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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JASPER JAUREGUI, Defendant and Appellant.	2d Crim. No. B267518 (Super. Ct. No. KA107217) (Los Angeles County)

Jasper Jauregui shot at a house, returned the same night, and shot at it again. He appeals judgment after conviction by jury of assault with a firearm (Pen. Code, § 245, subd. (a)(2));[1] being a felon in possession of a firearm (§ 29800, subd. (a)(1)); and two counts of shooting at an inhabited dwelling (§ 246). The jury found true allegations he committed each of the crimes for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b). It found he personally used a

[1] All statutory references are to the Penal Code unless otherwise stated.

firearm in the assault and in one of the shootings. (§§ 12022.5, 12022.53, subds. (b) & (c).) The jury acquitted him of one count of attempted murder and could not reach a verdict on another. The trial court sentenced Jauregui to 50 years to life in prison. It stayed his sentences for the assault and possession of a firearm pursuant to section 654.

We reject Jauregui's contention that the trial court erred when it did not instruct the jury on the lesser offense of grossly negligent discharge of a firearm. (§ 246.3.) But we reverse and remand the findings on the gang enhancements because the gang expert relied on a hearsay list of crimes committed by members of Jauregui's gang to opine that its "primary activities" include commission of specified crimes. (§ 186.22, subd. (f); *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).)

BACKGROUND

Miguel Yepez is a member of the Kiwanis Park criminal street gang. Jauregui is a member of the 420 Pomona gang. In 2014, there was "tension" between the groups.

Yepez lives in a house in Kiwanis Park territory with family members including his sister, Jeanette Rodriguez. On the night of August 23, Rodriguez hosted a party at the house. Yepez was not home.

The First Shooting

Jauregui and another 420 Pomona member arrived at Yepez's house about 11:00 p.m. and tried to enter the party. Rodriguez met them outside and told them to leave. One or both men pulled out guns. Rodriguez ran back into the house and heard gunshots. Bullets hit the front door, the front window, an interior wall, and a van and a car in the driveway.

Police officer Jesse Hedrick arrived about 11:20 p.m. He found 12 shell casings in the street and on the sidewalk in front of the house. Rodriguez later identified Jauregui. She told Hedrick that he shouted something like "Casper" and "420" when he pulled out the gun.

The Second Shooting

Thirty minutes after the police left, Rodriguez heard more gunfire. She called the police. Hedrick returned and found fresh shell casings and bullets in front of the house. Yepez told Hedrick that he came home after the first shooting, went back outside, and saw Jauregui across the street. Jauregui walked toward him, shooting. Yepez ran back inside. Yepez said there had been a "beef" between 420 Pomona and Kiwanis Park and that Jauregui had been driving by Yepez's house the past few days. At trial, Yepez denied this account. He said he did not see anyone shooting.

Gang Evidence

Police officer Blake Jensen testified as a gang expert. He identified several 420 Pomona members, including Jauregui and his brother, based on personal contact. The rest of his testimony was based solely on "departmental resources" and "speaking with other . . . officers." He was new to gang investigation.

Jensen opined that 420 Pomona is a criminal street gang. Based on hypothetical questions, he opined that both of the shootings were committed in association with and for the benefit of a criminal street gang, with specific intent to promote, further, or assist criminal conduct by gang members.

In support of his opinion that 420 Pomona is a criminal street gang, Jensen said 420 Pomona formed in about

2005 from a tagging crew, it has 20 to 25 members[2] some of whom use "420" hand signs or have "420" tattoos, and its "primary activities include unlawful taking of vehicles without the owner's consent, illegal possession of firearms, as well as illegal possession of narcotics for the purposes of sales." He said, "Yes," when the prosecutor asked, "Is that something you have, in your experience, noticed that the members of 420 [Pomona] consistently and frequently engage in?" But other testimony made clear that he did not have personal knowledge of the criminal activity and relied on "departmental resources," such as arrest reports and field investigation cards.

Based on minute orders[3] and an arrest report, Jensen described three crimes committed by 420 Pomona members: Jauregui took a car without the owner's consent; Alejandro Zaragoza possessed a firearm; and Edgar Diaz possessed narcotics for sale. Jensen did not identify any other criminal activity by 420 Pomona members on direct examination.

