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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LADONTE ANDERSON, Defendant and Appellant.	A130287 (Contra Costa County Super. Ct. No. 100204-7)

Defendant Ladonte Anderson was convicted of carrying a loaded firearm as a nonregistered owner (former Pen. Code, § 12031, subd. (a)(2)(F))[1] and placed on probation for three years. He argues that the trial court committed reversible error by admitting evidence that an officer was concerned a drive-by shooting might occur before he stopped the car in which defendant was a passenger, without informing the jury that a magistrate judge previously had dismissed a charge that defendant had intended to commit a drive-by shooting. We affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

On the night of January 26, 2010, Antioch police officers were dispatched to a call at an apartment on Spanos Street, after receiving a report of vandalism and the possible brandishing of a firearm. An officer talked to a witness at the apartment named Wyshai Fitzpatrick, who appeared to be nervous and upset, and who told an officer that a group

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

of people had come to the apartment, broken a window, and told him to come outside. Fitzpatrick also told the officer that he thought the vandalism was committed as retaliation, because a person who lived on Mandarin Way thought he was responsible for burglarizing her house. While the officer was talking to Fitzpatrick, other people were close enough to possibly hear the conversation. The officer told Fitzpatrick to stay inside that night and not " 'to go looking for any trouble,' " based on concern about possible retaliation. The officer said he would go to the home on Mandarin Way to see whether he could find the people responsible for the broken window.

As the officer left the apartment on Spanos Street, he saw a white car that was playing loud music pull up in front of the building. Defendant and other people got out of the car and walked toward the apartment. Officers then left to find the home on Mandarin Way in order to continue the vandalism investigation.

Officers found a house on Mandarin Way, about one or two minutes away from the apartment on Spanos Street, that matched the description provided by Fitzpatrick. Three officers spoke with a woman at the home for about 10 or 15 minutes. As the officers walked down the driveway to leave, one of them saw a car about six to eight buildings away, and it was driving slowly down the street with its headlights turned off, even though it was nighttime. The officer waited for the car (which had four males inside) to pass, then went to his patrol car so that he could conduct a traffic stop on the car.

Before the officer testified about why he conducted the traffic stop, the jury was instructed as follows: "You will hear evidence about an officer's belief that other crimes not charged in this case might have been intended or in progress at the time the vehicle in this case was stopped. That evidence is not offered and may not be considered as proof that in fact any such crime was intended or in progress. The evidence is offered only for the limited purpose of explaining the officer's state of mind and the reason the traffic stop and questioning were conducted in the way they were conducted. You may not consider this officer's beliefs for any other purpose."

The officer then testified that his "concern was, from an officer safety standpoint, there was about to be a shooting from the car." The car's headlights were turned on as the car passed the officer, and the officer saw that it was the same white car that he had seen on Spanos Street. This increased the officer's concern, because he "felt that the vehicle was associated with the earlier disturbance in some respect. [He] didn't know how at that point."

The officer conducted a traffic stop, and two officers joined him after the stop. The officer had his duty pistol out of the holster and held it against his body, because of his safety concerns. Inside the car was Fitzpatrick, the same person the officer had told to stay in the apartment that had been vandalized, to avoid possible retaliation activity. Defendant was in the front passenger seat. The driver of the car stated that he was "taking Fitzpatrick home," which seemed unusual to the officer because he "had just talked to Mr. Fitzpatrick at his apartment just a few minutes prior to that." The officer further testified that the four people in the car appeared nervous and would not look at him, and one passenger reached toward his waistband area, a common place for a pistol to be concealed.

The officer shone a flashlight inside the car and saw a black gun, which was later determined to be loaded, in the middle of a cavity in the dashboard area. The driver of the vehicle was removed from the car and placed in handcuffs. The rear passenger who had been seen reaching for his waistband also was removed from the car, and a gun was found in his right-front waistband area. Defendant and Fitzpatrick thereafter also were removed from the vehicle and handcuffed. A search of the vehicle revealed a single black glove on the right front passenger floorboard, in the area where defendant had been sitting. According to the arresting officer, a glove is sometimes used to prevent gunshot residue from being transferred onto a person's hand when he or she fires a gun. The officer further testified that he had investigated previous drive-by shootings.

A staff services analyst with the California Department of Justice's Bureau of Firearms testified that a check of the database containing all firearm registrations in the state revealed that no firearms were registered to defendant.

A felony complaint charged defendant and the driver of the car with one count of carrying a loaded firearm as a nonregistered owner (former § 12031, subd. (a)(2)(F)—count one), and one count of carrying a loaded firearm with intent to commit a felony (a drive-by shooting), in violation of former section 12023 (count 2). Following a preliminary hearing, defendant and the driver were held to answer on count one. As for count two, however, the magistrate judge dismissed the charge as to both defendant and the driver, finding both that the prosecution had not shown that the two had "carrie[d]" the firearm for purposes of the relevant statute, and that the evidence did not support a finding that defendant or the driver had the intent to shoot at an inhabited dwelling. Defendant and the driver thereafter were charged by information with a single count of carrying a loaded firearm as a nonregistered owner.[2]

Before trial, defendant filed a motion in limine seeking to exclude any testimony regarding a potential drive-by shooting as being irrelevant and more prejudicial than probative (Evid. Code, §§ 350, 352). The trial court held a hearing pursuant to Evidence Code section 402, and heard testimony from two officers regarding this and other issues. The court ruled that it would allow the police officer who conducted the traffic stop to testify about his fear that a drive-by shooting was about to take place, but with a limiting instruction that the testimony was to be considered only to explain the officer's conduct, and not as proof that a drive-by shooting was in fact about to take place.

