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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A130952

v.

**(Sonoma County
Super. Ct. Nos. SCR557225
& SCR571335)**

JOSE MANUEL MARTINEZ,

Defendant and Appellant.

_____/

Jose Manuel Martinez appeals from a judgment entered after he pleaded guilty in one criminal proceeding to possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and falsely representing himself to a police officer (Pen. Code, § 148.9, subd. (a)), and was found guilty by jurors in a second criminal proceeding of driving recklessly while evading a police officer. (Veh. Code, § 2800.2, subd. (a).) Appellant contends his conviction must be reversed because the trial court erred when it admitted certain evidence at his trial. We conclude the court did not commit any prejudicial errors and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

We need not set forth the facts that support appellant's first conviction in detail given the issues that have been raised. It should suffice to say that on March 14, 2009, police arrested appellant in an apartment in Cotati. Appellant had methamphetamine in his pocket and he falsely identified himself to the arresting officers.

Based on this incident, a complaint was filed charging appellant with the offenses we have set forth above. As is relevant here, the complaint also alleged appellant had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

Appellant pleaded guilty to both counts and admitted the prior prison term allegations.

On June 23, 2009, the trial court sentenced appellant to seven years in prison, but suspended the execution of sentence and placed appellant on probation for three years.

Shortly thereafter, appellant ran afoul of the law once again.

On October 15, 2009, shortly before 4:00 p.m., Sonoma County Deputy Sheriff Brandon Cutting was on patrol with a partner when he noticed a GMC pickup truck driving on Stony Point Road in Santa Rosa. Cutting decided to stop the truck because its license plate had expired and its windshield was cracked. He activated his lights and followed the truck into a nearby gas station.

When the truck stopped the passenger, Anatolio Barocio, jumped out and started to walk away. Cutting and his partner quickly exited their patrol car and the partner stopped Barocio. Cutting recognized appellant as the driver of the truck from a photograph he had seen at a meeting to receive information about recent parolees.

Suddenly appellant started driving again. He made a U-turn, drove past Cutting and out of the gas station. Cutting jumped back into his patrol car and gave chase. He activated his siren and lights and pursued appellant as he drove first onto Stony Point Road, then onto Highway 12, then onto Highway 101. Appellant drove wildly, cutting across lanes, passing vehicles on the road's shoulder, and driving at speeds of up to 100 miles per hour.

Appellant exited the highway and drove through a crowded intersection. Cutting lost sight of the truck momentarily but helpful citizens told him where it had gone. Cutting drove in the direction indicated and he again saw the truck at a nearby storage facility. As Cutting watched, a woman ran up to the truck. Cutting stopped his patrol car,

got out, and questioned the woman who by that point was inside the truck but was alone. She would not provide any information about where appellant had gone.

Cutting noticed a wallet and some money on the ground near the truck. He retrieved the wallet and determined that appellant's parole identification card was inside. The cash totaled approximately \$3,100.

Cutting and other law enforcement personnel searched the storage facility. They found appellant hiding under a bed in an apartment that was located above the storage facility's office. A person named Jose Lopez was sitting on top of the bed under which appellant was found.

Based on these facts, an information was filed charging appellant with driving recklessly while evading a police officer. As is relevant here, the information again alleged appellant had served four prior prison terms.

The case proceeded to trial where the prosecution presented the evidence we have set forth above. Appellant presented a SODDI defense,¹ arguing it was not he who was driving the truck, but Lopez, the man who was sitting on top of the bed at the time of his arrest. Appellant supported this defense with testimony from Lopez who testified he was driving the truck that day. Lopez's credibility on this point was put into question by his highly selective memory. For example, Lopez said he was with a friend when Detective Cutting pulled him over but he did not know his friend's name. Lopez also said he tried to visit three other friends that day but he did not know the names of those friends, where they lived, or what they looked like. Lopez could not recall whether there was any traffic on Highway 12 or Highway 101 while he was being chased. He could not recall how long he had known appellant or what they did when they associated with each other. Lopez could not even remember how he got into the storage facility where he was found.²

¹ A defense of "some other dude did it" (*People v. Benjamin* (1975) 52 Cal.App.3d 63, 72.)

² The trial court noted Lopez's selective testimony and stated he was being "purposefully evasive."

