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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSIE ABBOTT DURAN,

Defendant and Appellant.

B281893

(Los Angeles County
Super. Ct. No. VA 134599)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed in part and remanded with directions.

Lori A. Quick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jessie Abbott Duran appeals his conviction and sentence on one count of attempted carjacking (Pen. Code, §§ 664, 215, subd. (a) (count 1));¹ one count of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a) (count 2)); shooting at an occupied motor vehicle (§ 246 (count 3)); possession of a firearm by a felon (§ 29800, subd. (a)(1) (count 4)); and assault with a firearm (§ 245, subd. (a)(2) (count 5)). With respect to counts 2 and 3, the information alleged that defendant personally used and discharged a firearm within the meaning of section 12022.53, subdivision (c). With respect to count 5, the information alleged that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a). With respect to all counts, the information alleged that defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). Defendant pleaded not guilty and denied the allegations. The jury found defendant guilty as charged and found true all the special allegations.

Defendant raises two issues on appeal: First, he contends that trial counsel provided ineffective assistance, based on counsel's failure to object to the admission of what he argues was case-specific testimonial hearsay relied upon by the gang expert and admitted to prove the gang enhancements. Second, defendant contends that in light of Senate Bill No. 620, his case must be remanded for the trial court to consider striking the firearm enhancements. The Attorney General concedes the latter

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

point and agree, as do we, that remand is required. In all other respects, we affirm.²

FACTUAL AND PROCEDURAL SUMMARY

On April 3, 2014, at approximately 5:15 p.m., B.B. arrived home and backed his car into his parking space in an alley. Defendant approached B.B. and said, “Give me your fucking car. This is my car now, homeboy.” B.B. noticed that defendant had tattoos on his face.

B.B. accelerated forward, stopped the car, and looked back at defendant. B.B. waited, and observed defendant peeking at him. B.B. called 911 while he watched as defendant walked down the alley. The 911 operator told B.B. to return home and wait for police officers.

About 20 minutes later, B.B.’s neighbor A.A. arrived and got out of her car. As B.B. told A.A. what had happened, B.B. spotted defendant about 200 yards away, walking towards them. B.B. and A.A. got into their cars and drove away in opposite directions.

B.B. spotted defendant walking into an apartment complex just as Officer Hugo Figueroa arrived in a patrol car. B.B. identified himself and pointed out the defendant to Officer Figueroa. B.B. told Officer Figueroa that defendant had demanded his car and said, “13.” Officer Figueroa told B.B. to stay put and drove off toward where B.B. had pointed out defendant.

A.A. returned and exited her car. As she and B.B. talked, defendant appeared and walked towards them. B.B. saw that defendant had a gun in his right hand that he was trying to conceal in his waistband. A.A. saw defendant try to retrieve something

² Defendant filed a separate petition for writ of habeas corpus on May 1, 2018 (No. B289715), which we consider concurrently with this appeal. We address the petition in a separate order.

from his left jacket pocket. When defendant was within reach, B.B. punched defendant four times, and defendant fell on his back. In the scuffle, a fifth of vodka and a can of black spray paint fell from defendant's pocket. Defendant pulled a gun from his pocket and pointed it at B.B. As B.B. and defendant fought over the gun, defendant fired shots at B.B. but missed. B.B. took off running but tripped. Another shot missed B.B., who got up and ran across the street "zigzagging."

B.B. reached a nearby parking lot and looked back to see defendant in the middle of the street hobbling down Newlin Avenue. B.B. heard another shot and then lost sight of defendant.

At about the same time, C.N. was driving on Hadley Street. C.N. heard gunshots and her car window shattered. C.N. called the police. She saw a hole in her car door, from which police later removed a bullet fragment.

About 10 minutes later, police officers apprehended defendant, who B.B. identified as the shooter.

Officer Figueroa retrieved the vodka bottle and spray paint can that fell from defendant's pockets during the scuffle with B.B. A bystander flagged down Officer Figueroa and pointed out new black spray-painted graffiti at an apartment building near where police had recovered the can of black spray paint. Officer Figueroa found black graffiti painted in several locations in the complex. Officer Kevin Moretti photographed the graffiti tagging and testified that the paint was still tacky.

