstances of the murder before interviewing Munoz. During the interview, which was recorded, Munoz said he shot a Harpys member one time in the back between 9:00 and 11:00 p.m. “on 25th Street and Vermont.” “Or 24th,” he said, “three blocks” south of the 10 freeway. He shot six times at four men, one of whom was wearing a white jersey, and a woman, missing all but one of them. He knew he struck one of the men, and was later told it was the one wearing a dark jacket. He said the shooting occurred on the south side of the street “between October—it was right after my cousin got killed” (which was on Aug. 17, 2004), “[it] could have been September, October” of 2004, between 9:00 or 10:00 p.m. Munoz said he drove to the scene in his blue Astro van, going east from “a little small street” west of Vermont Avenue, traveling toward Vermont. When asked whether there was anything about the van that would stand out, Munoz said it had chrome rims. He identified the ammunition as copper jacketed hollow points and the gun as a .38 caliber Colt revolver, which after the shooting he “gave . . . back to the hood,” “[p]assed it back.” He said he did not say anything at the time of the

shooting, but if he had said anything it would have been “Rockwood.”

After the interview, Geiger and Carreon drove with Munoz to the scene of the murder. They drove south on Catalina Street, turned left on 25th, and continued east to Vermont. When Munoz indicated they were on the wrong street, they repeated the procedure on 24th Street and then again on 23rd. Munoz identified 23rd Street as the scene of the crime and indicated that after the shooting he continued east on 23rd, turned left onto Vermont, and got on the 10 freeway three blocks away.

Munoz was charged with having personally used and discharged a firearm to commit first degree murder for the benefit of a criminal street gang. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b), (c) & (d).) It was further alleged he had incurred one prior serious or violent felony conviction. (Pen. Code, §§ 667, subds. (a)-(i), 1170.12, subds. (a)-(d).) He pleaded not guilty and denied the special allegations.

Munoz was tried three times, the first two trials resulting in jury deadlock and mistrial.

At the third trial, Richard Castillo, the victim’s brother, testified that around 10:00 p.m. on September 28, 2004, a lone gunman exited a blue Astro van with “nice rims” at his house on the south side of 23rd Street and fired six shots at four men and a woman, killing his brother with one shot in the back. The man shouted, “That’s what you get for fucking with us, motherfucker,” then got back in the van and sped eastbound to the end of 23rd and turned left onto Vermont Avenue.

Jorge Ramos, who witnessed the Castillo murder, testified that immediately before the shooting a male voice “screamed out,

‘Where you guys from?’ or in Spanish, ‘where you vatos from?’” which he described as “a gang claim.”

Officer Philip Zalba testified as a gang expert. He opined that Munoz was a Rockwood member, based on his moniker (“Demon”), statements, and tattoos, and Rockwood and Harpys were rivals. Zalba testified that Rockwood’s primary activities were assaults with deadly weapons, extortion, robbery, vandalism, and narcotics sales. When posed a hypothetical question based on the facts of the case, he opined that the shooting was committed in association with and for the benefit of the gang. Zalba explained that a drive-by shooting of a rival gang member in that gang’s territory benefits a gang by elevating its reputation for violence, which tends to instill fear in the community so that members of the community become less likely to challenge the gang or call or cooperate with police when they witness a crime.

The defense was false confession.

Munoz contended he was delusional when he confessed to the Castillo murder. Dr. Jack Rothberg, a forensic psychiatrist, testified that when he interviewed Munoz he made fantastic, illogical, and delusional statements about his two 5150 holds and the 2009 confession. He was concerned that vehicle traffic in his neighborhood meant he had been targeted for assassination for having suggested to police that Harpys killed Plascencia.

Dr. Rothberg also testified that jail records disclosed Munoz believed he was being gassed in his cell, and occasionally complained that people inserted probes into him. The prosecution offered no objection to admission of this evidence. Dr. Rothberg opined that when Munoz confessed to the Castillo murder he suffered from a psychosis that caused delusions. He

was out of touch with reality, and perceived events that did not actually occur.

Dr. Rothberg also testified that jail mental health personnel reported Munoz was alert and “oriented times four,” his thought process was linear and goal-directed, and he suffered from no psychosis.

Dr. Sanjay Saghal, a forensic psychiatrist testifying for the prosecution, stated he interviewed Munoz in 2014. He opined Munoz may have had “some degree of psychotic thinking” when he confessed to the Castillo murder in 2009, likely the result of methamphetamine abuse, but the data was insufficient to determine to what degree it affected his interactions with others. Saghal observed that Munoz was coherent, communicative, and linear in his thought during his 2009 confession, rather than disoriented, confused or disorganized, which weighed against him being psychotic at the time. That he had been released from Harbor General the day of his confession suggested he was not psychotic at the time.

