

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMARR LEROY SESSION,

Defendant and Appellant.

E060544

(Super.Ct.No. SWF1203005)

OPINION

APPEAL from the Superior Court of Riverside County. Mark A. Mandio, Judge.

Affirmed in part; reversed in part with directions.

Steven J. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Lamarr Session, of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)), during which he was armed with a firearm (Pen. Code, § 12022, subd. (a)(1))¹ and armed with a deadly weapon (§ 667, subds. (c)(2) & (e)(2)(C)(iii)), two counts of receiving stolen property (§ 496, subd. (a)), during which he was armed with a deadly weapon, and two counts of possessing a firearm by a violent ex-felon (§ 29900), during which he was armed with a deadly weapon. In bifurcated proceedings, defendant admitted having suffered a prior conviction for which he served a prison term (§ 667.5, subd. (b)) and a strike prior (§ 667, subds. (c) & (e)(2)(A)). He was sentenced to prison for nine years, four months and appeals, claiming his motion to exclude his pretrial statements should have been granted and insufficient evidence supports his convictions for receiving stolen property. We reject his first contention, but agree with the second. Therefore, we reverse his convictions for receiving stolen property, affirm his remaining convictions and his sentence, absent any reference to the reversed convictions.

FACTS

On July 26, 2012, a police officer accompanied a Child Protective Services (CPS) social worker to an apartment occupied by defendant, the mother of his child and his child to investigate an abuse allegation that had been made concerning the child. While there, the officer saw a digital scale with white residue on it, a green container with

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

methamphetamine inside and a small amount of marijuana on the kitchen counter. Inside the master bedroom closet, on top of clothes in a laundry hamper, were two firearms and the magazines for each. For purposes of the counts charging defendant with possession of firearms by a violent ex-felon, defendant stipulated that he had been convicted of such an offense. More facts will be disclosed as they are relevant to the issues discussed.

ISSUES AND DISCUSSION

1. Defendant's Motion to Exclude His Pretrial Statements

During a pretrial motion in limine, defendant sought to suppress his statements to a police officer on the bases that he had not previously been advised of his *Miranda*² rights and the statements were involuntary. At the hearing on the motion, the officer testified that he went to defendant's apartment, which was in a complex that had experienced a lot of gang/drug and drug sales/firearms activity, with a CPS worker, because someone had made a complaint about possible abuse of defendant's one-year-old child and his spouse at the apartment. The officer testified that in cases where a police officer accompanies a CPS worker, the officer conducts a criminal investigation to make sure that the home is safe and the child is adequately fed and cared for in it. Defendant answered the door and the officer smelled marijuana when he entered. Defendant went into the master bedroom to retrieve the child, who was napping there, and the officer followed him. Defendant handed the child to the CPS worker, who checked the child for

² *Miranda v. Arizona* (1966) 384 U.S. 436.

injuries. The officer went into the kitchen to check the refrigerator for food when he noticed a scale and a container with what he suspected was methamphetamine inside it, in an amount he considered to be for sale. The officer arrested defendant for possession for sale, handcuffed him and called for back-up. Before that, the officer had not looked into the bedrooms, other than peeking into the master bedroom when defendant took the child from it. The officer asked defendant if there were any weapons or any more narcotics in the home and defendant said there were not. The back-up officer arrived and the aforementioned officer began looking in the kitchen cupboards for a firearm, as, according to the officer, whenever there are narcotics for sale, there are weapons for protection. The officer asked defendant where he kept his gun. This time, defendant responded that there were guns in the master bedroom closet. As the officer looked in the closet, defendant said that the guns were in the laundry basket. The weapons were in plain view at the top of the basket, two-and-one-half feet off the floor. One of the guns was cocked and ready to be fired. The officer considered the guns to be a danger to the child and during prior incidents, during which he had accompanied CPS workers, he would try to locate any unsecured firearms, knives or tools that were dangerous to children. The CPS worker took custody of the child and the officer put defendant into his patrol car for the ride to jail, leaving the apartment empty. During the trip, defendant asked the officer if he could ask the officer a question. The officer told defendant he could. Defendant asked the officer whether the punishment for the crimes for which defendant had been arrested was greater than ten years. The officer replied that he did not know—that was between

defendant and the district attorney. Defendant asked the officer if the officer would be adding a gang enhancement allegation to the crimes for which defendant had been arrested. The officer replied that he would if it was applicable. Defendant then said that he had the guns for his protection. After they arrived at the station, the officer *Mirandized* defendant and defendant invoked his rights.

