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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAREON YOUNG,

Defendant and Appellant.

C068991

(Super. Ct. No. 10F08510)

Following a jury trial, defendant Daeron Young was convicted of felony carrying a loaded concealed firearm, of which he was not the registered owner. (Former Pen. Code, § 12025, subd. (b)(6).)¹ The trial court suspended imposition of sentence, placed defendant on five years' formal probation and ordered him to serve 180 days in the county jail. Defendant

¹ Statutory references are to the statutes in effect at the time of sentencing.

was awarded presentence custody credit of 27 days, but was not awarded any presentence conduct credits.

On appeal, defendant contends 1) the trial court should have granted his motion for mistrial based on improperly admitted evidence, and 2) he is entitled to presentence conduct credits. We modify the award of credits and affirm as modified.

FACTUAL BACKGROUND

On December 28, 2010, Aaron Elliott was working at the Majestic Lounge, a bar and dance club in Sacramento. Elliott worked security at the door and frisked people for weapons. He saw defendant leave the club between 10:00 and 11:00 p.m. with a "busted" lip.

Defendant returned to the club 30 to 45 minutes later. Elliott tried to search defendant, but defendant declined. When told he could not enter the club, defendant asked Elliott to go in the club and get his brother "A.J." Elliott agreed and went inside the club, leaving the club's manager, Cheikh Sow, at the front door. Elliott found a person named A.J., but the man said he did not have a brother.

Elliott told Sow that defendant had been in a fight inside the club earlier that night. After Sow told defendant he could reenter, but would have to be patted down, defendant backed away. Suspicious, Sow placed his hands on defendant's waist. Sow felt a hard object that, based on his five years in the Senegalese military, he thought was a gun. Sow yelled, "He's got a gun," and defendant fled. Sow testified that he and an

employee named Dave Curry ran after defendant, following defendant past an apartment complex with a pool.

Sacramento County Sheriff's Deputy Eugene Hardy was at the parking lot of the Majestic Lounge, having responded to a different fight at the club. He heard someone yell, "[h]e's got a gun," and saw defendant being chased down the street by two men, Sow and Elliott. Deputy Hardy activated his lights and followed defendant in his patrol car. During the chase, Deputy Hardy saw defendant make a throwing motion toward the apartment complex's swimming pool and saw an object fly out of defendant's hand, but could not tell exactly what it was. Deputy Hardy described the throwing motion as beginning at defendant's right hip and resembling a motion like throwing a grenade. Deputy Hardy eventually cut in front of defendant with his patrol car, causing defendant to stop and raise his hands.

Deputy Hardy searched defendant. Defendant had a cell phone, but did not have anything illegal on him.

Both Deputy Hardy and Deputy Monica Chavez testified Sow and Elliott told them that defendant threw a gun by the pool while Sow and Elliott were chasing him. Sow and Elliott then assisted the deputies in searching for the gun in the area where they said defendant had thrown it. Deputy Eric Duncan participated in the search of the pool area and found a loaded nine-millimeter Ruger P-95 handgun within the folds of an umbrella that was lying on the ground. The location of the pistol was consistent with where Deputy Hardy saw defendant throw the object. The hammer of the gun was cocked, there was

a bullet in the chamber, and five more bullets were in the magazine.

The prosecutor impeached both Sow and Elliott with prior statements they made to the deputies. During their testimony, Sow and Elliott denied seeing defendant throw a gun during the chase. During his testimony Sow admitted having previously said that he did not want to testify. Elliott testified he did not want to be labeled a "snitch."

Deputy Hardy and Deputy Chavez testified that both Sow and Elliott told them that they chased defendant and saw him throw the gun by the pool during the chase. Elliott was further impeached because he gave the deputies a false last name and address when questioned, telling them his name was Aaron Thomas. He testified that he had lied about his name because he had an outstanding warrant for failure to complete home detention for a driving under the influence (DUI) conviction and did not want to be arrested.

The pistol was stolen.² No fingerprints were found on the pistol's magazine or bullets.

DISCUSSION

I. Defendant's Mistrial Motion

Defendant contends the trial court erred in denying his motion for mistrial based on the prosecutor's direct examination of Sow. We disagree.

² Defendant was acquitted of receiving stolen property.

As earlier noted, the prosecution found it necessary to impeach Sow with prior statements he made to the deputies. The prosecutor asked Sow about the various things he told Deputy Chavez. The issue defendant raises on appeal involves the following questions, answers and rulings by the trial court:

"[PROSECUTOR]: And did you tell her, 'He came back probably 45 minutes later and asked us to page a male named A.J.?'"

"[SOW]: That's right.

"[PROSECUTOR]: And did you tell her, 'I think that was the one he had a fight with and I think Young came back to shoot him'?"