Anatolio Barocio (who had a long criminal history and who at the time of trial was in custody on carjacking charges) testified he was in the truck that day and that Lopez was the driver.

In addition, the defense also presented testimony from an expert witness who said eyewitness identification is the least reliable means of identification and that police officers are no more accurate than the average person in making identifications.

The jurors apparently rejected this defense and convicted appellant on the charged offense. In a court trial that followed, appellant admitted serving the four prior prison terms.

On January 18, 2011, the court imposed judgment in both cases sentencing appellant to a total term of seven years, eight months in prison.

II. DISCUSSION

A. Jailhouse Conversations

Appellant contends the trial court erred because it failed to preclude the prosecutor from questioning defense witness Jose Lopez about telephone calls appellant made while he was in jail. To put this argument in context, further background is necessary.

During the defense case, the prosecutor wanted to admit evidence about two phone calls that had been recorded while appellant was in jail.³ In the first call, the person to whom appellant is speaking asks appellant to give \$1,000 to the person's mother.⁴ In the

³ Appellant has not provided a written transcript of the calls but he has reconstructed them based on testimony in the reporter's transcript. We will accept appellant's reconstruction for purposes of this appeal.

⁴ According to Appellant, the transcript of the first call is as follows:

“[Person 1] There is another favor I was going to ask you, dog.

“[Person 2] Hum?

“[Person 1] Before I'll go in homey, I wanna leave like, like, like 1,000 for my mom, fool, cause she really needs money.

“[Person 2] All right. I'll do that fool, all right. Fuckin, ah, as a matter of fact, look, Louisa for fff [*sic*] four hundred bucks on her right now of mine.

“[Person 1] All right.

second call, appellant tells the person he is so grateful he will have the person's name tattooed onto his body.⁵ The prosecutor argued the calls should be admitted because Lopez was the person to whom appellant was speaking and the calls showed Lopez had a motive to lie.

The trial court allowed the prosecutor to question Lopez on the issue briefly in front of the jurors. Lopez testified that he did not recall speaking with appellant on the telephone at any time after the charged incident and he did not recall asking appellant to give \$1,000 to his mother.

The court excused the jurors and the parties discussed how they should proceed. The prosecutor wanted to impeach appellant with the transcripts of the two calls. Defense counsel objected based on a lack of foundation arguing the prosecutor had not shown Lopez was the person on the calls. The prosecutor argued Detective Cutting was familiar with Lopez's voice and he could provide the needed foundation.

“[Person 2] I got, I got, I gotta [couple] of G's on my books right now, so I'll just fuckin' release, I'll release like 600 bucks from here and then I'll have her – I'll tell her to give you the 400.

“[Person 1] Yeah.

“[Person 2] That's like a G, fool, all right.

“[Person 1] All right. I just want to leave her a thousand, homey, because you know what I mean.”

⁵ According to appellant, the transcript of the second call is as follows:

“[Person 2] We're gonna do it fuckin' legit, fool. All right. And everything fuckin' cool, dog. We're gonna go to our little spot and everything. They ain't nothing change for. I ain't forgot about cha and never will, nigga, you stay in my heart, fool. As a matter of fact, I'm gonna get your motherfuckin' little name tattooed on me, fool.

“[Person 1] That's real love right there.

“[Person 2] Real love, niggah, watch watch, nigger, I ain't lying. I ain't got no mother fucker's name on me fool, but that's all – that's all in the hood, fool, you hear me.”

The court ruled the prosecutor could impeach Lopez with telephone conversations and noted the foundational problems might not materialize because Lopez might admit participating in the calls.

The court recalled the jurors and the prosecutor questioned Lopez about each of the statements made in both of the calls. Lopez denied participating in either call and he denied either hearing or uttering any of the statements made. In light of Lopez's testimony, the prosecutor moved on to other issues.

The parties returned to the issue later in the trial. The prosecutor asked that he be allowed to call Lopez's probation officer who would testify that he had approximately 15 contacts with Lopez and that he could recognize his voice on the calls. The trial court still declined to admit the calls stating the "foundational aspects are troubling . . . especially since the witness denied them."