The trial court concluded that the public safety exception to *Miranda* applied to defendant's statement in the apartment about where the guns were in that the officer knew that guns were likely to be where drugs were. The court said, "getting those guns, whether or not [defendant] was in custody . . . at the time, [was] of utmost public safety. Getting them out of the [stream] of illicit commerce and away from people who may use them in the drug trade or who themselves are criminals is absolutely paramount to public safety." As to defendant's statement in the patrol car that he had the guns for protection, the trial court concluded that it had been volunteered and was not in response to a question by the officer, therefore, *Miranda* did not apply. As to the voluntariness of the statement in the apartment, the court concluded that the CPS worker's urging defendant to tell the truth³ when the officer had asked him where he kept his gun did not amount to

³ This was not reported in the summary of the officer's testimony because his testimony about it was ambiguous. When asked if he heard the CPS worker tell defendant that he needed to cooperate because having guns around the child wasn't safe, the officer testified, "If [the CPS worker] made that statement to him, I was busy looking through the cupboards trying to locate the weapons [¶] I didn't exactly hear what she was saying to him. [¶] I heard her asking him something about tell the truth [¶] . . . but I didn't hear the whole conversation."

coercion and there had been a significant break between this question and what defendant said in the patrol car.

Defendant argues that the public safety exception to *Miranda* did not apply here because at the time the officer asked defendant where he kept his gun, “the child was taken into the custody of C[PS].” However, the officer did not testify that the child had been taken into custody before defendant made the statement. The officer testified that a few minutes elapsed between the defendant’s statement and him being placed in the officer’s patrol car “[b]ecause [the CPS worker] still had questions for [defendant] regarding the welfare of the child. [¶] . . . [¶] I didn’t just grab him up and rush him out [after arresting and cuffing him] I had him continue with his interview with the CPS worker” It makes no sense that the CPS worker would take custody of the child before she had completed her investigation. Moreover, the trial court’s reasoning regarding the public safety exception had nothing to do with the child. The court was concerned with the broader public safety issue of having guns, one ready to be fired, in an apartment occupied by another person, i.e., the child’s mother, whose whereabouts were unknown at the time⁴ in a complex that saw more than its fair share of gang, drug and firearms activity. As noted in *New York v. Quarels* (1984) 467 U.S. 649, 657 “an

⁴ It is entirely possible that the officer did not even know if the child’s mother was still in the apartment at the time defendant made the statement. Certainly, the officer testified that he had not searched the bedrooms before he placed defendant under arrest. The officer testified only that “at some point during [his] investigation” he determined that only defendant and the child were in the apartment.

accomplice might make use of it” There was no testimony about the child’s mother, who was the subject of the spousal abuse allegation. She could have been an accomplice in defendant’s drug selling. Clearly, the tools of defendant’s trade—the scale, the methamphetamine and the guns, were in plain sight for anyone in the apartment to see and use.⁵ Thus, defendant’s reliance on *United States v. Fautz* (2011) 812 F.Supp. 2d 570 is misplaced, as there was no evidence that the police “achieved complete physical control over all occupants and can foreseeably maintain that control as long as necessary[.]” (*Id.* at p. 631.) Contrary to defendant’s assertion, the facts here were similar to those in *People v. Simpson* (1998) 65 Cal.App.4th 854 (*Simpson*), upon which the trial court relied. In *Simpson*, the defendant and others were suspected of possessing large quantities of cocaine and marijuana. (*Id.* at p. 857.) Warrants to search their homes were obtained and defendant’s wife was detained elsewhere during the search of their home. (*Ibid.*) Defendant was lured out of the house on a ruse, then arrested and told the truth. (*Ibid.*) An officer asked defendant if there were any guns or weapons on the property. (*Id.* at pp. 857-858.) The defendant replied that there was an automatic weapon in the master bedroom under a mattress, but he did not know if it was loaded. (*Id.* at p. 858.) In response to further questioning, he said that the gun was his and that a

⁵ The fact that the officer testified later *during trial* and *not at the hearing on the motion* that he would have searched for a gun regardless of what defendant had said about the ones he had in the apartment is irrelevant to the evidence that was adduced at the hearing and upon which the trial court made its ruling. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1393.)

child, the child's nanny and 14 Rottweiler dogs were still at the premises. (*Ibid.*) Animal Control secured the dogs and the search took place. (*Ibid.*) Division Three of this court said, "In *Quarels*, police officers were approached by a young woman who told them she had been raped by a man who subsequently entered a supermarket carrying a gun.

