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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERT SENDEJAS, Defendant and Appellant.	2d Crim. No. B265902 (Super. Ct. No. BA433603) (Los Angeles County)

Robert Sendejas appeals his conviction by jury for assault with a firearm (Pen. Code, § 245, subd. (a)(2))[1] and making criminal threats (§ 422, subd. (a)) with a firearm (§ 12022.5, subd. (a)) and gang enhancements (§ 186.22, subd. (b)(1)(B)). He was sentenced to 12 years state prison. Appellant contends that a 15-month prefiling delay violated his due process rights and that the trial court committed evidentiary and

[1] All statutory references are to the Penal Code unless otherwise stated.

sentencing errors. We affirm the judgment of conviction but remand for resentencing.

Facts

On November 14, 2013, appellant and his cousin, Michael Diaz, confronted Juan Alvarado and Fernando Garcia, outside their car towing business in Montebello. Appellant said "this is my hood" and asked Alvarado where he was from. Diaz said they were going to tax Alvarado to do business. Appellant pointed a silver revolver at Alvarado's face and said "Do you want me to shoot it?" Terrified, Alvarado crouched down. Appellant and Diaz ran away, yelling "Vail" and "13."

Alvarado called 911 and reported that the man wielding the handgun was Hispanic and bald, and had a goatee and neck tattoo. It matched appellant's description. Alvarado also said that the man with the handgun wore a black T-shirt and the other man (Diaz) wore a white T-shirt. Officers searched the area and arrested Diaz, whom Alvarado and Garcia identified.

Alvarado showed Montebello Police Officer Melissa Leal a surveillance video of the armed assault. One man wore a white shirt and the other dark clothing. The man with the dark clothing pulled an object from his waistband and pointed it at Alvarado. Officer Leal testified that the video was too grainy to make out the facial details of the assailants.

Appellant was arrested the next day for possession of a loaded .38 caliber revolver (§ 29800, subd. (a)(1)). Appellant said he was a rapper and went by the name Bobby Detain, and that he carried the revolver for protection. Two detectives tried to interview appellant about the Alvarado assault but appellant

declined to waive his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436).

A few days later, Alvarado and Garcia identified appellant in a photo lineup. Alvarado had seen prior surveillance videos of appellant stealing property from the towing business.

The detectives assigned to the case suspended the investigation to work on other cases. In February 2014, appellant pled guilty to unlawful possession of a firearm and was sentenced to 16 months state prison. (Case no. BA 418499-02.) The revolver was ordered destroyed.

After the detectives resumed the investigation in 2015, Alvarado and Garcia identified a photo of the revolver that was recovered from appellant. On February 11, 2015, the district attorney filed a criminal complaint and obtained a warrant that led to the search of appellant's bedroom where a notepad was found. The notepad had gang graffiti and the words "Bobby Loco, V213R" written in it.

At trial, Alvarado and Garcia identified appellant as the man with the revolver who threatened to shoot Alvarado. Montebello Police Detective Craig Adams, a gang expert, testified that the assault was carried out in gang territory claimed by the Vail Street Locos gang. Diaz was a self-admitted member of the Vail Street Locos gang and the gang was on friendly terms with the Varrio 213, a criminal street gang that controlled the same neighborhood.

Detective Adams knew appellant and believed that he was an active member of the Varrio 213 gang and went by the moniker Bobby Loco. When Adams patrolled the neighborhood, he often saw Varrio 213 gang graffiti with the tag name "Bobby Locco." Bobby Locco was a rapper and rapped with Vail Street

Locos gang members. Appellant also had a Facebook page with photos of himself, Diaz, and Varrio 213 and Vail Street Locos gang members. In response to a hypothetical question that tracked the facts of the case, Detective Adams opined that the charged crimes were committed for the benefit of and in association with a criminal street gang.

Pre-Charging Delay

Appellant argues that the 15-month delay in filing the information violated his due process rights under the California Constitution. (Cal. Const., art. I, § 15; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504-505.) The trial court found that the applicable statute of limitations was three years and that the prefiling delay caused no prejudice. It found that "[t]he possibility of prejudice is inherent in any . . . delay" but was too speculative to demonstrate that appellant could not receive a fair trial.