Appellant now contends the trial court erred. Appellant *does not* challenge the court's ultimate ruling in which it declined to admit the calls. Rather, appellant contends the trial court erred because it allowed the prosecutor to question Lopez about the calls in front of the jury. According to appellant, through this procedure "the jury was presented with the entire content of the conversation[s], without there having been any foundational showing as to [their] reliability[.]"

The relevance of particular evidence frequently is dependent upon the existence of a preliminary fact. (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) When that is the case, a trial court can, but is not required to "determine the question of the admissibility of evidence out of the presence or hearing of the jury" (Evid. Code, § 402, subd. (b).) A trial court's ruling on this issue will be reversed on appeal only where the trial court abused its discretion. (*People v. Lucas, supra*, 12 Cal.4th at p. 466.)

Here, the phone calls at issue were highly relevant for two purposes: to show Lopez had a motive to lie, and to impeach Lopez's statement that he could not recall speaking with appellant on the telephone at any time after the charged incident. But the use of the phone calls for either purpose was dependent upon a preliminary fact: that Lopez was the person speaking with appellant on the calls. There was evidence to

support the conclusion that Lopez was the person who was speaking with appellant on the calls. Detective Cutting, who had two prior interactions with Lopez, was willing to testify the other person speaking was Lopez. Indeed, it later turned out that Lopez's probation officer, who had more than a dozen interactions with Lopez, also was willing to testify that he was the person on the tape. Based on this record, the trial court could reasonably conclude that it was appropriate to question appellant about the disputed preliminary fact in front of the jurors. We conclude the court did not abuse its discretion.

Furthermore even if we were to assume, *arguendo*, that the trial court erred, any possible error was harmless. First and importantly, while the court allowed the prosecutor to question Lopez about the calls, Lopez denied every aspect of them. Thus, no prejudicial evidence was presented to the jurors. The prosecutor's questions themselves could not have prejudiced appellant. The court specifically instructed the jurors that the prosecutor's questions were not evidence and that they must base their decision *only* on the evidence presented at trial.⁶ On appeal, we must presume the jurors followed this instruction. (*People v. Wilson* (2008) 44 Cal.4th 758, 834.)

Second, we do not view this as a close case. Detective Cutting identified appellant as the driver of the truck. He was sure of his identification and he got a good look at appellant both when he stopped him at the gas station, and when appellant drove by as he was attempting to flee. Cutting's identification was then buttressed by the fact that appellant's wallet and identification were found on the ground outside the truck, and by

⁶ The court instructed the jurors on this issue as follows:

“You must decide what the facts are in this case. You must use only the evidence that was presented in the courtroom. Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

“Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case. But their remarks to you are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence.

“The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggested it was true.”

the fact appellant was found hiding under the bed at the storage facility thus showing consciousness of guilt. (See, e.g., *People v. Kelly* (1928) 203 Cal. 128, 138.) While Lopez and Barocio both stated that Lopez was the driver, the testimony of both was suspect at best. Lopez's memory was highly selective and he could not remember even the most basic of facts about the incident. Indeed, the situation got so bad the trial court stated Lopez was being deliberately evasive. Barocio's testimony was problematic too as he had a long criminal history and at the time of trial he was being prosecuted for carjacking.

On this record, we conclude it is not reasonably probable appellant would have obtained a more favorable result absent the error alleged. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Any possible error the court may have committed was harmless.

The arguments appellant makes do not convince us a different conclusion is warranted. Appellant cites *People v. Mixon* (1982) 129 Cal.App.3d 118, 133, as supporting the conclusion that the court should have questioned Lopez about the calls outside the jury's presence. But that case simply states that foundational facts *can* be determined outside the jury's presence, not that a court *must* do so. *Mixon* is not controlling here.

Appellant also argues the court was correct when it ruled the phone calls were not admissible because the prosecutor did not lay an adequate foundation. Appellant cites *Hodo v. Superior Court* (1973) 30 Cal.App.3d 778, for the proposition that the prosecution was obligated to establish the identity of the person on the phone calls by "scientifically reliable means." But appellant overstates the holding of that case significantly. The issue in *Hodo* was whether voice identification using a device known as a spectrogram is scientifically reliable. The *Hodo* court conducted what today would be called a *Kelly/Frye* analysis and ruled that type of evidence could be admitted. (*Id.* at pp. 784-791.) Thus, contrary to what appellant argues on appeal, *Hodo* does not stand for the proposition a person's voice must be identified through scientifically reliable means. Indeed, our Supreme Court has long recognized that defendant's voice can be identified

by lay witnesses. (See *People v. Clark* (1992) 3 Cal.4th 41, 135-137; *People v. Osuna* (1969) 70 Cal.2d 759, 764-765.)