On cross-examination, Jensen was unable to recall any crimes committed by 420 Pomona members in the past 12 months to support his opinion that their primary activities include crime. He did not know of any other instances of 420 Pomona members taking a vehicle without consent, possessing firearms, or possessing narcotics. Jensen said a tagging crew becomes a criminal street gang when it starts "committing violent acts, such as shootings or stabbings or something that would put fear into a community . . . [and] into [a] rival group." He did not identify any violent crimes by 420 Pomona members.

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[2] He named five.

[3] Jauregui did not object to admission of these records.

On redirect after a four-day recess, Jensen presented a three-page list of "arrests involving members of 420 [Pomona] for various crimes." He did not have personal knowledge of the arrests. He printed the list from a police department booking database he searched. It listed 59 crimes by nine people that it identified as 420 Pomona members, including robbery, possession for sale of a controlled substance, taking a vehicle without the owner's consent, murder, participation in a criminal street gang, illegal possession of a firearm, and assault with a deadly weapon. The trial court allowed Jensen to testify about the arrests over Jauregui's hearsay and foundation objections. It admonished the jury that the printout was evidence that these people were "booked and arrested," but "not convicted."[4]

After Jensen testified, the prosecutor offered the printout into evidence. Jauregui objected to it as hearsay, lacking foundation, and irrelevant. He asked the court to redact information about which there was no testimony. The prosecutor argued the printout was a business record and relevant to prove "there are individuals that engage in a pattern of criminal conduct such as that required under [section] 186.22."

The trial court admitted the printout without redaction. It told counsel it would "permit the jury to consider [the printout] for purposes of membership, not so much for

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[4] The trial court told the jury, "This is general information that was obtained, evidently, through booking, which certain admissions, perhaps, were made during the booking process. [¶] But I want the jury to understand that this information is just a listing of individuals who were obviously accused, arrested and booked for certain offenses. Not convicted in any way, shape or form, just simply booked and arrested and nothing more."

predicate activity," but it did not so instruct the jury. The prosecutor argued in closing that it proved predicate activity.

DISCUSSION

Instruction on Lesser Included Offense

Jauregui contends the court had a sua sponte duty to instruct the jurors on negligent discharge of a firearm (§ 246.3) as a lesser included offense of the second count of shooting at the inhabited dwelling (§ 246). He argues there was no evidence that he fired shots in the direction of the house. The contention is without merit because the evidence was unequivocal that the second shooting was "within . . . range" of the house. (*People v. Ramirez* (2009) 45 Cal.4th 980, 990 (*Ramirez*).)

The trial court has a sua sponte duty to instruct the jury on lesser included offenses where there is substantial evidence the defendant committed the lesser, but not the greater, crime. (*People v. Cook* (2006) 39 Cal.4th 566, 596 (*Cook*).) The purpose of the rule is to avoid over-conviction and over-acquittal. (*People v. Breverman* (1998) 19 Cal.4th 142, 181 (*Breverman*).) We independently review a claim that the trial court did not discharge this duty. (*Cook*, *supra*, at p. 596.)

Grossly negligent discharge of a firearm is a lesser included offense of shooting at an occupied building. (*Ramirez*, *supra*, 45 Cal.4th at p. 990.) Both offenses require proof the defendant willfully discharged a firearm in circumstances in which there was a significant risk the act would result in personal injury or death. But the greater offense also requires proof that an inhabited target was "within the defendant's firing range." (*Id.* at pp. 986, 990.)

A jury could not reasonably find the second shooting was outside the range of an inhabited dwelling. After the second

shooting, Hedrick found "fresh shell casings," and two bullets in the "front area of the residence." Yepez told Hedrick he was "outside to the front of the residence," when Jauregui "approached the front-yard area of [the] residence, [and] began shooting at him, or began shooting," and Yepez "ran inside his residence." Yepez said Jauregei was "walking across the street towards him with his arm out." Yepez also told Detective Andrew Bebon that Jauregui shot at his house. The conversation with Bebon was about the second shooting, not the first: Yepez was only present for the second shooting and Bebon did not respond to the first.

