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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO TORRES, Defendant and Appellant.	B190227 (Los Angeles County Super. Ct. No. BA285923)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith Champagne, Judge. Affirmed.

Rodney Richard Jones, under appointment by the Court of Appeal, for Defendant and Appellant

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Juliet H. Swoboda, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Roberto Torres of being a felon in possession of a firearm and the trial court selected the upper term of punishment. The issues on appeal are whether the trial court erred in excluding evidence intended to show someone else had been the person in possession of the gun and whether the court erred by imposing the upper term based on facts not found by the jury beyond a reasonable doubt.[1] We conclude the trial court's evidentiary rulings do not warrant a new trial and the court did not err in imposing the upper term sentence.

FACTS AND PROCEEDINGS BELOW

Officer Alfred Garcia testified he and his partner were on patrol in their police cruiser shortly after midnight when they received a call regarding a group of young men gathered in front of a house. Driving to the location the officers came upon five young male Hispanics standing on the sidewalk. Garcia shined the car's spotlight on the group and continued driving in their direction. His view of the group was unobstructed. When he was approximately 15 feet away Garica saw a blue steel gun in the waistband of a man he later identified as defendant Torres. As the officers drew nearer Torres grabbed the pistol from his waistband and tossed it onto the sidewalk after which he and the other men started running in different directions. Garcia picked up the gun and called for backup. He then joined his partner who was already chasing Torres and two other men.

Officer Berdin, Garcia's partner, corroborated Garcia's testimony. He too testified he observed five young Hispanics "loitering" in front of a house and saw Torres remove a gun from his waistband before throwing it on the ground.

Torres, David C. and another minor who had been in the group were apprehended approximately five minutes later and taken to the local police station.

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[1] *Cunningham v. California* (2007) 549 U.S. ____, 127 S.Ct. 856.

At some point after Torres' arrest the officers determined he was on parole and booked him for being a felon in possession of a firearm. They released David C. and the other minor.

A jury convicted Torres on one count of possession of a firearm by a felon. The trial court sentenced him to the upper term of three years doubled under the three strikes law plus a one year prior prison term enhancement. Torres filed a timely appeal.

DISCUSSION

I. THE TRIAL COURT'S EVIDENTIARY RULINGS DO NOT WARRANT A NEW TRIAL.

Torres' defense was mistaken identity. In order to raise a reaonable doubt about his guilt Torres attempted to weaken Garcia's and Berdin's indentification testimony and to show another member of the group, the minor David C., had admitted to a friend it was he who tossed away the gun when the police approached.

A. The Trial Court Did Not Err In Limiting Torres' Cross-Examination Of The Officers On The Issue Of Identification.

Torres attempted to undermine the identification testimony of Garcia and Berdin by raising an inference they only focused on Torres after they learned he was an adult on parole and all the others in the group were minors.

Defense counsel established through Garcia that when the officers got to the police station they determined the two suspects arrested along with Torres were minors. But, when counsel sought to question Garcia about Torres' parole status the trial court disallowed this line of questioning.

"[Defense counsel]: You also did a check on Mr. Torres' background; is that right?"

"[Prosecutor]: Objection, relevance."

"[Defense counsel]: It goes to bias, your honor, motive."

"The court: Sustained. It's already happened. He's already there."

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"[Defense counsel]: Sir, you were informed that Mr. Torres is on parole; isn't that right?"

"[Prosecutor]: Objection, your honor, relevance."

"The court: Sustained."

"[Defense counsel]: You didn't know about Mr. Torres' status before you placed him in the police vehicle?"

"[Prosecutor]: Your honor, may we approach with the same objection again?"

"The court: Objection is sustained."

Outside the presence of the jury defense counsel argued the officers' knowledge of Torres' parole status was relevant "to show possible motive, bias, fabrication of their report [and] in their testimony in court today." It was the defense theory, counsel explained, the officers did not make a positive identification of Torres as the person with the gun until they arrived at the police station and discovered he was an adult on parole and the other two individuals were minors. Based on this information, the defense theorized, the officers decided to pin the weapon charge on Torres and let the minors go.

After listening to defense counsel's explanation the trial court stood by its ruling excluding questions about the officers' knowledge concerning Torres' parole status.

Torres contends the trial court's rulings violated his rights to due process of law and to confront the witnesses against him.

It is beyond dispute a fair trial requires reasonable latitude in cross-examination.[2] Such leeway is especially important in cross-examining law enforcement officers because, as our Supreme Court has candidly observed, triers of fact "generally believe the testimony of such persons rather than that of the accused[.]"[3] This does not mean,

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[2] *Alford v. United States* (1931) 282 U.S. 687, 691.