We defer to the trial court's factual findings that are supported by substantial evidence and determine whether the court abused its discretion in concluding that the justification for the delay outweighed the alleged prejudice. (*People v. Cowan* (2010) 50 Cal.4th 401, 431.) "Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 107.)

Appellant argues that he was prejudiced because the surveillance video was destroyed and the witnesses had fading memories. Purposeful delay almost always warrants dismissal, even where there is minimal prejudice. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431.) Investigative delay, whether negligent or not, requires a much greater showing of prejudice. (*Ibid.*)

Here, the detectives were busy with task force work and investigating other cases due to a spike in serious and violent crimes. The trial court reasonably concluded that the prejudice, if any, did not outweigh the justification for the delay. With respect to the surveillance video, the prefiling delay had nothing to do with its destruction. Officers Leal and Detective Adams asked for a copy of the video three different times within a week of the assault. Alvarado could not copy the video because of computer problems and later discovered that the surveillance system had recorded over the video. The prejudice was minimal because the video was too grainy to show the facial details of the assailants. Had the video been produced at trial, it would have corroborated the victim's testimony. There is no basis for appellant's speculation that the video could have exonerated appellant.

The trial court, in denying the pretrial motion to dismiss, ruled that appellant could file a *Trombetta* motion (*California v. Trombetta* (1984) 467 U.S. 479) for failure to preserve the video, request a jury instruction, or bring a motion to exclude testimony. Appellant did not exercise any of those options and cites no authority that the trial court had a sua sponte duty to give a limiting instruction or exclude testimony about the video. (See *People v. Medina* (1990) 51 Cal.3d 870, 894 [no sua sponte duty to give an adverse-inference instruction

absent a finding of bad faith destruction of evidence].) Dismissal of a prosecution is not called for when a less severe remedy affords a defendant due process and a fair trial. (*People v. Price* (1985) 165 Cal.App.3d 536, 545.)

Appellant contends that the prefiling delay resulted in faded witness memories as reflected by Alvarado's preliminary hearing testimony. Rejecting the argument, the trial court stated that "it's clear to me based upon a review of the [preliminary hearing] transcript that this fading memory of the victim is not so much a fading memory as a reluctan[ce] to testify in a case of this nature. [¶] . . . I think it inures to the defendant's benefit, not to the People in the sense [the witnesses] are much more vague now faced having to testify against the defendant than they were communicating with the police."

Alvarado cried at the preliminary hearing, was scared and afraid, and did not want to testify. Garcia, on the other hand, recalled a great deal about the assault and testified about appellant's dress and appearance, where appellant and Diaz positioned themselves, and what was said. Substantial evidence supports the finding that the prefiling delay did not prejudice appellant or deny him a fair trial. "The showing of actual prejudice which the law requires must be supported by particular facts and not, as in this case, by bare conclusionary statements." (*Crockett v. Superior Court of Santa Clara County* (1975) 14 Cal.3d 433, 442.)

Appellant claims that delay caused him to forget things and prejudiced his ability to present an alibi defense. Detectives tried to interview appellant two days after the armed assault but appellant refused to talk. The trial court reasonably concluded that appellant knew he was being investigated for

another crime and the 15-month delay did not prejudice appellant's ability to mount an alibi defense. "If the People had waited three or four months to file the case [appellant would] be making the same argument."

Appellant asserts that the prefiling delay prejudiced his sentencing because a joint trial of the Alvarado charges and the unlawful possession of a firearm charge (*infra* p. 3, case no. BA 418499-02) could have resulted in a concurrent sentence. A finding of prejudicial delay cannot be grounded solely on a lost opportunity for concurrent sentences. (*People v. Lowe* (2007) 40 Cal.4th 937, 942-946.) Appellant failed to make the requisite showing that the prefiling delay prejudiced his ability to defend against the charged crimes. Absent such a showing, the trial court was not required to consider "loss of an opportunity to serve a concurrent sentence in weighing all of the prejudice to the defendant against the prosecution's justification for the delay." (*Id.* at p. 946; see *People v. Contreras* (2009) 177 Cal.App.4th 1296, 1305, fn. 8.)

Facebook Photos

After appellant was arrested for unlawful possession of a firearm, he told a detective that his rap name was Bobby Detain. The detective searched the name on Facebook and a Bobby Detain Sendejas profile popped up with appellant's photo. Detective Adams accessed the same Facebook page and saw messages and gang photos that identified appellant by his name and moniker, Bobby Loco. The trial court did not abuse its discretion in overruling appellant's foundation objection to the Facebook photos.

A photograph may be authenticated by showing it is a fair and accurate representation of the scene depicted. (*People*

v. Goldsmith (2014) 59 Cal.4th 258, 267.) Posted photos of appellant and on-line comments "liking" appellant to the social media website were sufficient to infer that the account belonged to appellant. (See, e.g., *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435-1436 [MySpace page of defendant's photo and gang moniker sufficient foundation].) A web posting may be self-authenticating where it "refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1421; see also Evid. Code, § 1410 [no restriction on "the means by which a writing may be authenticated"].) Whether the foundational evidence is sufficiently substantial lies with the trial court's wide discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

The Facebook page had photos of appellant flashing gang signs with Varrio 213 and Vail Street Locos gang members. It had messages identifying appellant by name and gang moniker. The notepad in appellant's bedroom contained gang graffiti and the words "Bobby Locco" and "V213R," which also appear on the Facebook page. The trial court reasonably concluded that the Facebook page was appellant's social media site and that appellant controlled the posted material.

Citing *People v. Beckley* (2010) 185 Cal.App.4th 509, appellant argues that the Facebook photos could have been faked. In *Beckley,* the girlfriend of one of the defendants testified that, when she began dating defendant, she insisted that he stop associating with the gang. (*Id.* at p. 514.) To impeach her, the prosecution introduced a photo of the girlfriend making a gang sign on a MySpace web page. The officer who downloaded the photo from the web page did not know whether the photo was

doctored or truthfully portrayed the girlfriend flashing a gang sign. (*Id.* at p. 515.) The *Beckley* court concluded that the authentication was insufficient and noted that "'hackers can adulterate the content of *any* web-site from *any* location at *any* time.'" (*Id.* at pp. 515-516.)

Beckley suggests that online photographic images must be authenticated by the person who actually created or uploaded the image, or by expert testimony that the photo has not been altered. The analysis is inconsistent with *People v. Goldsmith*, *supra*, 59 Cal.4th 258, which holds that authentication can be established by "witness testimony, circumstantial evidence, [and] content and location. [Citations.]" (*Id*. at p. 268.) In making the authenticity determination, the trial court need only conclude that a prima facie showing has been made that the photograph is an accurate representation of what it purports to depict. (*Id.* at pp. 267-268.) "'As long as the evidence would support a finding of authenticity, the [photo] is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*Id.* at p. 267; see *People v. Valdez*, *supra*, 201 Cal.App.4th at pp. 1435-1436 [distinguishing *Beckley*]; *In re K.B.* (2015) 238 Cal.App.4th 989, 997 [criticizing *Beckley* because it ignores fundamental authentication principles emphasized in *People v. Goldsmith*].)

Unlike *Beckley,* the photos on appellant's Facebook page included communications tending to show appellant's ownership and management of a web page devoted to gang related interests. The Facebook page "friended" gang members that appellant socialized with and had gang photos and messages identifying appellant by name and gang moniker. The same gang

graffiti and Bobby Locco moniker were found on appellant's notepad and it was uncontroverted that appellant's rapper name was Bobby Locco.

Assuming, arguendo, that the Facebook photos were not properly authenticated, the error was harmless. (See, e.g., *People v. Seumanu* (2015) 61 Cal.4th 1293, 1319.) The evidence clearly shows that appellant committed the crimes for the benefit of a criminal street gang. Appellant said it was "[his] hood," that he would be coming back, and that it had something to do with a street gang. Diaz warned Alvarado they would be back to collect a tax. Appellant pointed a revolver at Alvarado, threatened to kill him, and fled yelling "13" and "Vail," the names of appellant's and Diaz's gangs. But for the admission of the Facebook photo images, it is not reasonably probable that appellant would have obtained a more favorable verdict. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

Motion for Mistrial

Appellant contends that the trial court abused its discretion in not ordering a mistrial after Detective Adams inadvertently said that appellant was on "probation" when the arrest warrant was served. The court reporter transcribed the full word "probation," but the trial court believed that the detective did not utter the whole word. (See discussion *infra*.)[2]

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[2] "Q. [Prosecutor] Alright. Did you obtain a warrant for the defendant's arrest around February 24 of 2015?

