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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.

JOHNNY KELVIN OLMEDO,

Defendant and Appellant.

G050307

(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.

Arthur Martin, 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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Johnny Kelvin Olmedo 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. Olmedo was sentenced to 25 years to life on the conspiracy count, but the trial court struck the gang enhancement for purposes of sentencing. On the gang participation count, the court sentenced Olmedo to two years, stayed in accordance with section 654.

Olmedo argues the judgment must be reversed because (1) the evidence was insufficient to support a finding of guilt beyond a reasonable doubt; (2) the conviction on the count of conspiracy to commit murder was based on the uncorroborated testimony of an accomplice; (3) his trial counsel was ineffective for failing to challenge the prosecutor's use of a grand jury to direct file charges against him as an adult, which violated Welfare and Institutions Code section 707, subdivision (a)(4); and (4) the trial court lacked jurisdiction to convict him of charges initiated through use of a grand jury. We find none of these arguments persuasive, and affirm the judgment.

Olmedo's attack on the sufficiency of the evidence is but a thinly disguised attack on the credibility of the evidence. That is an argument for the trier of fact, not for us. His assertion that the conspiracy conviction was unsupported by sufficient corroborating evidence likewise fails. 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, Olmedo's connection to the conspiracy was amply corroborated by evidence independent of the accomplice's testimony, and thus the evidence was sufficient to support his conviction.

Finally, Olmedo's contentions that his trial counsel was ineffective for failing to challenge the use of a grand jury to file charges against him as an adult, and that

the trial court lacked jurisdiction to convict him of charges initiated through use of a grand jury are fatally undermined by our Supreme Court's opinion in *People v. Arroyo* (Jan. 14, 2016, S219178 __ Cal.4th __). That opinion, affirming this court's own earlier opinion, concluded that Welfare and Institutions Code section 707, subdivision (d), allows prosecutors to charge such juveniles in criminal court by grand jury indictment.

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 Myrtle. At that point, one of the officers recognized all three of those men, one of whom was Olmedo. They appeared to be looking around, and returned to the car after about 30 seconds or a minute.

After those young 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, Olmedo 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. And one of those occupants, a young man named Eric Beltran, was interrogated by police a few days later. He claimed that everyone in the car, except for one occupant (the younger brother of another), was a member of the Los Compadres gang. Beltran stated the original plan that evening was 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 that 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” – “turtle” being the slang term for a member of the West Myrtle gang, and “get” meaning to kill. They 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.”

Olmedo was tried jointly with several of his codefendants. The transcript 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 Olmedo and his cohorts as Los Compadres gang members, and explained that Olmedo, along with others, had been previously served with notices under the California Street Terrorism Enforcement and Prevention Act (§ 186.22). Further, Olmedo had previously identified himself as a member of the gang.

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 Olmedo 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.

DISCUSSION

1. The Evidence was Sufficient to Prove Guilt Beyond a Reasonable Doubt

Olmedo first argues the evidence admitted at trial was insufficient to prove beyond a reasonable doubt there was any conspiracy to commit murder. Specifically, he contends that “[i]n the end, a few words in . . . Beltran’s statement constituted the only evidence any one in the car said anything about killing anyone,” and “that analysis of the circumstances of and actual words in . . . Beltran’s statement demonstrates the statement is not the kind of sol[i]d, credible evidence the law accepts as capable of proving beyond a reasonable doubt that Johnny Olmedo agreed and intended to commit murder.”

According to Olmedo, Beltran’s “few words” admitting that someone in the car said “let’s get [or kill] a turtle” were not credible because they were elicited in a lengthy interview by a trained interrogator whose goal was to get “Beltran to implicate the group in the car in a conspiracy to murder a gang rival.” As he explains, “[w]hen an experienced interrogator, trained to extract incriminating information about murder from gang members, sets up a 17 year-old kid who has never been arrested before . . . to say

certain magic words necessary for a conspiracy conviction, the fact that the interrogator succeeds does not make the uttering of those words substantial evidence capable of proving beyond a reasonable doubt the facts uttered. Those words are not solid, credible evidence.” The argument, which by its express terms is an attack on Beltran’s credibility, is unpersuasive.

As our Supreme Court explains, “[g]enerally, “doubts about the credibility of [an] in-court witness should be left for the jury’s resolution.” [Citation.] ‘Except in . . . rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury’s resolution’” (*People v. Hovarter* (2008) 44 Cal.4th 983, 996.)

Under this rule, “[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*People v. Huston*, (1943) 21 Cal.2d 690, 693, overruled on another ground by *People v. Burton* (1961) 55 Cal.2d 328, 352.) “Testimony may be rejected only when it is inherently improbable or incredible, i.e., “unbelievable *per se*,” physically impossible or “wholly unacceptable to reasonable minds.”” (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

As we explained in *People v. Ennis* (2010) 190 Cal.App.4th 721, 729, “The inherently improbable standard addresses the basic content of the testimony itself – i.e., could that have happened? – rather than the apparent credibility of the person testifying. Hence, the requirement that the improbability must be ‘inherent,’ and the falsity apparent ‘without resorting to inferences or deductions.’ [Citation.] In other words, the challenged evidence must be improbable “on its face” [citations], and thus we do not compare it to other evidence (except, perhaps, certain universally accepted and judicially

noticeable facts). The only question is: Does it seem possible that what the witness claimed to have happened actually happened?”