Whittier Police Officer Esteban Medina testified that he witnessed defendant running on foot. Searching the area, Officer Medina found a blue bandana underneath a parked car. The bandana had burn marks and concealed a black revolver that was warm to the touch. Officer Medina inspected the revolver and concluded that two shots had been fired from it.

Los Angeles County Sheriff's Department senior criminalist Tracy Peck examined the gun and the recovered bullet fragment. She testified that the bullet was heavily damaged and could not be tested for microscopic comparison purposes, either for identification or elimination. She determined, however, that the bullet was consistent with the type used in a .38 caliber firearm.

Los Angeles County Sheriff's Department chemist Joseph Cavaleri testified that defendant's hands tested positive for gunshot primer residue. Whittier Police Officer Jose Bolanos testified that he submitted defendant's cellular phone to a forensic specialist for analysis. It contained photographs of defendant's tattoos, a photograph depicting defendant making a gesture with his hands, and a photograph of a Smith & Wesson M&P revolver.

Los Angeles County Sheriff's Department criminalist Wilson Vong conducted DNA analysis of the recovered revolver and bandana. The testing revealed three or more persons contributed to DNA found on the bandana and the revolver's backstrap and grips. Vong identified defendant as a possible contributor of DNA found on the bandana and the backstrap. The profile of the major contributor matched defendant's DNA profile, and Vong estimated the probability of the match being random was one out of 634 quintillion.

The prosecution introduced gang expert testimony of Los Angeles County Sheriff's Department Deputy Armando Orellana. As part of his job, Deputy Orellana contacts gang members in the field and fills out field identification (FI) cards that include data such as name, date of birth, address, cellular phone, tattoos, vehicle and companions. Deputy Orellana testified that the "Little Hill" gang operates in the La Puente area, as do other local gangs including Puente Trece, Townsman, Valinda Flats, East Side Puente Trece, Hurley, Northam, and East Side Dukes. He testified

that territory is important to gangs and they control it through violent crime. Gangs use the number 13 as a sign of respect to the Mexican Mafia, a prison gang, because the thirteenth letter of the alphabet is M.

Deputy Orellana testified that Little Hill has “about 50 members,” of which about 15 to 20 are actively committing crimes. The members have common signs, symbols, and tattoos such as “LH,” “LHG,” which stand for Little Hill Gang, and “VLHG,” which stands for Varrio Little Hill Gang, sometimes with the number 13 at the end. Little Hill’s primary activities include murder, assaults, carjackings, possession of firearms, and drug sales. Deputy Orellana testified that he was familiar with specific Little Hill gang members and their gang monikers. The deputy previously assisted a police officer investigating a 2014 weapons charge against a specific Little Hill gang member and that is how he learned of that member’s gang moniker. When another Little Hill gang member was charged with murder in 2013, Deputy Orellana testified as a gang expert in that case.

Deputy Orellana reviewed photographs of the graffiti discovered in the apartment complex. He recognized the spray-painted “LHG” as “tagging from Little Hill Gang.” While such tagging would normally be found within the Little Hill gang territory, it is sometimes found outside of the boundaries, where it communicates, “I’m here on my own, I’m away from—from my stronghold, and I’m disrespecting you guys.” Deputy Orellana had never met defendant, but based on his review of the evidence, Deputy Orellana opined that defendant is “most definitely” a gang member. He based his opinion upon defendant’s tattoos, among other evidence. Deputy Orellana stated that “[y]ou would have to be a Little Hill gang member to have those tattoos,” and that a non-member with such tattoos could become the victim of

anything “from a beat down to murder.” He also based his opinion on photographs of defendant “throwing up his gang hand sign” in a gesture used by Little Hill gang.

