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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL CERVANTES, JR.,

Defendant and Appellant.

G049654

(Super. Ct. No. 12ZF0158)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

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Raul Cervantes, Jr., appeals from the judgment following his conviction on a count of conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1); all further undesignated statutory references are to this code) and a count of gang participation (§ 186.22, subd.(a)). A gang enhancement was also alleged, and found to be true, as to the conspiracy count. Cervantes was sentenced to 25 years to life on the conspiracy count, with a minimum of 15 years to be served in accordance with section 186.22, subdivision (b)(5), and the trial court stayed an additional two-year term on the gang participation count in accordance with section 654.

Cervantes argues the judgment must be reversed because (1) the conviction on the count of conspiracy to commit murder was based on the uncorroborated testimony of an accomplice, (2) the court erroneously admitted hearsay evidence consisting of a statement made by an unidentified person riding in the same automobile as he, and (3) the court failed to properly instruct the jury on the factual prerequisites to be established before it could rely on that hearsay statement as evidence. Finding none of those arguments persuasive, we need not separately consider Cervantes' contentions that his trial counsel was ineffective for failing to assert them below, and that the cumulative effect of these errors requires reversal. Instead, we affirm.

Section 1111, which imposes the requirement that accomplice testimony be corroborated, requires corroboration of the defendant's *connection to the conspiracy*, but not of the existence of that conspiracy. Here, Cervantes' connection to the conspiracy was amply corroborated by evidence independent of his accomplice's testimony, and thus the evidence was sufficient to support his conviction.

And Cervantes' challenge to the admissibility of statements made by an unidentified occupant of the automobile in which he was riding fails because those statements were not offered to prove the truth of the matter stated, and thus were not hearsay. We reject his related assertion of instructional error on the same basis. Because the challenged statements did not qualify as hearsay, there was no need for the jury to

make the determinations necessary to qualify those statements for admission under the coconspirator exception to the hearsay rule.

## FACTS

At about 11:00 p.m., on a Friday night, officers from the Santa Ana Police Department were staking out a neighborhood claimed by the West Myrtle Street gang, an area which had experienced several shootings – including one resulting in a death – within the prior six months. Four of the officers were secluded in shadowy courtyard areas of apartment buildings located on West Myrtle Street. After a quiet period with no traffic, the officers saw a white Chevrolet Lumina turning slowly onto West Myrtle. The car's windows were down and several occupants were inside.

The car paused for several seconds in front of each building's courtyard, before finally stopping to let three young men get out. Those men then walked alongside the Lumina, continuing to look toward the apartment buildings, while the car continued its slow progress down the street. The young men then got back into the car, which turned up another side street.

A few minutes later, the Lumina again appeared on West Myrtle, before turning onto a side street and stopping at a curb. Once again, three young men got out of the car and walked to West Myrtle. At that point, one of the officers recognized all three of those men, one of whom was Cervantes. They appeared to be looking around, and returned to the car after about 30 seconds or a minute.

After those men reentered the Lumina, it drove away but then returned a few seconds later to cruise West Myrtle again before driving away once more. Shortly thereafter, another Santa Ana police officer stopped the Lumina about four blocks away. After the car stopped, one of the occupants opened its right front door, jumped out, and then ran away with what appeared to be a handgun in his hand. He jumped a fence onto

the property of a taqueria, where he tossed the gun onto the roof and kept running. He was later apprehended in the restroom of the taqueria, and the gun was retrieved from the roof.

There were still six other occupants in the Lumina, including the driver, Cervantes, and a young man named Eric Beltran who would subsequently testify against Cervantes and others at trial.

Beltran was interrogated by police a few days later. He claimed that everyone in the car, other than one occupant who was the younger brother of another, was a member of the Los Compadres gang. Beltran stated the original plan that evening had been to go to a party, and someone suggested they pick up a “toy” – slang for gun – to use in case they ran into trouble. They drove to a house, where one of the other young men went inside briefly and then returned to the car saying, “[L]et’s go.” According to Beltran, at that point everyone in the car knew he had a gun.

Beltran stated that after they left that house, one of the car’s occupants said, “[L]et’s get a turtle.” He also explained that “turtle” was a derogatory slang term for a member of the West Myrtle gang, and “get” meant to kill. The group then proceeded to the West Myrtle neighborhood. Beltran admitted that when a group of gang members enter a rival gang’s territory with a gun, the goal is “[t]o shoot someone.”

Cervantes was tried jointly with several of his codefendants. The tape of Beltran’s interrogation was introduced into evidence at that trial.