The day after the trial court ruled on the issue, defendant filed a supplemental motion in limine, seeking a "curative instruction" to the jury that the magistrate judge had previously ruled that there was no probable cause to believe that defendant possessed a gun with the intent to commit a drive-by shooting. He argued that, pursuant to *People v. Griffin* (1967) 66 Cal.2d 459 (*Griffin*), he was entitled to the admission of evidence that the court previously had dismissed a charge against him related to a drive-by shooting. The trial court denied the motion, stating that *Griffin* was not on point, in part because the evidence of a possible drive-by shooting was to be offered only for a limited purpose,

[2] Defendant and the driver were jointly tried; however, the jury found the driver not guilty of the charged crime.

unrelated to defendant's guilt or innocence. The trial court again emphasized that it would provide a limiting instruction, which it did as set forth above when the officer testified, as well as during final instructions to the jury.[3]

A jury convicted defendant as charged. The trial court placed defendant on probation for three years. This timely appeal followed.

II.
DISCUSSION

Relying on *Griffin*, *supra*, 66 Cal.2d 459, and its progeny, defendant argues, as he did below, that the trial court erred by admitting evidence that an officer believed that a drive-by shooting was about to take place, without permitting defendant to present evidence that a drive-by shooting charge against him had been dismissed following the preliminary hearing. We disagree.

In *Griffin*, defendant was convicted of murdering a female victim. (*Griffin*, *supra*, 66 Cal.2d at p. 461.) The trial court admitted evidence that, before defendant was arrested for murder, he went to Mexico, where he attacked another woman. (*Id.* at p. 463.) The Supreme Court held that the evidence of the second attack was admissible "because the similarities between the crimes made evidence of the later crime relevant to prove that [the murder victim's] injuries were not accidental but inflicted by defendant and to prove that he intended to rape her." (*Id.* at pp. 464-465.) The court concluded, however, that it was prejudicial error to exclude evidence that defendant was acquitted of a rape charge by a Mexican court in connection with the second attack, because this

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[3] The jury was instructed before deliberations as follows: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other. [¶] Now I'm going to repeat for you the limiting instructions I gave at the time some of that evidence was admitted for a limited purpose come in [*sic*]. [¶] You've heard evidence about an officer's belief that other crimes, not charged in this case, might have been intended or in progress at the time the vehicle in this case was stopped. That evidence is not offered, and may not be considered, as proof that in fact any such crime was intended or in progress. That evidence is offered only for the limited purpose of explaining the officer's state of mind, and the reason the traffic stop and questioning were conducted in the way they were conducted. You may not consider the officer's beliefs for any other purpose."

evidence would assist the jury in assessing the weight to give the evidence of the rape accusation. (*Id.* at pp. 465-466.)

The so-called "*Griffin* rule" has been summarized as follows: "[I]f a trial court permits the prosecution to present evidence that the defendant committed one or more similar offenses for which he or she is not charged in the current prosecution, the trial court must also allow the defense to present evidence of the defendant's acquittal, if any, of such crimes, and failure to allow such acquittal evidence constitutes error." (*People v. Mullens* (2004) 119 Cal.App.4th 648, 664-665 [extending *Griffin* rule to evidence of sexual offenses admissible under Evid. Code, § 1108 to show propensity]; see also *People v. Jenkins* (1970) 3 Cal.App.3d 529, 533-535 [error, though not prejudicial, to admit evidence that codefendant was arrested for crime similar to charged offense to show intent, where evidence that similar charge had not been prosecuted was excluded].)

Here, however, the evidence defendant highlights on appeal was not offered to prove that defendant actually committed, or intended to commit, a drive-by shooting. (Cf. *People v. Mullens*, *supra*, 119 Cal.App.4th at pp. 664-665.) The "*Griffin* rule" simply does not apply here. As the jury was *twice* instructed, evidence that an officer believed that a crime might be in progress when he pulled over the vehicle in which defendant was a passenger was offered for the limited purpose of explaining the officer's state of mind, and that jurors could not consider the officer's belief "for any other purpose." Jurors also were specifically instructed twice that the evidence of the officer's belief "*may not be considered as proof that in fact any such crime was intended or in progress*." (Italics added.) In light of this limiting instruction, we reject defendant's argument that "the jurors were likely to have thought that [defendant] was implicated in a 'drive-by shooting,' just not yet charged or arrested, and thus predisposed to committing the instant offense." In fact, had the jury been told that a drive-by charge against defendant had been dismissed, this would only have served to inform the jury that defendant had at one point been *charged* with this crime. As instructed, the jury had no way of knowing that defendant was ever accused of intending to commit a drive-by shooting, unlike in *Griffin*, *supra*, 66 Cal.2d 459 and the other cases upon which

defendant relies, where the prosecution offered other-crimes evidence in order to prove a defendant's guilt. The trial court here did not err.

III.
DISPOSITION

The judgment is affirmed.

_____
Sepulveda, J.*

We concur:

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Ruvolo, P. J.

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Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.