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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE LAMONT SWAFFORD,

Defendant and Appellant.

B277723

(Los Angeles County
Super. Ct. No. KA103402)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Juan Carlos Dominguez, Judge. Affirmed.

H. Russell Halpern for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Steven E. Mercer and John Yang, Deputy
Attorneys General, for Plaintiff and Respondent.

In a trial by jury, defendant and appellant Andre Lamont Swafford was found guilty of second degree murder (Pen. Code, § 187, subd. (a)).¹ He admitted 10 prior convictions and prior prison terms (§ 667.5, subd. (b)), with one of the prior convictions being a “strike” (§§ 667, subd. (d), 1170.12, subd. (b)) and a serious felony (§ 667, subd. (a)(1)). Defendant was sentenced to a prison term of 30 years to life, plus five years.

Defendant timely filed a notice of appeal from the judgment. He contends that the trial court erred by allowing the People to introduce gang evidence.

We affirm.

FACTUAL BACKGROUND

I. Prosecution Evidence

In 2013, Danielle Webster (Webster), who knew defendant casually, was renting a room from defendant’s aunt, Gloria Harris (Harris). On October 9, 2013, defendant asked Webster to drive him to see his girlfriend, Shieka Lee (Lee). Defendant called Lee and said that he was on his way. They arrived at Lee’s home after seven or eight minutes of driving. Lee looked out the front door and said she was trying to find her keys.

Because the wait was taking too long, defendant, who had been drinking, exited the car and went to the door. He used his key to open the black screen door behind it. He said, “Open the door or else I am going to kick it.” He kicked the door several times and the door opened. He entered. Defendant then yelled, “That’s why you didn’t open the door because you got a dude in my house.”

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

By this time, Webster had gotten out of her car and approached the door. She saw defendant punch Vincent Clardy (Clardy); Clardy and defendant then began fighting inside the house. Defendant “bombed on” Clardy. The two tumbled out of the doorway and down the stairs and struggled on the ground. Clardy was momentarily on top of defendant. Defendant then said, “you can’t handle me,” and thereafter gained the upper position. He punched Clardy a few times and placed his forearm against Clardy’s neck. Lee tried to intervene by pulling defendant’s hair, and defendant swung his arm at her. Defendant then said to Clardy, “You’re f---ing my girl.” Defendant remained on top of Clardy for about 15 minutes. He attempted to free himself using “swatting” motions, but at some point, Clardy was not fighting back.

Jacob Paul Cyrus (Cyrus), a bystander, observed defendant on Clardy’s back, with a chokehold on Clardy’s neck. Defendant’s right arm was around Clardy’s neck and his left hand was pulling on his right arm. At some point, Clardy had his eyes wide open and was not moving. Meanwhile, Lee kept hitting defendant. Blood came out of Clardy’s mouth.

After being on top of Clardy for about 15 minutes, defendant stood up, took off his shirt, beat his chest, and yelled “456!” Webster also heard defendant yell “North side islands” and “Bloods” and “456.” She understood “456” to refer to a Piru Blood gang that claimed the north side of Pomona. Webster was once a member of 456.²

² During her trial testimony, Webster said that “456” referred to a “dice game.” The prosecutor then presented a copy of the preliminary hearing transcript, in which she stated that “456” referred to the Piru Blood gang.

After defendant walked away, Lee hit Clardy in the chest in an attempt to wake him up. A trash truck driver, David H. Espinoza (Espinoza), came by and observed Clardy with blood coming out of the side of his lips. Espinoza tried to take a pulse and noticed that it was becoming more faint. He called 911.

Pomona Police Officer Christopher Blank arrived at scene at 3:55 p.m. Espinoza and another witness identified defendant as the one involved in the fight. Crime scene investigator (CSI) Adam McDonald arrived at the scene and collected evidence. He did not find a knife at the scene. The front door had a big smear with grass on it, indicating that some force had been applied. A red shirt was found at the scene with the smell of marijuana on it. Clardy was pronounced dead at 4:33 p.m.