[3] *People v. Beardslee* (1991) 53 Cal.3d 68, 110.

however, the right of cross-examination has no limits. As the United States and California Supreme Courts have repeatedly recognized, the Confrontation Clause is not violated when a trial judge excludes evidence which is unduly prejudicial, confusing or, as in the present case, "'"only marginally relevant."'"[4]

Here, Torres argues, evidence the officers knew about his parole status before they released the minors would permit the jury to infer the officers decided to pin possession of the gun on Torres because he had already proved himself to be a "bad guy" and they wanted to give the minors a break. Torres' argument misses the distinction between reasonable inference and speculation.

An "inference" is "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."[5] "Speculation,"on the other hand, can be defined in this context as "reasoning or theorizing about a matter that transcends experience and does not admit of demonstration."[6] For example, a defendant cannot be convicted of burglary solely on the basis of proof his fingerprint was found on an object in the house but he can be convicted on the basis of a witness's testimony she saw the defendant carrying a television set out of the house while the owners were away. In the first instance the jury would not have enough evidence to convict the defendant without speculating there could be no innocent explanation of how his fingerprint happened to be in the house. In the second instance the jury would have enough evidence to convict without speculating because it can reasonably infer from the evidence a witness saw the defendant carrying a television set out of a house when the owners were not home the defendant was stealing the television.[7]

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[4] *Holmes v. South Carolina* (2006) 547 U.S. 319, ___, 126 S.Ct. 1727, 1732; accord *People v. Ayala* (2000) 23 Cal.4th 225, 301.

[5] Evidence Code section 600, subdivision (b).

[6] Webster's New International Dictionary (2002) at page 2189.

[7] See Nesson, The Evidence Or The Event? On Judicial Proof And The Acceptabililty Of Verdicts (1985) 98 Harv. L. Rev. 1357, 1373. As Professor Nesson acknowledges, inferences do not always lead to the correct conclusion—the witness in our example may be mistaken or lying—and speculation does not always lead to the

In the present case, even if the evidence established Garcia and Berdin knew about Torres' parole status before they released the minors no rational juror could logically or reasonably deduce from this evidence alone bias led the officers to lie in their identification and pick Torres as the person who had possessed the gun. Life experience does not teach that law enforcement officers would behave in this way and there was no evidence Garcia and Berdin behaved in this way. It is not error to exclude evidence "that has only a very weak logical connection to the central issues."[8]

B. The Trial Court Erred In Excluding David C.'S Admission He Was The One Who Possessed The Gun But The Error Was Harmless.

After David C. asserted his Fifth Amendment right not to incriminate himself, the defense called Veronica Carreno to testify to statements David made to her in which he admitted he, not Torres, was the person with the gun. In a 402 hearing Carreno testified she was Torres' ex-girlfriend. They broke up about a month before the gun incident. According to Carreno, between two weeks and a month after Torres' arrest she received a telephone call from David C., one of the minors arrested with Torres. David told Carreno he was with "friends" and "they dropped a gun . . . one night" while they were running from the police. Carreno testified David knew Torres had been arrested on account of the gun and "he felt that bad. He didn't know what to do because they had got—arrested somebody else when he was the one that had dropped the gun." Torres argued the evidence of David C.'s statements to Carreno was admissible under the hearsay exception for declarations against penal interest.[9]

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incorrect conclusion—the fingerprint may be in the house because the defendant left it there while stealing the T.V. set. Nevertheless a reasonable trier of fact is justified in rejecting the fingerprint evidence and accepting the eyewitness evidence because the former raises doubts which the evidence is incapable of resolving while the eyewitness evidence raises doubts the evidence can accommodate. (*Id*. at pp. 1373-1374.)

[8] *Holmes v. South Carolina, supra,* 126 S.Ct. at page 1734.

[9] Evidence Code section 1230.

The trial court disallowed this evidence on the ground neither it nor Carreno, who provided it, were credible. "The court finds the statement as described by Ms. Carreno is ambiguous, lacking in detail. Her testimony was fraught with inconsistencies. She is one of the least compelling witnesses I have seen. She would not speak up no matter how much counsel and the court asked her to use the microphone and talk in an audible manner. She was ordered back at 10:15 and its now 11:00. . . . I am finding the circumstances surrounding the giving of the statement are so lacking and untrustworthy of her reliability that it is inadmissible for the purposes for which the evidence was proffered."

We review the trial court's decision for abuse of discretion.[10]

Insofar as the court excluded David C.'s statements because it doubted *Carreno's* credibility it clearly erred. Our Supreme Court has held that in determining the admissibility of a declaration against penal interest "unless the testimony is physically impossible or its falsity is apparent 'without resorting to inferences or deductions'. . . doubts about the credibility of the in-court witness should be left for the jury's resolution."[11]

The court also erred in excluding David C.'s purported admission he was the person in possession of the gun on the grounds the statement was "ambiguous," "lacking in detail," and "untrustworthy." Here, the trial court apparently accepted the prosecution's argument the statement was not a true declaration against penal interest because it was too vague as to time and place and David might just have been trying to do Torres a favor knowing there was little chance he himself would be prosecuted[12] and,

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[10] *People v. Brown* (2003) 31 Cal.4th 518, 536.