Saghal then testified at some length, over the defense’s hearsay objections, about records generated by mental health personnel while Munoz was in jail. For example, he said that on July 10, 2009, jail personnel reported Munoz “had no need for mental health treatment,” as “he was communicative, calm, and . . . suitable for the general population.” He testified that absence of a diagnosis of psychosis in the jail records indicated that “yet another clinician close to the date in question of the interview with police didn’t think he was psychotic,” and jail personnel recommended general population placement and provided no mental health diagnosis. Saghal testified that a mental health evaluator at the jail reported she wanted to “‘rule out a Cluster B

personality disorder,’ ” which meant that she offered no diagnosis but suspected Munoz suffered from an antisocial personality disorder. However, she reported that he was “communicative and straightforward.”

During closing argument, the prosecutor argued that Dr. Rothberg’s opinion was unreliable because he spent only “one and a half hours with the defendant. Compare that with the staff at Harbor U.C.L.A. who had constant observation the entire time he was there” and who diagnosed Munoz with “ ‘[m]alinger, antisocial personality disorder, no primary psychosis.’ ” The prosecutor also argued that jail personnel had provided a similar diagnosis: “ ‘personality disorder . . . no primary psychosis.’ ” Dr. Rothberg, the prosecutor argued, “completely disagreed with every single medical professional that was involved in this case.” “Who’s in a better position to render an opinion about the defendant’s mental state on July 7, 2009? A hour-and-a-half interview a year and a half later? Or constant medical attention the entire time in Harbor U.C.L.A.?”

The jury found Munoz guilty of first degree murder and found the firearm and gang allegations to be true. He was sentenced to 25 years to life in prison, doubled under the “Three Strikes” law, plus consecutive terms of 25 years to life for the gun enhancement and five years for the felony conviction enhancement, for a total of 80 years to life. The trial court stayed imposition of any sentence for the gang enhancement.

Munoz timely appealed.

DISCUSSION

I. Hearsay

Munoz contends the trial court prejudicially erred when it allowed Drs. Rothberg and Saghal to offer hearsay testimony

about the content of his Harbor General and jail psychiatric records.

Hearsay evidence is a statement made by a witness not testifying at the hearing and offered to prove the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless an exception applies. (Evid. Code, § 1200, subd. (b).)

Here, Drs. Rothberg and Saghal testified at length about psychiatric records generated by Harbor General and jail mental health personnel. They testified that Harbor personnel concluded Munoz’s perception was reality based, and he suffered no lasting psychosis other than antisocial personality disorder. They testified that jail personnel found Munoz to be alert and oriented with linear and goal-directed thought processes, suffering no psychosis and having no need for mental health treatment.

This testimony repeated numerous statements made outside the hearing by mental health personnel and was offered solely to prove their truth—that Munoz suffered from no lasting psychosis. This was all inadmissible hearsay. An expert may not “relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.” (*People v. Sanchez* (2016) 63 Cal.4th 665, 686.) “When 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. It cannot logically be maintained that the statements are not being admitted for their truth.” (*Id.* at p. 686.)

Respondent argues the doctors' testimony was admissible because Munoz's psychiatric records were business records. We disagree.

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) the sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271, subd. (a)-(d).) A trial court has wide discretion in determining whether a qualified witness possesses sufficient personal knowledge of the identity and mode of preparation of documents for purposes of the business records exception. (*Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797 & fn. 28.) Indeed, "any 'qualified witness' who is knowledgeable about the documents may lay the foundation for introduction of business records—the witness need not be the custodian or the person who created the record." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324.) Thus, a qualified witness need not be the custodian, the person who created the record, or one with personal knowledge in order for a business record to be admissible under the hearsay exception. (See *id.* at p. 322.)

Munoz's psychiatric records were never authenticated or admitted into evidence, and nothing in the record suggests Dr. Rothberg or Saghal had particular knowledge about the identity or mode of their preparation. Although they testified about how

psychiatric records are prepared generally, they knew nothing specifically about Munoz's records.