Detective Richard Machado arrived at the scene at 4:40 p.m. No knife was found at the scene or on the victim.

According to the autopsy report, Clardy died of multiple traumatic injuries. The coroner's office found that substantial pressure had been applied to the right side of the chest, resulting in broken ribs, as well as to the right side of the neck. The combination of the neck compression and the compression of the right side of the chest was fatal.

Days after the incident, Detective Machado conducted a telephone interview of Ramona Dinger (Dinger),³ someone who

³ Dinger testified at trial that she was uncomfortable and did not want to be there. She did not want to testify, largely because she believed that the two men involved in the fight were gang members. Later, when the transcript of her telephone conversation with the police officer was introduced, it was noted that Dinger was "unavailable."

had called 911. She indicated that she was passing by in her car when she saw Clardy, defendant, and Lee fighting. Clardy was already on the ground unconscious and Lee was trying to pull defendant off. Defendant, who was on top of Clardy, had his arms wrapped around his neck. Lee was repeatedly yelling, “Get off of him!” But, the “dude was holding on tight.” When defendant finally let go, Clardy lay motionless and unconscious. Lee tried to give Clardy CPR. Dinger heard Clardy snore. Defendant calmly walked away. The police and paramedics arrived.

Detective Michael Lange, a gang expert, testified that “456,” “North side,” and “456 Island Bloods” all refer to the 456 North Island Bloods gang in Pomona. Blood gang members typically wear red. Based on the facts of this case, Detective Lange opined that the use of the term “456” did not refer to a dice game but to the 456 Island Blood gang.

Detective Lange opined that defendant was an associate of the 456 Island Blood gang based on a past contact with him and defendant’s proclamation of his gang after the fight with Clardy. The red shirt defendant wore was consistent with his gang association as 456 Island was a Blood gang. Defendant’s declaration of his gang served to intimidate witnesses from cooperating with the authorities.

II. Defense Evidence

Lee testified that her “on and off” relationship with defendant was “off” on the day of the incident. At the time, Lee was already dating Clardy, who was also Lee’s PCP supplier. When defendant called to say that he was going to her house, Lee was worried that defendant would see Clardy. In Lee’s mind, she was “doing two relationships at the same time.” At the time, both

Lee and Clardy had consumed PCP. Lee told Clardy to leave to avoid defendant, but Clardy refused. When defendant knocked, Clardy took off his shirt and opened the door. Defendant entered and Clardy said, “You old mother---.” Defendant then asked, “Are you f---ing my girl?” to which Clardy replied, “Yes.”

Clardy punched defendant and the two struggled. At some point, Clardy pushed defendant out the door and down the stairs. The two began punching each other and rolling on the ground. Defendant eventually gained the top position as Clardy lay on his stomach. Defendant held Clardy’s shoulder to stop him from digging into his pocket.

Lee tried to get defendant off of Clardy, but was knocked down several times. After the fight, someone told Lee that Clardy was still breathing. Lee experienced an anxiety attack and went inside the house to lay down. Lee said that Clardy was “chunky” in build and carried a pocketknife in the pocket he was reaching for during the fight. Clardy also used the name “Champ” because he was a “fighter.” Clardy died later that day.

Physician and medical school professor Dr. Marvin Pietrusvka testified that he reviewed defendant’s medical records and the preliminary hearing transcripts related to this case. He concluded that the cause of Clardy’s death was congestive heart failure and cardio respiratory arrest. The secondary cause of death was PCP toxicity. Dr. Pietrusvka testified that the situation was aggravated with a chest fracture and neck compression, but any effect from the struggle was minimal.

Webster testified that she was in the car when she saw the fight between Clardy and defendant. She arrived at the steps of the house when defendant and Clardy were exiting the house. She stood about eight to 10 feet away as the fight continued.

After the fight, defendant walked away saying, “456.” She did not hear defendant say “Northside.” She “overexaggerated a lot of things in [her] first statement . . . because [she] was mad [and] going through a lot.”