[11] *People v. Cudjo* (1993) 6 Cal.4th 585, 608-609.

[12] Under Evidence Code section 1230 a declaration against penal interest is admissible if it "so far subjected [the declarant] to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

even if he was, his punishment would be substatially less than Torres might receive.[13] Taken in context, however, it is clear David's statement as related by Carreno referred to the incident which resulted in the gun possession charge against Torres. As to the trustworthiness of the statement: David made it a few weeks after the incident and well before Torres' preliminary hearing, he did not go to the police even though Carreno urged him to but he did assert the Fifth Amendment when called as a witness at Torres' trial. In addition, David made his statement in what several courts have described as "the most reliable circumstance"—a conversation "between friends in a noncoercive setting that fosters uninhibited disclosures."[14] Finally, our Supreme Court has taken the view any doubts about the admissibility of relevant evidence of third party culpability should be resolved in favor of its admission reasoning "'if the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.'"[15]

Although we hold the court abused its discretion in barring Torres' evidence of third party culpability we conclude the error was harmless because it is not reasonably probable the jury would have reached a result more favorable to Torres in the absence of the error.[16]

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[13] Generally possession of a concealable weapon by a minor is punished as a misdemeanor. (Pen. Code § 12101, subd. (c)(2).

[14] *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335. In contrast there was no evidence David was a "particular friend" of Torres "and thus had a motive to lie." (*People v. Cudjo, supra,* 6 Cal.4th at page 613.)

[15] *People v. Hall* (1986) 41 Cal.3d 826, 834, quoting 1A Wigmore, Evidence (Tillers rev. ed. 1980) § 139, p. 1724 (holding trial court abused its discretion in excluding evidence of third party culpability under Evidence Code section 352).

[16] The *Watson* test for prejudice applies to errors in excluding evidence of third party culpability (*People v. Hall, supra,* 41 Cal.3d at page 836) and declarations against penal interest (*People v. Cudjo, supra,* 6 Cal.4th at page 612).

The jury heard the testimony of two police officers who unhesitatingly identified Torres as the man they saw remove a gun from his waistband, throw it on the sidewalk and run away. If the officers had only testified they saw Torres toss the gun away the outcome might be different. Torres was standing in a group with four other young Hispanics all between the ages of 18 and 21, it was nighttime and, even though the officers shined their high beams and spotlights on the group, the men were standing next to two large trees which may have cast shadows on the scene. Under those circumstances a juror could have a reasonable doubt the officers were able to identify which of the young men had actually tossed the gun. But here the evidence shows both officers focused their attention on Torres as soon as they spotted the group because he was wearing a white tank top and looking in their direction while the other four men were dressed in dark clothing and looking in other directions. While their attention was focused on Torres both officers saw him pull a gun from his waistband. They then saw him throw the gun on the sidewalk and flee.

In addition, the credibility factors which could not properly be used to determine the admissibility of David C.'s statements through Carreno can be properly used in assessing the prejudice to the defendant from excluding them.[17] Although Carreno was Torres' "ex" girlfriend they appear to have been on good terms since Carreno testified she invited Torres to visit her and he was on his way to her house when he was arrested. The record contains no evidence of the relationship between David C. and Torres but a reasonable juror could infer they too were friends because they were "loitering" together in front of a house and ran away together from the police. Thus both Carreno and David C. had a possible bias in favor of Torres. Carreno's testimony was suspect for other reasons. A reasonable juror might find it suspicious David would choose to confess his guilt to Carreno, with whom he had only a "hi" and "bye" relationship instead of Carreno's brother who, she testified, was more David's friend. A reasonable juror might

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[17] *People v. Cudjo*, *supra*, 6 Cal.4th at pages 608, 613 (reliability of hearsay witness's testimony erroneously considered in excluding testimony but properly considered in determining harmless error.)

also notice Carreno had no difficulty remembering David told her he was the one who threw away the gun but she had great difficulty remembering anything else David told her or when their conversation took place.

Given these circumstances the chance a reasonable juror would give Carreno's testimony significant weight seems remote. Accordingly, we find it is not reasonably probable admission of Carreno's testimony would have affected the outcome of Torres' trial.

C. Torres' Remaining Evidentiary Issues Are Without Merit.

Torres alleges other errors in the exclusion of evidence. None of his claims have merit.