The jury was shown photographs of defendant’s tattoos, which included “Little” tattooed across his right eyebrow and chest, “Hill” tattooed across his left eyebrow, “R-I-P Spanky” tattooed on the side of his head, and “L” and “H” tattooed below his lips. He also had “VLHG” tattooed on his index finger, three dots signifying “Me Vida Loca” tattooed on the web of his hands, and “Lil Hill[s]” tattooed on his finger. Deputy Orellana identified four FI cards, which he did not prepare, describing defendant as using the monikers “Swifty” and “Little Risky.” In response to the prosecutor’s hypothetical questions based on the alleged facts of the case, Deputy Orellana formed the opinion that defendant’s crimes were committed for the benefit of, in association, or at the direction of a criminal street gang with the specific intent to promote, further, or assist gang activity. In Deputy Orellana’s opinion, defendant was a gang member who was committing a violent crime outside of his stronghold, which was a way to gain respect for himself personally and for his gang.

Deputy Orellana based his opinion on his experience, defendant’s tattoos, the four FI cards, and the Little Hill gang specific tagging. He had not discussed whether defendant was a gang member with any other deputies, and defendant never told him he was a gang member. Deputy Orellana opined that because defendant was acting alone, his actions would not qualify as “committing a crime in association with the gang,” but would qualify as having been committed for the benefit of the gang. Deputy Orellana testified that tagging the gang’s initials is equivalent to leaving a business card that claims territory for the gang or disrespects the territory of a rival gang. Deputy Orellana

viewed a photo exhibit of graffiti on the apartment building in which the word “flaots” had been struck through. He testified that “flaots” is a derogatory term for Valinda Flats gang, a rival of Little Hill gang, and crossing it out communicates disrespect to the rival gang.

Randy Harmon, defendant’s stepfather, testified for the defense. Harmon testified he had known defendant for seven years and had never known him to be a violent person. He had heard that defendant belonged to the Little Hill gang but had never seen anything himself. Harmon was unaware of any criminal record defendant may have. Harmon testified that defendant did not have tattoos when Harmon first met him, and got them “within the past three years or so.” Harmon testified that he did not notice or pay attention to defendant’s tattoos or try to determine what they meant.

Gang expert Martin Flores testified for the defense. Flores testified that gang tattoos signify that a person was a member at one time in his life, not necessarily that they are currently a member. He was familiar with the Little Hill gang, which he testified operates in La Puente. Whittier is not a part of Little Hill gang’s territory. Flores opined that graffiti can promote a gang, and gang vandalism is a way to “disrespect” rivals. Flores viewed photographs of the graffiti at the apartment complex and opined that it was Little Hill graffiti and that it was consistent with a Little Hill gang member “disrespecting” the gang’s rivals. Based on a hypothetical describing the shooting in this case, Flores opined that the shooting was not committed for the benefit of, in association with, or at the direction of a gang. Instead, he believed the crime was a “personal conflict.” He based this opinion on there being “no mention of the gang. There’s no indication that this is a rival gang member. There’s no indication that this was about gang

territory or gang agenda.” Flores believed it was a personal conflict between defendant and B.B. and there was nothing to indicate the gang would benefit in any way. He acknowledged, however, that a gang crime can be committed by a lone member of the gang and still be for the benefit of the gang or even at the direction of the gang. He also testified that to be significant, the use of the number 13 “would have to be with a particular neighborhood in front of it.”

The jury convicted defendant as charged and found all the special allegations true. The trial court sentenced him to a term of life plus 35 years 8 months in state prison. The court ordered defendant to pay a \$300 restitution fine (§ 1202.4, subd. (b)), and a parole revocation fine (§ 1202.45) in the same amount but stayed its payment. The trial court also ordered defendant to pay a \$30 criminal conviction assessment (Gov. Code, § 70373), and a \$40 court operations assessment (§ 1465.8, subd. (a)(1)) as to each count. Defendant received 1,100 days of presentence custody credit.