Defendant testified that he was 50 years old at the time of trial. He suffered a serious work-related back and neck injury in 1999. He experienced blood clotting and was prescribed Coumadin.

Defendant and Lee became romantically involved about 12 years earlier. Defendant was constantly trying to stop Lee from taking narcotics. The morning before the incident, she arrived at defendant’s house to watch a movie, but because he saw that she was “high,” he said that she could leave if she wanted. Defendant himself used marijuana and PCP from time to time.

Later that day, defendant called Lee and asked if she wanted to watch the movie; Lee asked him to get her. Webster drove defendant to Lee’s place. Defendant called Lee to let her know that he was arriving. After waiting outside for 20 minutes, defendant went to the house, opened the screen door, and knocked. When no one opened the door, defendant kicked the door. Defendant attempted to open the door with one of his keys, and the door opened. Defendant walked in and saw Clardy behind the door with his fist “balled up,” saying “Old ass n---.” Clardy did not have a shirt on. Clardy hit defendant in the eye.

Defendant felt dizzy after the blow. Clardy began to shove defendant out the door and defendant responded by hitting Clardy multiple times with no effect. Defendant was pushed out of the door backward and landed at the bottom of the stairs on his back. Clardy landed on top of defendant, and defendant

began swinging hard. Defendant, who felt a pain in his back, tried to block the punches.

Defendant rolled his body and at some point ended up on top of Clardy. Because it was difficult for him to stand, defendant tried to restrain Clardy by strangling him. Defendant was trying not to be too active because he had a blood clot, which was found by the doctors a month earlier. Defendant placed his forearm around Clardy but never used a chokehold. At this point, Lee was trying to pull defendant's hair. Defendant believed that Lee did not understand that he could not just "jump up." Defendant used his right hand to "swat[]" Lee away.

Later, Clardy tapped defendant's leg as if signaling that he was "tapping out." Defendant began to get up and Clardy "rear[ed] back again," prompting defendant to resume his hold on Clardy. Defendant was afraid that Clardy would try to reach into his own pocket to retrieve any weapon that he could find.

Then defendant stood up. Because he did not die from the blood clot, he said "456," which pertained to a dice game. Someone from a city truck arrived and checked on Clardy; the man said Clardy was "okay." An ambulance arrived and defendant waved to it. Clardy did not get up; defendant believed that Clardy had "passed out" from the PCP.

Defendant knew what "North Side Islands" referred to, but he was never jumped into any gang.

Defendant had previously been convicted of possession of narcotics for sale, criminal threats, possession of a firearm, taking or attempting to take a police officer's firearm, felon in possession of a firearm, and resisting the police.

CSI McDonald testified that at the scene, defendant told him that his back hurt and that he had injured it at work. At the jailhouse, defendant continued to complain about back pain.

Joshua Hong, an emergency room physician from Pomona Valley Hospital, testified that in October 2013, he examined defendant and because of his self-reported history of blood clots, prescribed Coumadin, a blood thinner.

III. *Rebuttal*

Harris testified that on October 9, 2013, at the time of the fight, she received a call from Webster, saying, “Can you come and get your nephew? I think he’s going to have a fight.” Harris also told an officer that during the call, Webster said that her “nephew was acting crazy. He was up there. He was down there beating up a guy and acting crazy.” Harris also told another detective that Webster had told her that defendant was “beating him bad.”

Detective Machado testified that he interviewed Webster; she told him that she overheard a discussion between Harris and defendant during the days leading to the fight. Harris said that if defendant kept drinking, he was going to jail. Defendant replied, “F---the police.”

DISCUSSION

Defendant contends that the admission of gang evidence was erroneous because such evidence was unduly prejudicial.

I. *Relevant Proceedings*

During pretrial proceedings, defendant moved to exclude any evidence relating to gangs, including his verbal references to the 456 Blood gang and expert testimony on what those references meant. After entertaining oral argument, the trial court determined that the evidence was admissible. The trial

court reasoned that since there was evidence that defendant had uttered those words, the prosecution was entitled to offer explanations of why those words were said. The trial court noted that the words lent themselves to conflicting interpretations and that the parties could advance the interpretation they chose. But, because the meaning of those gang references fell into a special area, the jury was entitled to hear from gang experts regarding the meaning. The trial court found the evidence admissible pursuant to Evidence Code section 352.