The number of times Berdin had testified, how many arrests he had made, and whether he was aware he could be held civilly liable for wrongful arrest were beyond the scope of direct examination and irrelevant to any issue in the case including Berdin's credibility. Evidence Berdin did not mention Torres' tattoo at the preliminary hearing was irrelevant because Berdin was never asked at the preliminary hearing about a tattoo on Torres. The description of the men in front of the house which Garcia and Berdin received while on patrol was irrelevant to any issue in the case.

III. THE TRIAL COURT DID NOT COMMIT "CUNNINGHAM ERROR" IN SENTENCING TORRES TO THE UPPER TERM.

In *Cunningham v. California* the United States Supreme Court reiterated the view it expressed in *Apprendi v. New Jersey*[18] and other cases "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maxim based on a fact, other than a prior conviction, not found by a

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[18] *Apprendi v. New Jersey* (2000) 530 U.S. 466.

jury or admitted by the defendant."[19] Applying this rule to California's determinate sentencing law the court held the law violates the defendant's Sixth Amendment right to a jury trial to the extent it permits the imposition of an upper term sentence based "on facts found discretely and solely by the judge."[20] Torres argues such a violation occurred here. We disagree.

In sentencing Torres to the upper term for possession of a firearm by a felon the court stated it "select[ed] the upper term because the defendant was on parole at the time of the instant offense [and] his conduct in the intance [sic] offense clearly demonstrates that his performance on parole was totally unsatisfactory." The court went on to say: "Looking at the circumstances in aggravation, this is the defendant's third felony as an adult. He suffered an adjudication for three counts of robbery as a juvenile. He involved young people in this offense. He ran from the police putting others at risk creating the potential for great bodily injury." After defense counsel, in an effort to protect the record,[21] objected to the trial court's use of aggravating factors not found by the jury, such as "involving young people in the offense" and "creating a risk of great bodily injury," the court responded: "As I indicated and as I think the record clearly reflects, there are numerous circumstances in aggravation, not only the ones that you are complaining the jury didn't specifically decide in a verdict form, but rather implicitly by their verdict. He was on parole. He had been released [from prison] five months before this event. His performance on parole was obviously unsatisfactory as evidenced by his conduct in this case. These are all factors that the court may consider, above and beyond looking at the threat that is part of the conduct and implicitly found by the jury."

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[19] *Cunningham v. California*, *supra,* 127 S.Ct. at page 860.

[20] *Cunningham v. California*, *supra,* 127 S.Ct at page 868.

[21] At the time of Torres' sentencing trial courts were bound by our Supreme Court's opinion in *People v. Black* (2005) 35 Cal.4th 1238, upholding California's determinate sentencing law against a Sixth Amendment *Apprendi* challenge.

The People contend to the extent the trial court based its selection of the upper term on Torres' numerous prior convictions, sustained juvenile petitions, prior prison term[22] and unsatisfactory performance while currently on parole[23] the court's sentencing came within the *Cunningham* exception for a sentence based on a prior conviction.[24] The court's reference to other factors such as involving youth in the crime or posing a danger of bodily injury were mere dictum or, if error, then error of the harmless variety.

A number of other jurisdictions have interpreted the "prior conviction" exception to extend beyond the mere fact of a prior conviction and to include facts more broadly characterized as the defendant's recidivism.[25] We need not address the scope of the "prior conviction" exception because the present case plainly falls within the *Cunningham* exceptions.

The trial court's finding Torres had suffered numerous convictions as an adult[26] and a juvenile falls directly within the *Cunningham* exception for a sentence based on the defendant's prior convictions. Furthermore, the court's finding that at the time of the offense Torres was on parole and performed unsatisfactorily is valid under *Cunningham* because the fact he was on parole at the time of the offense was admitted by his counsel[27] and the fact he performed unsatisfactorily was necessarily found by the jury beyond a reasonable doubt when it convicted him of the current offense.

We agree with the People the trial court's references to other factors such as involving youth in the crime or posing a risk of great bodily injury does not require

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[22] California Rules of Court, rule 4.421, subdivision (b)(2), (3).

[23] California Rules of Court, rule 4.421, subdivision (b)(4), (5).

[24] *Cunningham v. California*, *supra,* 127 S.Ct at page 860.

[25] See discussion in *People v. McGee* (2006) 38 Cal.4th 682, 702-707.

[26] In 1999, Torres was convicted of driving a vehicle without the owner's consent and sentenced to six years in prison. Later the same year he was convicted of possessing a controlled substance and sentenced to 32 months.

[27] See discussion in Part I A, above.

reversal of the sentence. It is clear from the trial court's remarks at sentencing the court was focusing on Torres' prior convictions and the fact he commited the present offense while on parole. The other factors the court mentioned were merely make-weights. This is not a case where we are left to wonder whether improper factors were determinative in the defendant's sentence. Without a doubt, they were not.

DISPOSITION

The judgment is affirmed.

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JOHNSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.