We conclude the trial court did not commit prejudicial error when it allowed the prosecutor to question Lopez in front of the jury.

B. Evidence that Appellant was a Parolee

At several points during the trial, the jurors were told appellant was on parole when the incident in question occurred. For example, Detective Cutting testified that he recognized appellant as the driver of the truck from a picture he saw at a meeting to receive information about recent parolees. John Thompson, who was appellant's parole officer, testified it would have been a violation of appellant's parole to be found in a car with Anatolio Barocio.

Appellant now contends his conviction must be reversed because the "highly prejudicial" fact that he was on parole should have been excluded from the evidence presented to the jurors.

Evidence Code section 1101, subdivision (a) states the general rule that character evidence including evidence that the defendant has committed prior crimes, is inadmissible to prove the defendant's conduct on a specific occasion. Evidence Code section 1101, subdivision (b) then states the familiar exception that evidence that the defendant has committed some other crime is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition . . . to commit such an act." The trial court is granted broad discretion to determine whether other crimes evidence should be admitted and we will reverse the court's ruling on appeal only where the court abused its discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

Here, the trial court allowed the jurors to learn that appellant was on parole at the time of the offense charged. "There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580.) On the other hand, many cases have recognized that evidence the defendant is on parole

can be admitted if it is relevant and not unduly prejudicial under Evidence Code section 352. (See, e.g., *People v. Durham* (1969) 70 Cal.2d 171, 188-189; *People v. Powell* (1974) 40 Cal.App.3d 107, 154-155.)

Here, evidence that appellant was on parole was highly relevant. Appellant claimed Lopez was driving the truck that day therefore Detective Cutting's ability to identify appellant as the driver was critical. The trial court could and impliedly did conclude the fact that Cutting learned of appellant's identity through a meeting that was specifically designed to inform him about persons who recently had been placed on parole made it more likely Cutting would recognize appellant.

Furthermore, appellant's status as a parolee helped identify appellant as the driver. Appellant's parole officer testified it would be a violation of appellant's parole to be in a car with Anatolio Barocio. The fact that the driver of the truck fled was strong evidence that appellant was the driver and that he fled to avoid being returned to prison. As another court noted in similar circumstances, "Service of a prison term is highly probative to show a motive to flee apprehension for the current crime, i.e., to avoid service of future additional prison time." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1020, fn. 2.)

The court's admission of evidence that appellant was on parole was not unduly prejudicial. The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) As we have stated, the fact that appellant was on parole was highly relevant to identify appellant as the driver of the truck and to explain his actions. We see no chance for undue prejudice. The trial court instructed the jurors that appellant's status as a parolee was being admitted for a limited purpose and that it could not be used as evidence of his guilt.⁷ We must presume the jurors understood and followed this instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

⁷ The court instructed the jurors as follows:

In sum, we conclude the trial court did not abuse its discretion when it allowed the jurors to learn appellant was on parole at the time of the charged offense.⁸

C. Cumulative Error

Appellant argues that even if the individual errors he has identified were not prejudicial, when they are considered cumulatively, they require a reversal of the judgment. We have rejected most of appellant’s arguments. Considered cumulatively, the even possible errors appellant has identified do not require reversal. (Cf. *People v. Leonard* (2007) 40 Cal.4th 1370, 1431.)

III. DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.

“Ladies and gentlemen, the fact that Mr. Martinez may have been on parole at the time of this particular incident is being introduced for a limited purpose, only. And it is not to be used by you to infer guilt as to the charged crime in this case.

“So again, the fact that there may be evidence that he was on parole or possibly on parole is not—it’s being introduced for a limited purpose, only, and it was not to be used to infer guilt to the crimes charged in this case.”

⁸ Having reached this conclusion, we need not decide whether any possible error was harmless.