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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO J. BARRAGAN et al.,

Defendants and Appellants.

D036697

(Super. Ct. No. SCE201483)

APPEALS from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed in part; reversed in part.

Antonio J. Barragan was found guilty of possession of a firearm by a felon. Carlos Paz was found guilty of assault with a firearm. It was found true Barragan had two prior felony convictions within the meaning of Penal Code<sup>1</sup> section 1203.4 and a prior strike conviction within the meaning of section 667, subdivisions (b) through (i). It was found true Paz personally used a firearm and committed his crime for the benefit of a

criminal street gang. Barragan was sentenced to a prison term of four years, Paz to a term of nine years. They appeal, arguing evidentiary and sentencing issues.

## FACTS AND BACKGROUND

### *A. Prosecution Evidence*

Appellants were charged with conspiracy to commit murder, conspiracy to commit robbery, conspiracy to assault with a firearm and with assault with a firearm. Barragan was additionally charged with being a felon in possession of a firearm. Barragan was found not guilty of the conspiracy charges and the assault charge but was found guilty of being a felon in possession of a firearm. Paz was found not guilty of conspiracy to commit robbery. The jury was unable to reach a verdict as to him on the conspiracy to commit murder and conspiracy to assault with a firearm charges but found him guilty of assault with a firearm.

The charges against appellants arose from events in the early morning hours of November 21, 1999, that the prosecutor unsuccessfully argued involved a conspiracy by appellants and co-defendant Joaquin Ruiz to commit robbery and to kill rival gang members. We relate the facts relevant to the charges on which appellants were convicted.

At approximately 11:45 p.m. on November 20, 1999, Steven Barton went to his neighborhood Circle K market. Barragan was in the store eating a hotdog. As Barton walked out of the market, he saw Paz and another man come around a corner. Another man immediately behind Barton was leaving on a bicycle. Paz drew a gun and raised it

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

to an angle of 45 degrees. Barton was afraid Paz was going to shoot him. As Barton got in his car and left, Paz lowered the gun. Barton stopped and called the police.

In the early morning hours of November 21, 1999, Christina Sick and Amanda O'Dell met Christina's boyfriend Angel Lopez in the parking lot of the same Circle K where Barton had seen appellants. A car driven by Paz pulled into the lot and the men inside talked to Lopez. Paz had a gun in his hand. He asked Lopez: "Where are you from?" In the gang subculture this is a conditional threat, i.e., if Paz was unhappy with the answer, there could be violence. The situation was defused when it became clear that Lopez was not a member of a rival gang. The men drove to the back of the store and parked. Two of the men, Barragan and Paz, walked back to where Sick and Lopez were standing and continued to talk with them. Paz took out a gun removed its bullets and handed it to Barragan. Barragan placed the gun to his head and pulled the trigger. The gun did not fire. A third man was talking to O'Dell. When police officers arrived, Barragan ran but was caught. A loaded .357 revolver was found on Paz.

A videotape, found during a search of Paz's car, made on November 20, 1999, showed Barragan with what appeared to be a handgun in his waistband. The conversation between Barragan and others tended to confirm his possession of the firearm. The conversation also suggested appellants and others were planning to commit gang related crimes.

#### *B. Defense Evidence*

Barragan testified and denied being in possession of a firearm either during the making of the videotape or at Circle K.

As to the assault charge, Paz argued the testimony of the witnesses was unreliable and no assault was proved.

## DISCUSSION

### A. *Section 995 Motion*

Barragan filed a section 995 motion asking that all charges against him be dismissed. The trial court granted the motion as to one charge of assault with a firearm but denied it as to the remaining conspiracy, assault with a firearm and firearm possession charges. Barragan argues the trial court erred in refusing to dismiss the remaining conspiracy and assault charges, contending there was insufficient evidence to support them. He argues the error was prejudicial since had the trial court granted the motion, evidence of his gang involvement, relevant to the conspiracy and assault charges but irrelevant to the firearm possession charge, would have been excluded.