Jauregui argues a jury could find he did not aim at the house because the second shooting caused no new damage. But that would not make him guilty of only the lesser offense. Section 246 "is not limited to shooting *directly* at an inhabited or occupied target." (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1355-1356 (*Overman*).) It is a general intent crime and, "proscribes shooting *either* directly at *or* in close proximity to an inhabited or occupied target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it." (*Id.* at p. 1356.) The second shooting was unequivocally in close proximity to the house under circumstances showing a conscious disregard for the probability that bullets would strike the house or Yepez.

This case is unlike *Overman*, *supra*, 126 Cal.App.4th 1344, in which the court reversed a conviction for shooting at an inhabited dwelling because the trial court refused to instruct on section 246.3. In *Overman,* the evidence was equivocal whether the inhabited building was within the defendant's firing range. The defendant fired a rifle out the window of his car in a

commercial neighborhood. A coworker said the defendant fired at him and his brother. Other witnesses said they did not see which way the defendant aimed. There were two casings in the road, but no physical evidence to show the direction of the shots. (*Id.* at p. 1353.) There was evidence the defendant "was an excellent marksman, and that bullets from an SKS rifle travel in a straight-line trajectory for over 300 yards" suggesting "that [the] defendant would have hit anything he was aiming at." (*Id.* at p. 1363.) Here, the second shooting was in a residential neighborhood immediately adjacent to Yepez's house. There is no reasonable chance Jauregui would have received a better result at trial if the court had instructed on section 246.3. (*Breverman*, *supra*, 19 Cal.4th at p. 178 [*Watson*[5] prejudice standard applies].)

Sanchez

We must reverse the gang enhancements because they are based on inadmissible case-specific hearsay. (§ 186.22, subd. (f); *Sanchez*, *supra*, 63 Cal.4th at p. 686.) A gang 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." (*Ibid.*)

Jensen relied on the printout of 59 arrests, and three independently admissible records of conviction, to opine that committing the offenses enumerated in the gang statutes is one of 420 Pomona's "primary activities." (§ 186.22, subd. (f).) The criminal street gang component of a gang enhancement requires proof of (1) an ongoing association of three or more people with a common name, sign, or symbol, (2) one of whose "primary activities" is commission of one or more enumerated offenses, and

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[5] *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

(3) a pattern of criminal gang activity consisting of two or more enumerated offenses by its members within a specified time frame. (*Ibid.*; *People v. Gardeley* (1996) 14 Cal.4th 605, 621, overruled on other grounds in *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)

When an expert relates case-specific out of court statements and treats the content as true and accurate to support his opinion, the statements are hearsay. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) To support his opinion on 420 Pomona's primary activities, Jensen related that the content of the printout was true. He testified about the listed arrests and said the listed people admitted gang membership "[a]t some point during the arrest or booking process," although he was not there.

No hearsay exception applied to the printout. It was like the inadmissible field investigation cards and STEP notices on which the expert improperly relied in *Sanchez*. Jensen generated the printout when he "conduct[ed] a [computer] search regarding the membership -- or the gang membership of the booking process." The prosecutor told the trial court, "I believe the foundation has been laid for it as a business record." But he offered no foundational evidence the records were made in the regular course of business, at or near the time of the event, and created through sources of information and a method of preparation reflecting trustworthiness. (Evid. Code, § 1271; *Sanchez*, *supra*, 63 Cal.4th at p. 695, fn. 21.) Jensen said the printout was "based on information that is entered into the database at the time the information is received," but did not say he entered it or knew anything about its method of preparation. To the extent the booking records and the printout were prepared for later use at trial, they are testimonial and would not qualify

as business records even with a proper foundation. (*Sanchez*, at pp. 695-697.)