[Citation.] When Quarels was finally apprehended, police found him wearing a shoulder holster, but the holster was empty and no gun was on his person. Without administering *Miranda* warnings, an officer asked what had become of the gun, and Quarels responded by nodding in the direction of some cartons, saying, "[t]he gun is over there."

[Citation.] [¶] The [U.S. Supreme C]ourt concluded 'that the need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self incrimination.'

[Citation.] In so holding, the [C]ourt expressed its confidence that ' . . . police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed *solely* to elicit testimonial evidence from a suspect.' [Citation.] Thus, *Quarels* teaches that where questions are reasonably directed to defusing a situation which threatens the safety of either police officers or members of the general public, a suspect's answers are admissible in evidence, even if the questions were not preceded by *Miranda* warnings, and even if they happen to elicit an incriminating response. [¶] . . . Quarels was 'detained, frisked, and handcuffed prior to any questioning and was surrounded by at least four police officers when questioned about the gun. Nothing in the *Quarels* opinion suggests the police were

concerned for their own safety. Moreover, there was no imminent urgency; the supermarket was almost deserted and presumably could have been cordoned off.

[Citation.] . . . It was enough, however, that the officers reasonably believed the gun had been disposed of in a public place to justify an inquiry as to its location before *Miranda* warnings were required. . . . [¶] So here, even though [the defendant], who was handcuffed at a police command post, posed no imminent threat to anyone at the moment he was asked about guns in his residence, . . . the public safety exception of . . . *Quarels* still applies if the questions [the officer] asked were primarily related to an objectively reasonable need to protect police officers or the public from the dangers that would be immediately encountered once the police attempted to enter [the defendant's] residence to execute their warrant. . . . [¶] . . . Illegal drugs and guns are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons. . . . [¶] . . . [¶] . . . [The officer] had no way of knowing for sure who might still be 'behind the door' at [the defendant's] home. The mere fact that [the defendant] told the officer only a child and nanny were inside was certainly not dispositive. [The officer] was not obligated to believe [the defendant] and unnecessarily subject himself and others to dangers he reasonably believed to exist." (*Id.* at pp. 860-863, fn. omitted.) Although *Simpson* is distinguishable because it involved potential danger to officers executing a search warrant, here, the whereabouts of the third occupant of the apartment was unknown—she could have been in the apartment at the time

defendant made his statement, or she was elsewhere and could return to the apartment at any time.

In *People v. Cole* (1985) 165 Cal.App.3d 41, 51, the defendant was armed with a knife during an attempted kidnapping before running off, then, shortly thereafter, he jumped into another person's car and was let off at a house. He was seen at an apartment complex and when finally apprehended, did not have the knife. (*Id.* at p. 51.) He was asked where the knife was and said that he had gotten rid of it. (*Ibid.*) The appellate court held, "[The officer's] question to [the defendant] concerning the whereabouts of the knife was reasonably prompted by a concern for public safety. . . . [The officer] was . . . confronted with the immediate necessity of ascertaining where the knife was. Until the knife was discovered, it posed a threat to public safety." (*Id.* at p. 52.) The appellate court did not appear bothered by the fact that the defendant could have left the knife in the car or the house or one of the apartments. Similarly, in *People v. Gilliard* (1987) 189 Cal.App.3d 285, 287, after a shooting, defendant was arrested for being drunk in public near the scene of the shooting. No gun was found at the scene or on the defendant and an officer who suspected that defendant had been involved in the shooting asked him where the gun was. (*Ibid.*) The defendant said he had thrown it into bushes near the scene of the shooting. (*Ibid.*) In rejecting the defendant's assertion that the gun could have been locked in a house or car or placed somewhere out of the reach of the public, the appellate court concluded, "[The officer's] question was specifically directly only to the recovery of the missing gun. The scene of the crime and arrest were in a

residential area. As [the officer] testified, he asked [the] defendant where the gun was simply to remove it from a location where it might be retrieved by a child or other member of the public.” (*Id.* at p. 292.) Here, the potential for the third occupant of the apartment to come across the gun justified the officer’s question.

2. *Sufficiency of the Evidence*

Defendant contends that there was insufficient evidence to support the jury’s implied finding that he knew the guns that were found in the laundry hamper were stolen, therefore, his convictions for receiving stolen property involving them must be reversed. We agree.