#### 1. Background

Barragan and Paz were charged with three conspiracy counts and two assault with a firearm counts. Barragan was charged with one count of being a felony in possession of a firearm. With the exception of the firearm possession charge, each count alleged the crime was committed to assist in criminal conduct by a gang within the meaning of section 182.22, subdivision (b)(1).

In his conclusory section 995 motion, Barragan argued the evidence at the preliminary hearing supporting the conspiracy charges was lacking since there was no evidence of his intent to commit any of the crimes to which the conspiracies were allegedly directed. Although claiming the assault with a firearm and firearm possession

charges should also be dismissed, the exact basis for such dismissal was not clearly stated.

The prosecutor responded there was sufficient evidence to support each of the charges. As to the assault with a firearm charge in count four, the prosecutor stated the charge related to the initial confrontation between Lopez and appellants when Paz, displaying a firearm, asked Lopez about his gang affiliation. The prosecutor argued Paz and Barragan were operating in association and the question concerning gang affiliation was an assault based on a conditional threat theory.

The trial court granted the motion as to the assault with a firearm count not involving Lopez and denied it as to all other counts.

At trial Barragan was found not guilty of the conspiracy and assault with a firearm charges but guilty of being a felon in possession of a firearm. Paz was found guilty of assault with a firearm and not guilty of conspiracy to commit robbery. As to the charges of conspiracy to commit murder and conspiracy to commit assault with regard to Paz, the jury was unable to reach a verdict.

## 2. Law

"Penal Code section 995 permits the court to set aside an information on a finding that the defendant was committed without reasonable or probable cause. On appeal, the superior court's decision to set aside the information is disregarded, and the magistrate's determination holding the defendant to answer is directly reviewed. [Citation.]" (*People v. Kongs* (1994) 30 Cal.App.4th 1741, 1748.) "Our task is to determine whether the magistrate, acting as a person of ordinary prudence, could conscientiously entertain a

reasonable suspicion that the defendant committed the crime charged. [Citation.] To that end, we draw every legitimate inference supported by the competent evidence and refrain from substituting our judgment for that of the magistrate. If the record demonstrates some showing of every element of the charge [citation], we must affirm the magistrate's ruling denying the motion to set the charge aside. [Citations.]" (*Ibid.*, internal quotation marks omitted.)

On appeal "an erroneous denial of a section 995 motion justifies reversal of a judgment of conviction only when a defendant is able to demonstrate prejudice at trial flowing from the purportedly inadequate evidentiary showing at the preliminary hearing. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 136-137.)

### 3. Discussion

Whatever the propriety of the magistrate's finding of sufficient evidence with regard to the conspiracy counts -- a complex question -- Barragan cannot demonstrate prejudice since we conclude the evidence was sufficient to bind him over on the assault with a firearm charge. That count included a gang involvement allegation pursuant to section 182.22, subdivision (b)(1), and proof of the assault charge as to Barragan necessarily was based on an aiding and abetting theory. That being the case, evidence of Barragan's gang involvement would have been admitted even if the conspiracy charges had been dismissed.

The charge of assault with a firearm was based on the theory of conditional threat concerning Paz's demand that Lopez reveal his gang affiliation. "Where a party puts in a condition which must be at once performed, and which condition he has no right to

impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is *then* necessary for him to go in order to carry out his intention, then it is as much an assault as if he had actually struck, or shot, at the other party and missed him.'" (*People v. Lipscomb* (1993) 17 Cal.App.4th 564, 570, citing *People v. McMakin* (1857) 8 Cal. 547, 548-549; see also CALJIC No. 9.00.1.)

To support a finding of assault with a firearm under this theory, it is unnecessary the weapon be pointed at the victim. (See *People v. McMakin, supra*, 8 Cal. at pp. 548-549.)