"[DEFENSE COUNSEL]: I'm going to object, Your Honor.

"THE COURT: I'm sorry?"

"[DEFENSE COUNSEL]: I'm objecting to this."

The court overruled the objection and explained the impeachment process to the jury. When defense counsel asked to approach, the court denied her request and allowed the prosecutor to proceed.

"[PROSECUTOR]: Did you tell the deputy you spoke to, 'I think that was the one he had a fight with, and I think Young came back to shoot him?'"

"[SOW]: I didn't say he -- I say he came back to shoot him. I say that's the one he had a fight here with and he came back. I say that.

"[DEFENSE COUNSEL]: Your Honor, again, I'm going to object to that as to no personal knowledge of this witness, and speculation.

"THE COURT: Well, he's being asked whether or not he said that to the police. So to the extent that's what the question's about, it's overruled."

Defense counsel provided additional explanation for the objection at the next break. Counsel told the court the question was improper impeachment because it addressed a matter that could not be brought up on direct, since Sow had no personal knowledge of why defendant returned to the club. It was speculation on Sow's part. Defense counsel further pointed out that there was no testimony that was inconsistent with Sow's statement that he thought defendant had come back to shoot the person with whom he had fought. The trial court agreed, and told counsel to remind the court to give a cautionary instruction at the conclusion of the evidence, which counsel agreed to do. Defense counsel did not request an immediate admonition. According to the court's later recitation of an off-the-record conversation between the court and counsel on this matter, defense counsel expressed some concern that such an admonition might draw attention to the statement. When the prosecutor sought clarification of the questions she would be permitted to ask Deputy Chavez regarding Sow's prior statements, the trial court ordered the prosecutor to not ask the deputy about Sow's speculation that defendant had returned to shoot somebody.

At the conclusion of the evidence, defense counsel moved for mistrial and also proposed an instruction for the jury to be used if the court denied the mistrial motion.³ In support of defendant's mistrial motion, counsel argued that the instruction would not cure the prejudice from the prosecutor's question and Sow's answer. Counsel asserted the statement was very prejudicial to defendant as it was not based on personal knowledge, but on speculation derived from hearsay. According to counsel, while the prosecutor could argue that defendant got into a fight with someone at the club and chose to return later that night, a witness's testimony regarding his belief as to what happened carried greater weight than an attorney's argument. Counsel noted, "The jury has never heard that that information was to be stricken or that they were not to consider it," and asserted that the court could not "unring the bell." Counsel argued the statement that defendant brought a gun to shoot the person with whom he fought was tantamount to saying defendant was guilty. Thus, no instruction could cure the prejudice.

³ The proposed instruction read as follows: "You heard testimony from Cheikh Sow that he made a statement to Deputy Chavez that he believed AJ was the person that Dareon Young had been involved in a fight with earlier on the night of December 28, 2010, and that he also believed that Daeron [*sic*] Young came back to the Majestic Lounge later that night to shoot AJ. [¶] Cheikh Sow had no basis in his personal knowledge for that statement; it is mere unfounded speculation. [¶] Further, that statement is completely unsupported by the evidence in this case. [¶] I instruct that this statement is to be stricken from the record. [¶] Do not consider it for any purpose."

The trial court denied the mistrial motion, stating, "given all the other evidence in the case, I think that that one brief throwaway line that Mr. Sow made, even though it sounds pretty bad, obviously, but I think that was said one time. I'm going to give a limiting instruction, tell the jurors to disregard it." The court's instruction to the jury was substantially similar to defendant's requested instruction, but the court removed the sentence, "This statement is completely unsupported by the evidence in this case."⁴

"In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. [Citation.] 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

Defendant argues the case against him was "[m]arginal" and "far from strong." He observes that no witness testified to seeing defendant in physical possession of the gun. Defendant emphasizes that the credibility of two of the three main witnesses against him, Elliott and Sow, was impeached.

⁴ The trial court agreed with defendant's request to give the instruction orally but not in writing.

Elliott was impeached with a prior felony conviction⁵ and had given a false name to the deputy who interviewed him at the scene, while Elliott and Sow were both impeached with prior inconsistent statements made to law enforcement.