The police officer testified at trial that after denying that there was a gun in the apartment in response to the former’s question where defendant kept his gun, and being urged by the CPS worker to either tell the truth or cooperate with the officer, defendant said “it” was in the bedroom in the clothes hamper. Inside the closed closet of the bedroom that appeared to be occupied by adults, on top of clothes in a laundry hamper, the officer found an Uzi-type semi-automatic handgun, a Browning Arms 9mm handgun and two unattached magazines that would fit each. The magazine that would fit the Browning had one round in it—the one that would fit the Uzi-type gun had 30 rounds in it. The Browning’s hammer had been pulled back and it was ready to fire, however, there was no round in it. The serial numbers of both guns had not been modified or obliterated in any way. On the way to the station, defendant told the officer that he had those guns to keep himself from getting “robbed or jumped.” The Uzi-type gun had been taken during

a residential burglary in Beaumont. The Browning had been taken during the burglary of a Los Angeles home.

The CPS worker testified at trial that she had urged defendant to tell the truth when the officer had asked him if there were any more narcotics in the apartment or firearms. When the worker contacted the mother of defendant's daughter to tell her, *inter alia*, that the child had been taken into protective custody, the mother said that she, defendant and the child lived in the apartment. The mother testified that defendant had keys to the apartment and he was on the lease.

The People assert that the guns were not registered to defendant, but they cite no portion of the record supporting this.⁶ Although the jury might have been able to reasonably infer from the officer's testimony that the guns were stolen and that they had not been registered by defendant, this fact does not create a reasonable inference that defendant knew the guns were stolen. He could have acquired them without knowledge of their nature and simply failed to register them. The People also point to the fact that defendant initially denied having the guns and this showed consciousness of guilt. While this may be true, it did not establish the nature of the guilt of which defendant was conscious. Defendant was a convicted felon and, no doubt, knew that possessing firearms constituted yet another felony. However, his original disclaimer of having the

⁶ In their statement of facts, the People assert that pages 76 and 77 of the reporter's transcript contain evidence supporting their assertion that the guns were not registered to defendant. Those pages contain no such reference.

guns did not create a reasonable inference that he additionally knew that the guns were stolen. Finally, the People assert that there is sufficient evidence of this knowledge where the defendant does not explain his possession, citing *People v. Perez* (1974) 40 Cal.App.3d 795, 799 [disapproved on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 863]. In *Perez*, the appellate court said, “[T]he law is . . . clear that possession of stolen property, accompanied by no explanation, or an unsatisfactory explanation, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. *Only slight corroboration is necessary to turn the inference into a verdict supported by substantial evidence.* [Citation.] . . . [The defendant] told [his nephew] that he knew the [stolen items] were stolen. . . . [H]e was present at his place of residence with goods which he admitted knowing were stolen. These factors constitute adequate corroboration that the good were ‘received’ by [the defendant] with knowledge that they had been stolen.” (*Id.* at p. 799, italics added.) Here, in contrast, while defendant offered no explanation for his possession of the guns, there was no corroboration, as there was in *Perez*, in the form of an admission by defendant that he knew the guns had been stolen. As we have already stated, defendant’s conduct, in attempting to distance himself from the guns, under the circumstances here, did not constitute corroboration tending to prove that defendant knew the guns were stolen. Neither did the testimony of the mother of defendant’s child that she had never seen defendant in possession of the guns, therefore, the People assert defendant must have been hiding the guns from her because he knew they were stolen. It was obvious

that the mother testified for the defense in an attempt to exonerate defendant from any guilt of the charged offenses. Her denial of ever seeing defendant with guns was about as credible to the jury as her story of the mysterious “Chico,” the father of defendant’s sister’s child, whose last name and contact information she did not know, who she appeared to infer must have been the one who brought the drugs and guns into the apartment. Moreover, much like the inference to be drawn from defendant’s denial of possessing the guns at all, any attempt he might have engaged in in “hiding” the guns from the mother of his child by keeping them on top of clothes in the closet she used in the bedroom in which she slept could have been directed at concealing from her the fact that he, a convict, was in possession of guns, not that he knew the guns were stolen.

DISPOSITION

Defendant’s convictions for possessing stolen property (counts 2 and 3) are reversed and the trial court is directed to amend the minutes of the sentencing hearing and the abstract of judgment to omit any mention of them. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

McKINSTER

J.