It was the prosecution's theory Barragan was vicariously responsible for Paz's assault on Lopez. Evidence was presented at the preliminary hearing that Barragan and other gang members were together in the car when Paz, holding a gun, confronted Lopez and demanded he declare his gang affiliation. Given the context of the demand, there was sufficient evidence to conclude that had Lopez not answered or if Paz were not satisfied with the answer, he would have shot Lopez. Indeed, Paz was convicted at trial of assaulting Lopez based on that theory. Given the evidence presented at the preliminary hearing of Lopez's association with Paz, their common gang membership and Lopez's activities at Circle K that evening, there was sufficient evidence to conclude Barragan aided and abetted Paz in the assault.

Since there was probable cause to bind Barragan over for trial on the assault with a firearm charge involving Lopez and since trial of that charge and its attendant gang involvement allegation would have made relevant evidence concerning Barragan's gang

membership, no prejudice was done even assuming the trial court erred in not dismissing the conspiracy charges.

### B. *Strike Enhancement*

Barragan argues there was insufficient evidence to support the true finding on his alleged strike prior.

In determining whether the evidence is sufficient to support the verdict, we review the entire record viewing the evidence in the light most favorable to the judgment and presuming in support of the verdict the existence of every fact the jury could reasonably deduce from the evidence. The issue is whether the record so viewed discloses evidence that is reasonable, credible and of solid value such that a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.)

#### 1. Background

The information alleged that within the meaning of section 667, subdivisions (b) through (i), Barragan had suffered a prior juvenile adjudication in case No. JD887757 for assault with a deadly weapon (§ 245, subd. (a)(1)) with a true finding on an allegation of the infliction of great bodily injury.

In support of the "strike" allegation, the prosecution offered the section 602 petition, alleging Barragan "did assault another with a deadly weapon and instrument and by means of force likely to produce great bodily injury" and alleging the infliction of great bodily injury in the commission of that offense. The prosecution also offered the minute order for the jurisdictional hearing showing those allegations were found true.



The trial court instructed the jury that assault with a deadly weapon and with the infliction of great bodily injury, in violation of sections 245, subdivision (a)(1), and 12022.7, was a serious felony for determining the existence of a prior strike. The jury found the strike allegation true and Barragan's prison term was doubled based on that finding.

## 2. Discussion

### a. Insufficiency of Evidence

Barragan notes that a prior juvenile adjudication is a strike under section 667, subdivision (d)(3)(D), if it meets certain requirements. Pertinent to his claim is the requirement that "The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

Barragan contends the evidence offered to prove the strike allegation was insufficient in two respects. First, he argues none of the crimes found true in the section 602 proceeding qualify as strikes. Second, while the exhibits offered included a section 602 petition, the minutes of a jurisdictional hearing at which true findings were made and a dispositional hearing was set, there is no evidence Barragan was ever adjudged a ward of the court. He contends for a juvenile adjudication to qualify as a strike, the prosecution must prove that the section 602 petition resulted in a declaration of wardship.

We disagree with Barragan's first contention but find merit in the second.

## 1. Offense

The evidence was sufficient to find true the allegation of a strike within the meaning of section 667, subdivision (d)(3)(D), and Welfare and Institutions Code section 707, subdivision (b)(14). Pursuant to those sections, assault by means of force likely to produce great bodily injury qualifies as a strike. It was found true in the juvenile proceeding that Barragan violated section 245, subdivision (a)(1), i.e., he assaulted another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury. Barragan notes the crime can be committed in two ways, one of which is a strike while the other is not. He argues, therefore, that a mere showing that the charge was found true is insufficient evidence the offense qualified as a strike.

Barragan is mistaken. It was alleged in the section 602 petition that in the commission of the assault, he, with the intent to inflict such injury, personally inflicted great bodily injury on the victim within the meaning of section 12022.7. The minute order for the jurisdictional hearing indicates the juvenile court found true the section 12022.7 allegation.<sup>2</sup> Given the true finding on the great bodily injury enhancement, the jury could reasonably infer that it was found true in the juvenile court proceeding that Barragan committed an assault by means of force likely to produce great bodily injury. (See *People v. Kelii* (1999) 21 Cal.4th 452, 456-457.)