Without the printout, the records of three convictions could not prove "primary activities" because they did not show consistent or repeated enumerated offenses. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324 (*Sengpadychith*).) "Primary activities," requires more than "occasional" criminal conduct. (*Ibid.*) Proof of a "pattern" of two or more enumerated offenses is not necessarily sufficient to prove "primary activities." (*Ibid.*)

Three crimes over a period of 10 years by a group of 20 to 25 people is no more than occasional criminal conduct. It is like the criminal activity in *People v. Perez* (2004) 118 Cal.App.4th 151, 157, where three shootings and one attempted murder in six years by a group of 20 people was not sufficient to support a finding of primary activities for purposes of a gang enhancement. Similarly, in *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612, two assaults and the charged vandalism were not sufficient to support a finding of primary activities, although the expert testified he "kn[e]w" the gang committed "quite a few" enumerated offenses. Even if the jury were to consider Jauregui's present offenses, there is admissible proof of only occasional criminal activity. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 323 [past and present offenses are relevant to prove primary activities].)

This case is unlike *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224-1225 (*Vy*), in which evidence of two attempted murders by a small group in a short period of time was sufficient to prove primary activity. In *Vy,* there were only two crimes aside from the charged offense, but it was more than

occasional conduct because they occurred within three months immediately preceding the charged offense and the gang had only existed for two years and had just six members. (*Ibid.*) This case is also unlike *People v. Duran* (2002) 97 Cal.App.4th 1448, 1455, 1465, in which the expert's statement that the gang's primary activities included robberies, assaults with deadly weapons, and narcotics sales was supported by personal interviews with over 100 members of the gang and personal experience investigating the crimes.

The People argue the court "properly exercised its discretion in allowing the evidence on redirect examination for the limited purpose of responding to cross-examination of the prosecution's gang expert on the subject of gang membership," and any error was harmless. It is true that the scope of redirect is a matter for the trial court's discretion. (*People v. Steele* (2002) 27 Cal.4th 1230, 1247.) But the trial court has no discretion to allow an expert to relay case-specific hearsay for which there is no independent competent proof. (*Sanchez, supra,* 63 Cal.4th at p. 679.) The printout was offered to prove the case-specific fact that 420 Pomona members were arrested for 59 crimes, many of which were enumerated offenses, not as general "background information and knowledge." (*Id.* at p. 685.)

This case was tried before the Supreme Court decided *Sanchez*. Counsel and the trial court proceeded with the understanding that any problem with the expert's reliance on inadmissible hearsay could be cured with a limiting instruction or exercise of the court's discretion under Evidence Code section 352. (See *Sanchez*, *supra*, 63 Cal.4th at p. 679.) Under *Sanchez,* "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth

by a jury." (*Ibid*.) *Sanchez* "disapprove[d] . . . prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Id*. at p. 686, fn. 13.)

The People suggest the printout was admitted only to prove there are more than five members of 420 Pomona. But Jensen testified that he printed the list to respond to the question, "how many crimes 420 [Pomona] members have committed since it began." When the prosecutor offered the printout into evidence he tacitly acknowledged that without it there was insufficient evidence of primary activity: "Pattern of criminal activity is going to be an issue," because Jensen "didn't know how many crimes these individuals have committed." And the prosecutor argued to the jury that the printout proved primary activities: "These are nine guys that are arrested 59 times for various offense[s] that are included as the primary activities of the gang and so you can certainly infer there is a pattern of criminal gang activity that their primary activities including the commission of the offenses in the jury instruction: the illegal narcotic sales, the 11378, the 10851; the taking and driving of vehicles; 29800, the illegal possession of firearms; 245, the assault with a firearm. The evidence suggests and shows that that is, in fact, what they do."

The error was prejudicial. We review improper admission of hearsay under the "reasonable probability"[6] standard for state law statutory error or, if the hearsay is

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[6] *Watson*, *supra*, 46 Cal.2d 818, 836.

testimonial, under the "harmless beyond a reasonable doubt"[7] standard for federal constitutional error. (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) Under either test we must reverse here. Committing enumerated offenses may be a primary activity of 420 Pomona, but there was no competent proof of that fact at trial. There is a reasonable probability the jury would have reached a result more favorable to Jauregui on the gang enhancements in the absence of the *Sanchez* error.

DISPOSITON

The true findings on the gang enhancements are reversed. The judgment of conviction is otherwise affirmed and the matter is remanded to the trial court for proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

[7] *Chapman v. California* (1967) 368 U.S. 18, 24.

Mike Camacho, Jr., Judge

Superior Court County of Los Angeles

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