In this case, there was nothing inherently improbable about Beltran’s statement that one of the car’s occupants declared an intention to kill a rival gang member. There may have been reasons to doubt its veracity, but highlighting those reasons was an argument to be made to the jury, not on appeal.

In the alternative, Olmedo contends Beltran’s statement, even if viewed as credible, was insufficient to prove *Olmedo* intended to commit murder because (1) there was no evidence Olmedo himself heard the unidentified occupant say “let’s get [or kill] a turtle,” (2) there was no evidence he personally interpreted it in the way Beltran claimed, and (3) there was no proof that he or anyone else who got out of the car intended to kill anyone, as none of them was carrying the gun. We reject this contention as well. The jury is entitled to draw inferences from the evidence presented, and in this case the jury could easily infer that if Beltran, sitting in the front seat, heard someone in the back seat say “let’s get [or kill] a turtle,” then everyone else in the car heard it too. Similarly, the jury could infer that if Beltran understood that to “get” a turtle meant to *kill* a turtle, then Olmedo – his fellow gang member – would have understood it that way too. Moreover, the gang expert testified that such a statement would be commonly understood in these circumstances as reflecting an intention to kill the rival gang member. Finally, the fact that none of the young men who got out of the car had the gun in his hand demonstrates only that none of them were expecting to kill anyone at that precise moment. It does nothing to undermine the conclusion that killing a rival was the group’s shared goal.

“[T]he judgment is not subject to reversal on appeal simply because the prosecution relied heavily on circumstantial evidence and because conflicting inferences on matters bearing on guilt could be drawn at trial. Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable

interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt.

[Citation.] We review the entire record in the light most favorable to the judgment and affirm the convictions as long as a rational trier of fact could have found guilt based on the evidence and inferences reasonably drawn therefrom.” (*People v. Millwee* (1998) 18 Cal.4th 96, 132.) In this case, the evidence was sufficient for that purpose.

2. The Evidence was Sufficient to Demonstrate the Existence of a Conspiracy to Commit Murder.

Olmedo next argues 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. Olmedo 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 Olmedo’s view, this evidence amounts to “speculative leaps, which do not qualify as rational inferences under the law,” and thus do not establish that “anyone in the car *agreed to commit murder.*” Thus, he believes “the required corroboration was lacking.”

We disagree. Section 1111 does not require corroboration of accomplice testimony to establish the crime itself; instead it 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.)

Hence, the flaw in Olmedo’s argument is that he conflates the evidence which establishes what crime was committed – the conspiracy to commit a murder, which Beltran admitted in his statements to police, and need not be corroborated – with the evidence establishing *Olmedo’s own connection* to that crime. It is only the latter which requires corroboration.

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, while 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 the fact they also obtained a gun before embarking on this venture suggests the goal of the agreement was criminal in nature – 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 Olmedo’s *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, Olmedo’s *connection to* the conspiracy Beltran described was established by Olmedo’s 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. Finally, when the Lumina was pulled over by police, it was Olmedo who jumped out of the car with the gun in his hand and tried to dispose of it by throwing it onto the roof of a taqueria.

That corroborating evidence is more than sufficient to link Olmedo 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.

3. Claims Based on Prosecutor's Decision to Proceed by Grand Jury Indictment

Finally, Olmedo also contends that because he was 15 years old, and thus a juvenile, when he committed his crime, Welfare and Institutions Code section 707, subdivision (d)(4) (section 707 (d)(4)), required a magistrate to determine at a preliminary hearing that it was appropriate to try him as an adult.

Section 707 (d)(4) provides: "In any case in which the district attorney or other appropriate prosecuting officer has filed an accusatory pleading against a minor in a court of criminal jurisdiction pursuant to this subdivision, the case shall then proceed according to the laws applicable to a criminal case. *In conjunction with the preliminary hearing as provided in Section 738 of the Penal Code, the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within this subdivision.* If reasonable cause is not established, the criminal court shall transfer the case to the juvenile court having jurisdiction over the matter." (Italics added.)

But rather than filing a criminal complaint against Olmedo and proceeding to a preliminary hearing, the prosecutor here chose to seek an indictment from the grand jury. According to Olmedo, this meant "not only that a magistrate never made the finding[] specified in the statute, but that appellant lost the opportunities afforded by a preliminary hearing to be present, to test the prosecutor's evidence through cross-examination, and to challenge the case for bringing charges." He contends (1) his trial counsel was ineffective for failing to object to the prosecutor's use of the grand jury to initiate charges against him in adult court, and (2) the failure to obtain the required

finding from the magistrate deprived the trial court of jurisdiction to proceed against him as an adult.

We reject both arguments. Our Supreme Court has just issued its opinion in *People v. Arroyo, supra*, (Jan. 14, 2016, S219178 __ Cal.4th __), affirming this court’s earlier opinion and expressly holding that section 707(d)(4) “allows prosecutors to charge such juveniles in criminal court by grand jury indictment.” (*Id.* at p. 1.) Given the Supreme Court’s holding, the failure of Olmedo’s trial counsel to object when the prosecutor chose to proceed in that manner cannot be deemed ineffective assistance, nor could doing so deprive the superior court of jurisdiction to proceed against Olmedo on the charges contained in the indictment.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.