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<sup>2</sup> While the petition alleged Barragan intended to inflict great bodily injury, such intent is not an element of the enhancement and the trial court's general finding the 12022.7 allegation was true is not a finding that such infliction was intentional.

## 2. Wardship Finding

As Barragan notes, in order for his prior juvenile court adjudication to be a strike, it was necessary the prosecution prove it resulted in a declaration of wardship. The prosecution did no more than prove that true findings were made on the petition and the matter was set for a dispositional hearing. While it is possible to speculate that the true finding on the petition resulted in a declaration of wardship, we conclude on this record it is not possible to so infer. The evidence supporting the finding of a strike based on Barragan's prior juvenile adjudication was insufficient.

### b. Remedy

A split of authority exists concerning the proper remedy when insufficient evidence is offered to sustain the finding of an alleged strike. This court in *People v. Mitchell* (2000) 81 Cal.App.4th 132, 138-154, concluded that while retrial of the factual issue was not barred by double jeopardy considerations, it was barred by equitable principles of res judicata and law of the case. Other courts disagree and find no impediment to retrial of an alleged strike. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1455; *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, 1301-1305; *People v. Scott* (2000) 85 Cal.App.4th 905, 909-926.)

We stand by our opinion in *Mitchell*. The true finding that Barragan suffered a strike based on the juvenile adjudication in case No. JDA87757 is reversed and it may not be retried.

### *C. Impeachment with Priors*

Barragan argues the trial court erred when it allowed the use of a prior juvenile adjudication to impeach his testimony.

During his testimony, Barragan admitted two prior felony convictions and a true finding in a juvenile proceeding. The trial court instructed those convictions and adjudication could be used in assessing Barragan's credibility. No objection was made to the introduction of the priors or to their use for impeachment.

The question of whether juvenile court adjudications are admissible to impeach is not fully resolved. (Compare *People v. Lee* (1994) 28 Cal.App.4th 1724, 1739-1740; *People v. Jackson* (1986) 177 Cal.App.3d 708, 711-713; *People v. Sanchez* (1985) 170 Cal.App.3d 216, 218.) It is unnecessary we resolve the question. No objection was made to the use of the juvenile adjudication to impeach and the issue is waived. (*People v. Belmontes* (1988) 45 Cal.3d 744, 766-767.) In any event, any error in admitting the juvenile court adjudication to impeach was harmless in light of the use of two felony convictions to impeach.

### *D. Search and Seizure*

Paz argues the trial court erred in denying his motion to suppress the videotape seized from his car. He first argues that while the police could lawfully search his vehicle, they could not seize the videotape since it was not evidence of the crime for which he was arrested, i.e., assault with a deadly weapon, and was not a container that could hold evidence of that crime. Next, he argues the seizure could not be justified as an

inventory search since none of the purposes allowing such searches were served by the police viewing the tape.

"When reviewing a ruling on an unsuccessful motion to exclude evidence, we defer to the trial court's factual findings, upholding them if they are supported by substantial evidence, but we then independently review the court's determination that the search did not violate the Fourth Amendment. [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 846.)

### 1. Background

Prior to trial, Paz moved for the suppression of the videotape seized from his car after his arrest. He argued the search was presumptively illegal since it was not carried out pursuant to a search warrant.

The prosecution responded that Paz had not demonstrated a reasonable expectation of privacy in the videotape and thus could not assert any illegality its seizure. In any event the prosecution argued the search of Paz's vehicle and its contents was lawful for several reasons. First, the search was conducted incident to his arrest; second, there was probable cause to believe the vehicle contained evidence of a crime; and finally, the search was conducted to inventory the contents of the car.