According to defendant, the prosecutor's question and Sow's answer elicited information -- that defendant carried a gun back to the club to shoot the man who had fought him -- was highly prejudicial to defendant because it bolstered the People's weak case. In compliance with the trial court's order, the prosecutor did not ask Deputy Chavez about that part of Sow's statement. Nor did the prosecutor refer to the improper question or answer in closing or expressly argue that defendant came back to shoot someone. Instead, the prosecutor argued that the fight at the club gave defendant "a motive to possess that gun. He gets in a fight, he leaves with a busted lip, and he comes back with a gun." (Italics added.) Later, the prosecutor told the jury, "The defendant got in a fight that night. He didn't leave and not come back. He left and came back. He had a motive. He got his lip busted in a fight. A busted lip is pretty good evidence that he was in a fight. . . ." Defendant contends the prosecutor's argument heightened the prejudice from the improper question and answer. From this, defendant

⁵ In addition to having an outstanding warrant, Elliott admitted he had a 1990 conviction for possession of cocaine, a 1998 misdemeanor conviction for domestic violence, and a 1992 DUI conviction.

concludes that no instruction could cure the prejudice and the trial court should have granted his mistrial motion.

We do not agree that the evidence against defendant was "marginal." While circumstantial, the evidence was nonetheless compelling. Defendant left the club with a "busted lip." When he came back, he twice refused to be patted down for weapons -- strong evidence he did not want the gun to be discovered. He was looking for A.J. and falsely claimed A.J. was his brother. When Sow attempted to pat him down, defendant stepped back. Sow, a former member of the Senegalese military, thought he felt a gun. When Sow yelled out his suspicion, defendant immediately fled. Deputy Hardy saw defendant throw something toward the apartment pool area during the chase. Both Sow and Elliott told deputies they saw defendant throw the gun in that area as they chased him. A gun was recovered from that area. The gun was loaded and cocked with a bullet in the chamber, apparently ready for immediate use.

We acknowledge that the trial court erred in overruling defendant's objection to the prosecutor's question about Sow's statement that defendant returned to shoot the person he had fought. There was no evidence that the statement was based on personal knowledge. A hearsay declarant (here, Sow) must have personal knowledge when the declarant's statement is offered for the truth of the matter asserted. (*People v. Valencia* (2006) 146 Cal.App.4th 92, 103.) "The rationale for requiring a hearsay declarant to have personal knowledge when the declarant's statement is admitted for its truth is identical

to the rationale for requiring a witness to have personal knowledge of the subject matter of the witness's testimony. In the absence of personal knowledge, a witness's testimony or a declarant's statement is no better than rank hearsay or, even worse, pure speculation." (*Id.* at pp. 103-104.) In addition to a lack of evidence of personal knowledge, the statement was not inconsistent with testimony Sow had given. Thus, it was not admissible under the prosecutor's theory that it was a prior inconsistent statement.

Nevertheless, the exchange at issue was a single question which elicited an ambiguous answer. The transcript reflects that Sow spoke in somewhat broken English throughout his testimony. Sow's testimony was: "I didn't say he -- I say he come back to shoot him. I say that's the one he had a fight here and he came back. I say that." That testimony could be understood as a denial that he told the deputies defendant came back to shoot the person with whom he fought, but an admission that he told the deputies defendant had been in a fight and returned. This reading is reasonable, especially in light of Sow's denials of other things he told the deputies. The ambiguous nature of the answer to the prosecutor's question makes the possibility for prejudice less likely. Moreover, the prosecutor made no further reference to the exchange, and the prosecutor's argument to the jury was based on the permissible inference that the prior fight gave defendant a motive to return to the club with a gun -- an obvious inference a reasonable jury

would likely have drawn from the strong circumstantial evidence without Sow's statement.

Even if Sow's testimony is understood as an admission that he told the deputy, "I *think* Young c[a]me back to shoot him," that single question and answer, containing what was clearly Sow's speculation, was amenable to a curative instruction. "It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]' [Citation.]" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) The trial court gave a curative instruction and we presume the jury followed it. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1014.) That instruction was sufficient to cure any prejudice from the prosecutor's error. It was not an abuse of discretion to deny defendant's mistrial motion.

II. Conduct Credits

Defendant was sentenced on August 5, 2011. The trial court granted probation and ordered defendant to serve 180 days in jail, with presentence custody credit for 27 actual days. The court did not award presentence conduct credits.

Defendant contends and the Attorney General agrees that defendant is entitled to 12 days' presentence conduct credit. We agree as well. (Former Pen. Code, § 4019, subds. (a)(1), (b), (c), (f), eff. Sept. 28, 2010; see *In re Marquez* (2003) 30 Cal.4th 14, 25-26 [setting forth the formula under the statutory language to which former Penal Code section 4019 was reinstated

in the September 2010 amendment].) We shall modify the judgment accordingly.

DISPOSITION

The matter is remanded to the Sacramento County Superior Court with directions to amend its records to reflect that in addition to the 27 days' credit for actual service defendant received against the 180-day jail term imposed, he is to receive an additional 12 days' presentence conduct credit against that term. In all other respects, the judgment is affirmed.

_____ MURRAY _____, J.

We concur:

_____ NICHOLSON _____, Acting P. J.

_____ HULL _____, J.