When Beltran testified at trial, he acknowledged he had entered into an agreement with the prosecutor that would allow him to go free if he testified truthfully, but he then told a substantially different story than the one he had previously related to the police. Beltran first testified he was not a member of Los Compadres, and did not know anyone who claimed to be, asserting he had been pressured to say otherwise by police. But he then conceded that was a lie and admitted that he had claimed Los Compadres since he was 14 or 15 years old. Beltran identified the West Myrtle gang as

one of the primary rivals of Los Compadres, and explained that entering rival gang territory is a way to gain respect within the gang, and actually killing a rival is the ultimate way to gain respect.

Beltran also contradicted his earlier statements to police about the group's intentions on the night they were arrested. Although he admitted having told police that rolling up with six other gang members into rival territory, with a gun, demonstrates the intention to shoot someone; i.e., to "murder" them, he claimed at trial that the group was just looking to "have a little excitement," not to shoot anyone, when they cruised slowly through West Myrtle territory. Beltran claimed he was personally unaware that anyone in the car even had a gun, but explained that if there were one, it would have been intended solely for protection because they had no intention of shooting anyone. Beltran stated he had been in a car or with another person who had a gun on many occasions, but those guns were hardly ever used.

The prosecution also introduced the testimony of various Santa Ana police officers, who identified Cervantes and his cohorts as Los Compadres gang members, and explained that Cervantes, along with others, had been previously served with multiple notices under the California Street Terrorism Enforcement and Prevention Act (§ 186.22). Further, Cervantes had previously admitted his membership in the gang, and claimed the moniker "Sick" or "Gangster."

One of the police officers testified as a gang expert, and he explained how important guns are within gang culture, and why a gang member holding a gun would never hide that fact from his fellow gang members – to do so would be a sign of disrespect. The expert also stated that Hispanic gangs like Los Compadres and West Myrtle, are "turf-oriented" and that entering the turf of a rival gang is considered a sign of disrespect. He also confirmed that the area where Cervantes and his fellow gang members were cruising on the night they were arrested was West Myrtle territory. When presented with a hypothetical based on the facts of this case, the expert opined that the

group's decision to cruise through West Myrtle territory with a gun was a "classic" gang crime designed to show disrespect for West Myrtle and generate respect for their own gang, and if one of the group members had openly expressed a plan to "smoke a turtle," that would show the group's intention was to commit a murder.

*1. The Evidence Supports the Conviction for Conspiracy to Commit Murder.*

Cervantes' first argument is that his conviction for conspiracy to commit murder must be reversed because it was based on the uncorroborated testimony of Beltran, his alleged accomplice in that conspiracy. Cervantes contends that apart from Beltran's statements, the only evidence against him is that he was among a group of gang members that drove slowly through rival gang West Myrtle's territory with a gun in the car, looking into courtyards, and that he and others periodically got out of the car and walked alongside the car while appearing to look for something or someone.

In Cervantes' view, this evidence merely demonstrated that he and his cohorts "acted suspiciously in rival gang territory" but did nothing to "corroborate Beltran's statements that the group conspired to commit a murder, that [Cervantes] specifically agreed to kill anyone, intended for someone to get killed, or that anyone in the car intended to kill."

Cervantes' argument misconstrues the requirement for evidence to corroborate an accomplice's testimony. Section 1111 does not require corroboration of accomplice testimony about the nature of the crime, but instead requires corroboration of the *defendant's connection* with that crime. Thus, section 1111 provides in pertinent part that "[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence *as shall tend to connect the defendant with the commission of the offense*; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (Italics added.) With respect to the crime of conspiracy specifically, "[t]he testimony of an accomplice is sufficient to establish the fact or existence of a conspiracy (the *corpus delicti*); his or her testimony

needs corroboration only as to the defendant's connection with it.” (*People v. Cooks* (1983) 141 Cal.App.3d 224, 312.)

The flaw in Cervantes' argument is that he conflates the evidence which establishes the crime committed (the conspiracy to commit a murder, which Beltran admitted in his statements to police) with the evidence establishing Cervantes' own connection to it.

The essence of a criminal conspiracy is the agreement: “A criminal conspiracy exists where there is an unlawful agreement between two or more people to commit a crime and an overt act in furtherance of the agreement.” (*People v. Williams* (2013) 218 Cal.App.4th 1038, 1063.) “‘Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.’ [Citations.] . . . ‘Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes.’” (*People v. Johnson* (2013) 57 Cal.4th 250, 258-259.)