Respondent makes no attempt to explain how the testimony of Drs. Rothberg and Saghal falls under the business records exception. He merely notes that the trial court relied on the exception in overruling Munoz's hearsay objection, and argues that because Munoz failed to complain about the court's invocation of the exception at trial he cannot complain about it for the first time on appeal. Respondent offers no authority to support this argument other than an unexplained citation to *People v. Braxton* (2004) 34 Cal.4th 798, which held only that "a party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error or omission probably was inadvertent." (*Id.* at p. 813.) But respondent offers no explanation how the trial court's error—its expressed rationale for overruling Munoz's hearsay objection—could have been inadvertent. It was not; it was simply wrong. To preserve an evidentiary claim on appeal a defendant need do no more at trial than make a timely, properly grounded objection.

Respondent argues the hearsay was admissible because Munoz "opened the door" to it by eliciting hearsay testimony from Dr. Rothberg. We disagree. "By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony. The so-called 'open the door' or 'open the gates' argument is 'a popular fallacy.'" (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192.)

But the error was harmless under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is

required under the federal Constitution unless the error was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error requires reversal only if it is reasonably probable that the error had an effect on the verdict].)

The hearsay to which Drs. Rothberg and Saghal testified was to the effect that in 2009 Munoz suffered from no psychosis other than was induced by methamphetamine use, which undermined his false confession defense. But the jury already knew that Munoz's mental impairment was at most intermittent. He was admitted to Harbor General twice on 5150 holds and was twice discharged, indicating mental health personnel twice determined he was not so impaired as to pose a danger to himself or others.

Further, as Dr. Saghal testified, even a delusional person can tell the truth. No evidence suggested Munoz's mental impairment affected his ability to tell the truth to police. During his confession he was coherent and communicative and linear in his thinking. He accurately described a crime that had occurred five years prior. Although he got two details wrong—the street on which the shooting took place and type of ammunition used—he correctly identified the time of the shooting; the general location and route he took to and from it; the vehicle used, down to its rims; the type of gun used; the number and gender of victims; the number of shots fired; and the number of injuries. And he was able to drive police directly to the scene at 23rd Street after bypassing two false locations at 25th and 24th streets.

Munoz offers no explanation how the jury could believe his purportedly delusional state produced a false confession that

exactly described the Castillo murder, and we can conceive of none.

We conclude Dr. Rothberg's and Saghal's testimony was harmless beyond a reasonable doubt.

II. Gang Enhancement

Munoz contends the jury's true finding on the gang enhancement was unfounded. We disagree.

A "gang enhancement applies to one who commits a felony 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (Pen. Code, § 186.22, subd. (b)(1).) 'In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' " (*People v. Sanchez, supra*, 63 Cal.4th at p. 698.)

"The standard of appellate review for determining the sufficiency of the evidence supporting an enhancement is the same as that applied to a conviction. [Citations.] Like a conviction unsupported by substantial evidence, a true finding on a gang enhancement without sufficient support in the evidence violates a defendant's federal and state constitutional rights and must be reversed. [Citations.] [¶] 'In considering a challenge to the sufficiency of the evidence to support an enhancement, we

review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We draw all reasonable inferences in favor of the verdict, and presume the existence of every fact the jury could reasonably deduce from the evidence that supports its findings. [Citations.] [¶] The court may not, however, “‘go beyond inference and into the realm of speculation in order to find support for a judgment. A finding . . . which is merely the product of conjecture and surmise may not be affirmed.”’ [Citations.] “‘[E]vidence which merely raises a strong suspicion of the defendant’s guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.”’ [Citation.] Indeed, ‘[a] trier of fact may rely on inferences to support a conviction only if those inferences are “of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt” that the inferred facts are true.’” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947-948.)

Munoz contends no evidence undermined the obvious motive for the Castillo murder—personal revenge. He argues no evidence suggested his fellow gang members were aware of the Castillo murder or participated in it. He is incorrect. First, Officer Zalba testified that a murder committed under the circumstances here would be intended to benefit the Rockwood gang by enhancing its status in the community. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208-1209 [expert opinion about such behavior admissible to support a gang enhancement].) Second, Jorge Ramos and Richard Castillo testified the shooter

shouted gang slogans, which constitute a challenge in gang culture. Specifically, Castillo testified the shooter shouted, “That’s what you get for fucking with *us*,” the plural pronoun suggesting the shooting was committed on behalf of several persons, not just on behalf of the shooter, i.e., for personal, solitary revenge. Finally, Munoz admitted in his 2009 confession that he obtained the gun from the Rockwood gang, and after the shooting gave it back to them. The jury could reasonably infer from this evidence that the gang participated to some extent in the crime, and could further reasonably conclude Munoz committed the murder intending to benefit the gang.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.