The suppression hearing was based on the transcript of the preliminary hearing and on the testimony of investigating officer Harold Turner at the section 1538.5 hearing. In the early morning hours of November 21, 1999, Turner and another officer, Michael Knobbe, were dispatched to a Circle K market in El Cajon to investigate the report of a man brandishing a firearm. As the officers arrived, Barragan came around a corner of the

market and was contacted by Knobbe. Turner looked around the corner and saw five persons, including Paz, standing by a dumpster that had graffiti on it. When Turner told the persons to get on the ground, one of them, Carlos Arizmendez, threw a can of spray paint over a fence. Eventually, the five people got on the ground. As they did so, Turner saw Barragan running with Knobbe in pursuit.

Paz was searched and a loaded .357 revolver gun was found in his pocket. Paz was placed under arrest for possessing a concealed weapon and for carrying a loaded firearm in a public place. Arizmendez was arrested for placing graffiti on the dumpster -- the paint, which matched the paint in the discarded can, was still tacky. Barragan was apprehended by Knobbe and was arrested for delaying and obstructing an officer.

Behind the market, about 20 feet from where he contacted the men, Turner saw a car facing out to the street which a records check indicated was registered to Paz. The car was unlocked and windows were down. In plain view the officer saw a ski mask, silver duct tape, a box of ammunition and a video camera with a tape in it. Turner entered the car because he believed it contained evidence of criminal activity, i.e., masks, duct tape and handgun ammunition are used in robberies and cars are parked facing the street to allow quick getaways, because he had arrested the car's driver and because he wished to inventory its contents before impounding it. He seized the video camera and videotape because in his experience "taggers," i.e., those who paint objects with gang logos, "routinely" videotape to record their act. Turner noted that in his experience those who commit crimes at times videotape them. Turner's decision to impound the vehicle and conduct an impound search were pursuant to sheriff's department policy.

When interviewed by Turner later in the evening, Paz denied the tape was his and stated he did not believe the tape was in his car.

The trial court denied the motion to suppress the videotape. It found the car was lawfully entered and the tape properly seized as incident to Paz's arrest. Analogizing viewing seized videotape to opening a container, the court concluded the police lawfully viewed the tape.

## 2. Discussion

The videotape was properly seized and viewed.

When an officer makes a lawful custodial arrest of a driver, the officer is entitled to search the passenger compartment of the vehicle and may also examine the contents of any containers found within the passenger compartment, whether it is reasonably probable that such a container might hold a weapon or evidence relating to the offense for which the driver has been arrested. (*New York v. Belton* (1981) 453 U.S. 454, 460-463 [101 S.Ct. 2860]; *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042.)

There is no requirement that containers seized during a warrantless search be immediately opened. (*United States v. Johns* (1985) 469 U.S. 478, 487 [105 S.Ct. 881].) This rule applies in particular to seized videotapes since a video player is required to view them. (*U.S. v. Albers* (9th Cir. 1998) 136 F.3d 670, 674.)

As we understand Paz's argument, he concedes he was lawfully arrested and that Turner could properly search his car incident to that arrest. He argues, however, the videotape taken from the camera was not a container, therefore, the police had no right to view it. In our view a videotape cassette is a container. (See generally *U.S. v. Albers*,

*supra*, 136 F.3d at p. 674.) Simply because the contents may require a device to see them does not change the nature of the videotape cassette as a receptacle of an item that may have evidentiary value. Officer Turner properly seized the tape for viewing.

In any event, there was probable cause to believe Paz's car contained contraband used to paint graffiti. As Turner testified, "taggers" frequently videotape these criminal acts. As such, there was probable cause to seize the videotape irrespective of any other constitutionally permissive ground. (See *United States v. Ross* (1981) 456 U.S. 798 [102 S.Ct. 2157].)

The judgment as to Paz is affirmed. The finding of a strike prior as to Barragan is reversed; in all other respects the judgment is affirmed.

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BENKE, J.

WE CONCUR:

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KREMER, P. J.

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HUFFMAN, J.