“To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, ‘a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design.’” (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1025.) Thus, “the conspiracy complained of may oftentimes be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy.” (*Siemon v. Finkle* (1923) 190 Cal. 611, 615-616, abrogated on another point in *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1208-1212.)

Here, as Cervantes acknowledges, there is ample circumstantial evidence that the occupants of the Lumina were engaged in some sort of coordinated plan when they chose to cruise through West Myrtle on the night they were arrested. And although the fact they also obtained a gun before entering the neighborhood suggests the goal of

the agreement was criminal in nature, and the gang expert's testimony suggested it was murder specifically, there is at least an argument to be made that in the absence of Beltran's statements to the police, the jury could not know the precise goal of that conspiracy. Beltran's statements to the police supplied that link, specifying that the goal of this conspiracy was to commit a murder.

But because Beltran's identification of the criminal purpose underlying the agreement does nothing more than "establish the fact or existence of a conspiracy (the *corpus delicti*)" (*People v. Cooks, supra*, 141 Cal.App.3d at p. 312) it required no corroboration. Thus, that aspect of the crime could be established by Beltran's testimony alone. It is only Cervantes' *connection with* that established conspiracy which must be independently corroborated in accordance with section 1111. (*People v. Cooks, supra*, 141 Cal.App.3d at p. 312.) He could not have been criminally responsible for participating in this conspiracy merely because Beltran *claimed* he had been involved.

And he was not. Instead, Cervantes' *connection to* the conspiracy Beltran described was established by his active participation in both the Los Compadres gang and the series of events described by the police officers. We know from this other evidence that he was in the car with Beltran and the others – and a gun – cruising the territory of a rival gang. We know he personally got out of the car at one point with two of the others, and they walked alongside the slowly moving car while appearing to look for someone. And he then got back into the car, which certainly suggests he was not making any effort to distance himself from the group's plan.

That corroborating evidence is more than sufficient to link Cervantes to the conspiracy described by Beltran, and was entirely consistent with what Beltran originally admitted was the group's plan to commit a murder. This corroborating evidence was more than sufficient to satisfy the requirements of section 1111.

## 2. Admission of the Statement Made by an Unidentified Person in the Backseat

Cervantes also contends the statement Beltran attributed to an unidentified occupant in the backseat of the Lumina – either “Let’s get a turtle” or “Let’s smoke a turtle” – made right after the group stopped to pick up the gun, was hearsay and should not have been admitted into evidence. According to Cervantes, the statement was inadmissible because (1) the other evidence in the case was insufficient to demonstrate it was admissible under the coconspirator exception to the hearsay rule (Evid. Code, § 1223), and (2) the trial court failed to instruct the jury that before it could consider the unidentified person’s statement, it must first find that the prosecutor satisfied the requirements of the coconspirator exception.

Cervantes also claims this statement was “the sole evidence supporting the prosecution’s theory that [he] and his co-defendants conspired to commit a murder,” and thus its erroneous admission was highly prejudicial. The latter claim is inaccurate, however, as the evidence also included Beltran’s own admission that when a group of gang members enter a rival gang’s territory with a gun (as this group did), the goal is “[t]o shoot someone.”

Finally, Cervantes also acknowledges the admission of this statement into evidence was not specifically objected to by his trial counsel, and argues that failure amounted to ineffective assistance of counsel.

The Attorney General counters all of this by asserting that the challenged statement – “Let’s get [or ‘smoke’] a turtle” – was not hearsay in the first place because it qualified as an act or declaration of the conspiracy itself. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 64 [“The acts and declarations constituting the conspiracy agreement itself are admissible as ‘part of a transaction’ which is in issue and are, therefore, outside the hearsay rule”].) We agree.

Evidence Code section 1200, subdivision (a), states: “‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the

hearing and that is offered to prove the truth of the matter stated.” Here, of course, the statement “Let’s get a turtle” does not assert the truth of any fact. It merely states a goal. (See *People v. Jurado* (2006) 38 Cal.4th 72, 117 [noting that “[b]ecause a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated”].) The statement is relevant not because it is true or false, but simply because it was said in the presence of a group – right after the group obtained a gun and just before they proceeded into West Myrtle territory. If any other occupant of the Lumina did not share that stated goal, it offered him the perfect opportunity to protest or depart. The fact none did was evidence they supported the declared goal. Consequently, the challenged statement, combined with the manner in which it was received by the others, constitutes the “transaction” at the heart of the charged conspiracy.

Cervantes disputes this assertion in only a cursory manner, asserting “the statements were clearly introduced to prove the truth of the matter asserted, namely, that the group planned to kill a member of a rival gang because, without the statements, there was no evidence to support a finding that the group conspired to commit a murder.” We do not agree. As we have already explained, it is the fact the statement was made and how it was received by the others, not its supposed abstract truth or falsity that demonstrates the conspiracy.

Instead, Cervantes’ primary argument is that the Attorney General is prohibited from asserting on appeal that the statement is not hearsay because that position represents a change from the prosecutor’s theory of admissibility at trial. Cervantes claims the prosecutor argued for the admissibility of Beltran’s description of this out-of-court statement on the basis it was “1223 evidence” – meaning it would be admissible only under the coconspirator exception to the hearsay rule – and contends the Attorney General cannot now assert “a new theory of admissibility on appeal to save the error committed below.”

But there was no dispute about the admissibility of this particular statement in the trial court. As Cervantes otherwise acknowledges (and spends considerable effort portraying as an example of ineffective assistance) his counsel did not object to the admissibility of this statement. Nor, as far as we can tell, did anyone else. The colloquy Cervantes points to as demonstrating the basis upon which the prosecutor claimed this statement would be admissible is actually part of a discussion about the propriety of admitting a similar statement made by Beltran’s police interviewer at an earlier point in Beltran’s taped interview – which was objected to by another defendant. In the course of that discussion, the prosecutor referred to a statement now at issue as “1223 evidence.” But because no one ever objected to the admission of Beltran’s description of the unidentified accomplice’s “let’s get a turtle” statement, the prosecutor never had occasion to take any formal position as to the basis for its admission.

In any event, Cervantes’ waiver argument fails for two reasons. First, the prohibition against a party offering a new justification for admitting evidence on appeal applies only to parties challenging the trial court’s evidentiary ruling, not those explaining why it was correct. It is grounded on Evidence Code section 354, which states that “[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and *it appears of record that:* [¶] (a) *The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.*” (Italics added.) (See *People v. Fauber* (1992) 2 Cal.4th 792, 854 [“Defendant now contends that the statements were not hearsay, but rather went to Dowdy’s state of mind shortly before he disappeared. We agree. . . . [¶] Defendant’s trial counsel did not, however, specifically raise this ground of admissibility. In these circumstances he is precluded from complaining on appeal. (Evid.Code, § 354, subd. (a)”].) In *People v. Hines* (1997)

15 Cal.4th 997, the case Cervantes relies upon, the Supreme Court rejected the Attorney General's challenge to "the propriety of the trial court's ruling that the statement was inadmissible," explaining that "[b]ecause the prosecutor did not attempt to justify admission of the statement on either of these grounds, the Attorney General may not now assert them as a basis for challenging the trial court's ruling excluding the statement." (*Id.* at p. 1034, fn. 4.) In this case, however, it is Cervantes, not the Attorney General, who is asserting the trial court erred by allowing into evidence the unidentified person's statement "Let's get [or 'smoke'] a turtle." Thus, it is Cervantes who waived any arguments on the point that were not raised before the trial court. And this is also why Cervantes must rely on a claim of ineffective assistance of counsel as a basis for seeking appellate review of the point.

Which brings us to the second problem with Cervantes' waiver argument. Even if there were some basis to conclude the prosecutor had waived the contention this disputed statement was not hearsay, by failing to make that assertion below, we could not ignore it. We would have to address the point in the context of evaluating Cervantes' claim that his counsel's failure to assert the hearsay objection (and preserve it for appeal) constituted ineffective assistance of counsel. "A claim of ineffective assistance of counsel has two components: "First, the defendant must show that counsel's performance was deficient. This requires showing that *counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment*. Second, the defendant must show that the deficient performance prejudiced the defense." (In *re Vargas* (2000) 83 Cal.App.4th 1125, 1132, italics added.) Thus, in order for us to conclude Cervantes' trial counsel was ineffective for failing to assert a hearsay objection, we would first have to conclude the objection was a meritorious one — it could not be error, let alone a serious one, for counsel to refrain from making an unmeritorious objection. In short, if the disputed statement is not hearsay, as the

Attorney General contends, it fatally undermines Cervantes' claim of ineffective assistance of counsel. There is no waiver.

And having concluded the unidentified back seat occupant's statement was not made inadmissible by the hearsay rule, we need not separately consider Cervantes' claim that the trial court also erred by failing to instruct the jury that it had to find the evidence satisfied all the elements of the coconspirator exception to the hearsay rule, before considering that statement as evidence. Nor is there any basis to separately address Cervantes' claim of ineffective assistance of counsel or his claim that cumulative error warrants reversal of the judgment.

#### DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.