II. *The Law*

While gang evidence is inadmissible solely to prove a criminal defendant's criminal disposition (Evid. Code, § 1101, subd. (a); *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240), such evidence is often relevant to "identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) In this regard, evidence of the sociology and psychology of gangs may be relevant. (*People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497.)

It follows that courts have upheld the admission of gang evidence to prove mental state. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 [motive, malice, and intent for murder].)

We review the trial court's order for abuse of discretion. (*People v. Funes, supra*, 23 Cal.App.4th at p. 1519.)

III. *Analysis*

A. No Error

The trial court here did not abuse its discretion in admitting the challenged gang evidence. Defendant's verbal gang references and their meaning were crucial circumstantial evidence of defendant's mental state when he maintained a

chokehold over Clardy for 15 minutes. The invocation of a gang affiliation after choking the victim into unconsciousness, smacking of bravado and intimidation, would tend to rebut defendant's central defense that the chokehold was a fearful attempt to defend himself. This evidence also disproves a theory of voluntary manslaughter that was made available to the jury via the jury instructions, i.e., that defendant simply lost his cool and killed out of the heat of passion.

Defendant claims that the trial court erred when it allowed Dinger's testimony that she was afraid to testify because she was under the impression that he was a gang member. But, as the trial court noted, her testimony was not offered for the truth of the matter asserted; rather it was offered to show her state of mind when she kept indicating a lack of memory to important questions that were posed to her during trial. Indeed, a witness's fear and the basis for that fear of testifying can be presented to shed light on her credibility in court. (*People v. Valdez* (2012) 55 Cal.4th 82, 135.) And the jury was given a limiting instruction informing them of the limited purpose of her testimony. ([“You may consider [Dinger's] beliefs only for the limited purpose of evaluating her testimony and her demeanor here in court”].)

B. Any Alleged Error Was Harmless

Even if the trial court had erred in admitting this evidence, which it did not, any such error would have been harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The jury was given the following cautionary instruction “The fact that the defendant in this case may or may not be a member of, or may or may not be associated with a gang, is not an issue in this case and is therefore not a question that is to be considered by you. Membership in or association with a gang is not a crime. You

may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit a crime. The testimony of [Detective] Michael Lange was received only for the limited purpose of assisting the jury with the meaning of the words spoken by the defendant immediately following the altercation with the decedent, and why the words may have been spoken. You may not consider this testimony for any other purpose. You are required to consider the testimony of [Detective] Michael Lange, but you are not required to accept it as true or accurate. It is up to you and you alone to determine whether the words were in fact spoken by the defendant, in whole or in part, and if you decide that the defendant spoke the words, to determine the meaning and relevance the words may have, if any, to any of the issues to be decide[d] by you in this case. Consider the words spoken along with all of the other evidence presented to you during the trial. It is up to you to determine how much importance to give to the words.”

The jury was given a similar cautionary instruction regarding Dinger’s testimony about her fear of testifying.

We presume that the jury understood and followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Moreover, the evidence was strong that defendant was not acting out of any belief in self-defense, as he claimed at trial. Rather, the evidence demonstrates that defendant was the aggressor. According to Webster, before the fight began, defendant yelled, “That’s why you didn’t open the door because you got a dude in my house.” He struck Clardy first and then “bombed on” him. He told Clardy that he could not “handle” him. He also revealed his motive for the fight, stating “You’re f---ing my girl.”

And the intent to kill was clear. Defendant placed his forearm against Clardy's neck. He had his right arm around Clardy's neck and his left hand pulling on his right arm. He maintained that fatal chokehold for 15 to 20 minutes.

In light of this overwhelming evidence, there is no reasonable probability that absent the gang evidence, defendant would have received a better outcome.

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT