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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DANIEL FLORES, Defendant and Appellant.	2d Crim. No. B231789 (Super. Ct. No. 2008046499) (Ventura County)

Daniel Flores appeals the judgment following his convictions for murder (Pen. Code, §§ 187, subd. (a)/189),[1] and two counts of attempted murder (§§ 664/187, subd. (a)). The jury found allegations to be true that all offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). The jury also found that Flores intentionally and personally discharged a firearm in the murder (§ 12022.53, subd. (e)(1)) and attempted murders (§ 12022.53, subd. (d)). For these offenses and associated enhancements he was sentenced to life without possibility of parole, three terms of 25 years to life, and determinate terms of 9 and 10 years, all to be served consecutively. Flores contends the trial court erred by admitting a coerced confession to a confidential informant, and hearsay evidence of a witness statement made to the same confidential informant. He also contends the trial

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

court abused its discretion by failing to bifurcate trial of the offenses and the gang enhancement. We affirm.

FACTS

Attempted Murders. Rafael R. lived on Lemar Avenue in El Rio. During the afternoon of January 9, 2008, he was in his backyard painting. His nephew Jesus R. was also in the backyard. Rafael saw a 20- to 25-year-old Hispanic man on a fence with a gun. The man began firing his gun, wounding both Rafael and Jesus. A witness also saw the shooter run to a car after the shots were fired. The car drove away. Rafael and Jesus survived the attack.

Sepulveda Murder. Armando Sepulveda, Sr., and his family also lived on Lemar Avenue in El Rio. On the evening of February 4, 2008, his son Armando Sepulveda, Jr., walked outside his house and was wounded by several gunshots. Sepulveda managed to get back into his house where he stated that "they shot me." He told his parents that he loved them, and fell to the living room floor. His father took him to the hospital where he died later in the evening.

Three neighbors saw a man running from the scene, and two neighbors heard four to six shots. One neighbor described the man as slender and young and wearing black clothing and a baseball cap. Another neighbor described the fleeing man as running as if he had something in his pocket. She also stated that he got into a small light colored older "SUV Blazer or Bronco or something," and that one of its brake lights was inoperative. The description was dispatched to police.

Police Investigation. Approximately 20 minutes after the shooting, a police officer patrolling the Colonia section of Oxnard, saw a 1987 light gray Chevrolet Blazer with a right brake light noticeably dimmer than the left. The Blazer's engine was running and the driver was sitting in the vehicle. The officer turned around and began driving towards the Blazer. The driver exited the car and walked away with a man the officer believed to have been a passenger in the Blazer. The men were temporarily detained and identified as Flores and Jose Velasquez. In the ensuing weeks, police made two additional stops of a light colored SUV Blazer. They were not positively identified as the

same vehicles, but both had an inoperative brake light and Velasquez was the driver on both occasions. Flores was a passenger on one occasion and Brandon Arauz was a passenger on the other occasion. On the same day as the second traffic stop, officers found a .25-caliber handgun in a garage near a party attended by Flores and other known Colonia Chiques gang members. The expended bullet casing at the scenes of the attempted murders and the murder were fired from that gun.

Confessions. In jailhouse conversations with a police confidential informant (CI), Flores confessed to involvement in the murder of Sepulveda and attempted murder of Rafael and Jesus R., and Jose Velasquez confessed to involvement in the murder. Flores stated to the CI that he and Brandon Arauz went up to Sepulveda, Flores shook Sepulveda's hand, and Arauz fired the fatal gunshots. Velasquez stated to the CI that he drove to the Sepulveda residence with Flores and Arauz. Flores and Arauz got out of the car and walked towards Sepulveda's residence where several shots were fired.

Gang Evidence. A prosecution gang expert testified that Flores, Brandon Arauz and Jose Velasquez were active members of the Colonia Chiques criminal street gang. The Colonia Chiques had an intense rivalry with the El Rio criminal street gang, and members of each gang often entered each other's territory to "strike out at" members of the other gang. The expert identified gang symbols and signs of the Colonia Chiques, and described the gang's extensive criminal activities. He also testified to the importance of respect in the gang and retaliation against expressions of disrespect.