A. [Detective Adams] Yes.

Q. And did you at some point in time learn where he was residing?

A. Yes.

Q. How did you learn that?

A. Well, Mr. Sendejas was on probation --

On direct, the detective was asked how he learned where appellant was living. Detective Adams said that appellant was on "probation" and that he conducted surveillance and detained appellant outside his apartment.

During the jury break, appellant's trial counsel moved for mistrial because "Detective Adams blurted out and mentioned probation." The trial court found that the detective was interrupted before "the entire word probation even got out of his mouth. [¶] The court certainly heard only the first syllable of that word when it became clear to [the] parties that that was an inappropriate representation . . . . I am grateful that [defense counsel] did not draw additional attention to that one syllable, at most two, . . . by Detective Adams. Counsel moved right along. There was no pregnant pause. [¶] I do not believe that the partial stating of the word 'probation' has prejudiced [appellant]. The request to declare a mistrial is respectfully denied."

"'"Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions."' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 714.) No abuse of discretion occurred here. Detective Adams was stopped midsentence. Appellant did not request a curative instruction or dispute the trial court's observation that the detective was stopped before "the entire word probation even got out of his mouth."

Q. Hold -- Hold --

A. I'm sorry.

Q. Did you at some point learn about where he resided at some point?

A. I did."

A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) The evidence here clearly established appellant's guilt. Appellant, an active gang member, brandished a handgun and threatened to kill the victim as part of a gang effort to extort money. Appellant was arrested the next day for unlawful possession of the same handgun and was later identified in a photo lineup and at trial. But for the stray remark about probation, it is not reasonably probable that appellant would have obtained a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Sentencing Errors - Firearm Enhancement

Appellant was sentenced to 12 years state prison based on the following sentence calculation: Selecting count 1 (assault with a firearm) as the principal term, the trial court imposed a three-year midterm, plus four years for use of a firearm (§ 12022.5, subd. (a)) and five years on the serious felony gang enhancement (§ 186.22, subd. (b)(1)(B)). On count 2 (criminal threats) the court imposed a concurrent term of 11 years (two-year midterm plus nine years on the firearm and serious felony gang enhancements).

Appellant argues, and the Attorney General agrees, that a trial court may not impose both a firearm enhancement and a serious felony gang enhancement where the crime qualifies as a serious felony solely because it involved the use of a firearm. (*People v. Le* (2015) 61 Cal.4th 416, 429 (*Le*).) Section 1170.1, subdivision (f) requires that only the greater of the two enhancements be imposed, which in this case would be the five-year gang enhancement. (*Le*, at p. 429.) We remand the matter for resentencing to give the trial court the opportunity to

restructure its sentencing choices. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509.)

Stay of Sentence on Count Two

The trial court also erred in not staying the sentence on count 2. (§ 654.) Alvarado was assaulted (count 1) and threatened (count 2) for extortion purposes. Section 654 prohibits multiple punishment for a single act or indivisible course of criminal conduct where, as here, the defendant acted pursuant to a single intent or objective. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952; *People v. Lawrence* (2000) 24 Cal.4th 219, 226 [§ 654 prohibition against double punishment applies to concurrent as well as consecutive sentences].) Section 654, subdivision (a) states in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment . . ." which, in this case, is count 1 for assault with a firearm.

Disposition

We reverse the sentence and remand for resentencing on counts 1 and 2 to give the trial court the opportunity to restructure its sentencing choices. (*People v. Rodriguez*, *supra*, 47 Cal.4th at pp. 508-509.) On count 2 (criminal threats), the trial court is directed to stay the sentence pursuant to section 654. The judgment of conviction is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J. PERREN, J.

Craig J. Mitchell, Judge

Superior Court County of Los Angeles

James E. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

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