DISCUSSION

No Error in Admission of Flores's Confession

Flores contends the court erred in admitting his confession to the CI. He argues that the confession was obtained by coercion and deception when the CI told Flores that he was in danger from the Mexican Mafia unless he told the CI the truth about the shootings. We disagree.

The federal and state Constitutions prohibit the admission of a defendant's involuntary confession into evidence at trial. (*People v. Williams* (2010) 49 Cal.4th 405,

436; *People v. Carrington* (2009) 47 Cal.4th 145, 169.) When a confession is challenged as involuntary, the prosecution has the burden of establishing by a preponderance of the evidence that the confession was voluntarily made. (*Williams*, at p. 436.) In making the determination, courts must consider the totality of the circumstances. (*Ibid*.) The defendant's age, sophistication, education, physical and mental health, and experience with the justice system as well as the length of the interrogation, its location, and the interrogation techniques employed must be considered. (*Ibid*.)

Police may use falsehoods and psychological ploys provided they are not "so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Williams, supra*, 49 Cal.4th at p. 436.) Questioning by law enforcement may include an exchange of information, theories of events, and confrontation with contradictory facts, but not threats of punishment for failing to admit facts or false promises of leniency as a reward for an admission. (*People v. Carrington, supra*, 47 Cal.4th at p. 170.)

A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary. (*People v. Cruz* (2008) 44 Cal.4th 636, 669.) The test is whether the "defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." (*People v. Williams, supra*, 49 Cal.4th at p. 436.) On appeal, we accept the trial court's findings as to the circumstances of the confession when supported by substantial evidence, but independently review the trial court's ruling on the voluntariness of the confession. (*Ibid*.)

Here, the police used a paid CI who had worked in that capacity numerous times in return for monetary compensation and other consideration. In order to initiate a conversation between the CI and Flores, the police placed the two men in adjacent jail cells in the county jail. No other inmate was in either cell. Flores and the CI could not see each other but could speak without being overheard by another inmate. The police recorded the ensuing conversation.

Using gang and prison jargon, the CI identified himself as an important member of the Mexican Mafia. He stated that he had the job of gathering information

about the charged offenses. The CI told Flores that drive-by shootings violated the "rules" of the Mexican Mafia and the Mexican Mafia wanted to find out whether the Sepulveda shooting was a drive-by shooting. The CI stated that Flores's "name is out there," and a "job" may happen which intimated that, if the shooting was a drive-by, there could be retaliation against Flores while Flores was in prison. But, if it was not a drive-by shooting, the CI could spread the word and forestall any retaliation.

Flores told the CI that he had driven to the murder scene with Velasquez and Arauz. Flores described what Sepulveda was wearing and correctly described the street as having no sidewalks. He told the CI that he and Arauz approached Sepulveda. He shook hands with Sepulveda and then "threw" his barrio which apparently identified him as a gang member. Arauz then shot Sepulveda. Flores also admitted involvement on the attempted murders.

During trial, the prosecution filed a motion to admit a recording of the conversation between Flores and the CI into evidence. Flores opposed admission arguing that the CI coerced the confession by deceiving Flores into believing Flores was in danger from the Mexican Mafia. At a hearing on the motion, the trial court listened to the audio tape of the conversation and considered expert testimony offered by Flores concerning the meaning of some of the CI's gang jargon.

The trial court granted the motion and admitted the evidence. In a carefully considered order, the trial court concluded that the confession resulted from an "acceptable law enforcement ruse" and not from "coercion which caused the defendant's will to be overborne." The trial court found that no "credible threat" was made by the CI and Flores could not have had a "reasonable belief" that a threat on his life had been made. The court also found that Flores was assertive and motivated by a desire to get "full credit for doing the killing 'right.'"

The trial court's factual findings were supported by substantial evidence and, based on our independent review of the record, the confession was voluntarily made. The deception employed by the CI was proper and not likely to produce an untrue or unreliable confession. Flores was willing to speak about the shooting and explained his

criminal conduct freely and without hesitation. The record shows nothing physically or emotionally coercive about the conversation, or any indication of vulnerability, intimidation or fear on the part of Flores or that Flores was unfamiliar with the criminal justice system or the jail environment. Flores's choice to confess was "essentially free" and his will was not "overborne." (*People v. Williams, supra,* 49 Cal.4th at p. 436.)

Flores relies on *Arizona v. Fulminante* (1991) 499 U.S. 279, 287-288 (*Fulminante*), where the United States Supreme Court held that a confession was coerced when made in exchange for protection against a threat of physical violence. Although *Fulminante* involved a jailhouse confession to a police informant, the facts are readily distinguishable. Unlike in the instant case, the *Fulminante* confession resulted from believable threats relayed by the informant and the defendant's fearful reaction.

In *Fulminante,* the defendant, while in custody on an unrelated charge, confessed to a paid informant that he had sexually assaulted and murdered his 11-year-old stepdaughter. (*Fulminante, supra,* 499 U.S. at pp. 282-283.) In exchange for the confession, the informant had promised "protection" from "tough treatment" in prison due to the rumors of his involvement in the sexual assault and murder of a child. (*Id*. at p. 283.) The Supreme Court noted that the defendant was particularly vulnerable, and had been unable to adapt to the stress of prison life in the past. (*Id*. at p. 286, fn. 2.)

Flores also relies on *United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, which also, unlike the instant case, involved credible and serious threats against the defendant by the informant. In *McCullah*, a CI facilitated the defendant's use of drugs immediately before the informant took the defendant on a long drive in an isolated area. (*Id*. at p. 1100.) During the drive, the informant told the defendant that a criminal drug organization planned to kill him due to his involvement in a criminal incident. Fearing that the informant had been hired to kill him during the drive, the defendant confessed to involvement in the criminal incident. (*Id*. at p. 1101.) In the instant case, Flores was in no immediate danger from the CI, and there was no evidence that Flores was in fear of physical harm.

No Error in Admission of Velasquez Statement

The police also used the CI to obtain information from Jose Velasquez in the same manner as with Flores. The CI and Velasquez were placed in adjacent jail cells and the ensuing conversation was recorded. The trial court admitted statements by Velasquez under the declarations against penal interest exception to the hearsay rule. (Evid. Code, § 1230.) Flores contends the statements do not qualify as declarations against penal interest because they were not specifically disserving to Velasquez and were untrustworthy. We disagree.

Evidence Code section 1230 permits admission of a hearsay statement when the declarant is unavailable, the statement was against the declarant's penal interest when made, and the statement is sufficiently reliable to warrant admission despite its hearsay character. (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) To be admissible, a statement or portion of a statement must be "specifically disserving" to the declarant's penal interest so as to give the statement reliability and trustworthiness. (*Id*. at pp. 612, 614; see also *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176-177; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 329, 334.)

The focus of the declaration against penal interest exception to the hearsay rule is the trustworthiness of the declaration. (*People v. Geier* (2007) 41 Cal.4th 555, 584.) In determining trustworthiness, courts look to the totality of the circumstances including the declarant's motivation, the words spoken, the circumstances of the statement, and the declarant's relationship to the defendant. (*Ibid.*; *People v. Duarte, supra,* 24 Cal.4th at p. 614.) In general, the least trustworthy statements are made to the police in order to deflect criminal responsibility onto others and the most trustworthy occur in noncoercive and uninhibited settings. (*People v. Greenberger, supra,* 58 Cal.App.4th at p. 335.) Generally, when an inculpatory statement is combined with self-serving exculpatory assertions, the exculpatory assertions will be considered untrustworthy and inadmissible. (*Duarte,* at p. 612.)

We review a decision to admit or exclude evidence under Evidence Code section 1230 for abuse of discretion. We will uphold the trial court's ruling unless it is

arbitrary, capricious, or patently absurd so as to result in a miscarriage of justice. (*People v. Geier*, *supra*, 41 Cal.4th at p. 585.)

As with Flores, the CI identified himself to Velasquez as a member of the Mexican Mafia who had been designated to determine whether the Sepulveda murder was a drive-by shooting. Velasquez told the CI that he drove the car to the Sepulveda residence and that Flores and Arauz were passengers in the car. He stated that he parked three houses down from Sepulveda's house, and that Flores and Arauz got out of the car and shot Sepulveda. Velasquez heard six shots, and knew the gun was a .25-caliber semiautomatic handgun. Velasquez then picked up Flores and Arauz and drove away.

The trial court granted the prosecution's motion to admit these statements as declarations against Velasquez's penal interest. The court found that each of the statements was "specifically disserving" to Velasquez's penal interest, and were not self-serving statements designed to minimize his involvement in the shooting. The court reasoned that, because Velasquez thought he was speaking to a gang member, not the police, he was motivated by a desire to describe the murder as it happened and not to minimize his culpability. We conclude that the trial court did not abuse its discretion in admitting the statements.

Flores concedes that it was against Velasquez's penal interest to reveal his involvement in the shooting but that his statement that Flores and Arauz fired the shots was a self-serving statement intended to shift primary responsibility onto Flores and Arauz. We agree that Velasquez may have been attempting to deflect some criminal responsibility to others, but conclude that his statement was essentially inculpatory in its entirety. A statement that incriminates others along with the declarant is admissible as long as the self-incriminating statements are unequivocal and an integral part of the statements against penal interest. (*People v. Samuels* (2005) 36 Cal.4th 96, 120-121; see also *People v. Cervantes, supra,* 118 Cal.App.4th at p. 175; *People v. Greenberger, supra,* 58 Cal.App.4th at pp. 339-340.) Here, Velasquez unequivocally admitted his involvement in the Sepulveda shooting and his identification of Flores and Arauz was

part of his explanation of the shooting and described his actions. He was describing his crime, not blaming the crime on another.

Flores also repeats his argument regarding the use of coercion by the CI so as to render the statements involuntary. We have previously discussed that issue in connection with the confession by Flores and, for the same reasons, conclude that coercion and threats were not used by the CI to extract the Velasquez statements.

No Abuse of Discretion in Failure to Bifurcate Gang Enhancement

Flores contends the trial court abused its discretion by declining to bifurcate trial of the substantive offenses and the gang enhancement. We disagree.

A trial court has discretion to bifurcate a gang enhancement when the probative value of the gang evidence is outweighed by a risk of undue prejudice. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1051.) Gang evidence always carries a potential for prejudice and, when gang enhancements are not alleged, the probative value of such evidence is often minimal. Conversely, when an offense is alleged to be gang-related, gang evidence is relevant and highly probative to prove elements of the charged offense. (*Id.* at p. 1049.) "Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid*.) To the extent that evidence supporting a gang enhancement is admissible at a trial of the offense, bifurcation is not necessary. (*Id.* at pp. 1049-1050.)

In this case, evidence of uncharged gang conduct was inextricably intertwined with evidence of guilt and was particularly relevant to Flores's identity, motive, knowledge, and intent. (See *People v. Hernandez, supra,* 33 Cal.4th at p. 1048.) """[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]"' (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

Flores concedes that some gang evidence was admissible but argues that admission of evidence of a large number of predicate offenses unrelated to Flores was prejudicial. We agree that, because predicate offenses need not be related to the defendant or charged offenses, their admission provides a potential for prejudice. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) Nevertheless, none of the predicate offenses in this case was more serious than the charged offenses, and the number offered into evidence was not so great as to cause significant prejudice. The burden is on the defendant to establish a substantial danger of prejudice requiring bifurcation. (*Id.* at p. 1051.) Flores has failed to meet that burden.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

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