DISCUSSION

I. Ineffective Assistance of Counsel

Defendant contends that he received ineffective assistance of his trial counsel because counsel failed to object to what defendant argues was case-specific testimonial hearsay evidence under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which was decided six weeks prior to defendant’s trial. We do not decide whether counsel was deficient because defendant did not suffer prejudice; the evidence of guilt being overwhelming.

The Sixth Amendment “ ‘right to counsel is the right to the effective assistance of counsel.’ [Citation.]” (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) In order “[t]o establish ineffective assistance of counsel, [defendant] must demonstrate that (1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected [defendant] to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to [defendant].” (*In re Wilson* (1992) 3 Cal.4th 945, 950, citing *Strickland, supra*, 466 U.S. at p. 687; *In re Jones* (1996) 13 Cal.4th 552, 561.) In order to prevail on a claim of ineffective assistance of counsel on direct appeal, “ ‘the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.’ ” (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

To prove a gang enhancement, the prosecution must establish that a defendant committed his crimes “for the benefit of, at the direction of, or in association with any criminal street gang.” (§ 186.22, subd. (b)(1).) A “criminal street gang” has “as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute.” (§ 186.22, subd. (f); *Sanchez, supra*, 63 Cal.4th at p. 698.) A gang’s primary activities can be established through expert testimony, such as the testimony provided by Deputy Orellana. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Prior to *Sanchez*, gang experts were permitted to recite testimonial hearsay as “basis” evidence; that is, evidence ostensibly offered not for the truth of the statements, but merely as matter the expert relied upon in forming his or her opinions. (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13.) The *Sanchez* Court explained that, traditionally, experts could “relate

information acquired through their training and experience, even though that information may have been derived from conversations with others.” (*Id.* at p. 675.) Thus, “an expert’s testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds.” (*Id.* at p. 676.) Experts could not, however, relate “*case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried,” and must generally be introduced through witnesses with personal knowledge of such facts. (*Ibid.*) The expert may opine about the *meaning* of case-specific facts by responding to hypothetical questions that assume their existence. (*Ibid.*)

Here, Deputy Orellana’s testimony regarding the statements made by Little Hill gang members, even if hearsay, were not case-specific as described in *Sanchez*. In *Sanchez*, unlike the testimony in this case regarding the Little Hill Gang members, the expert testimony at issue related to Sanchez’s own gang membership. In contrast, the testimony regarding the Little Hill gang members’ alleged gang membership is unrelated to the crimes alleged against the defendant in this matter. “By permitting this type of background testimony, the court recognized it may technically be based on hearsay, but an expert may nonetheless rely on it and convey it to the jury in general terms. [Citation.] Thus, under state law after *Sanchez*, [the gang expert] was permitted to testify to non-case-specific general background information about [a gang], its rivalry with [another gang], its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers.” (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175; review granted on an unrelated issue on Mar. 22, 2017, S239442; cf. *People v. Ochoa* (2017)

7 Cal.App.5th 575, 588–589 [“out-of-court statements by individuals admitting [gang membership] are case-specific hearsay”].)

Deputy Orellana’s testimony regarding the FI cards specific to defendant, on the other hand, are a type of hearsay evidence precluded under the rule articulated in *Sanchez*. (*Sanchez*, *supra*, 63 Cal.4th at pp. 697-698.) Here, however, defendant fails to establish prejudice. The evidence of his gang membership and the gang-related actions in the current case, excluding the case-specific FI cards, was overwhelming. There is not a reasonable probability that, but for counsel’s failings, the result would have been more favorable to defendant. Similarly, even if we assume that the cellular phone’s photographs were case-specific testimonial hearsay under *Sanchez*, their exclusion would not support a conclusion that defendant was prejudiced.

For these reasons, any error was harmless beyond a reasonable doubt. The evidence presented with respect to the Little Hill gang specific graffiti at the crime scene, B.B.’s testimony regarding the statements defendant made during the carjacking, the black spray-paint can, the gang expert background testimony regarding the Little Hill gang, coupled with the testimony of Harmon and the defense’s gang expert, Flores, were sufficient to support the true finding on the gang enhancement. As a result, defendant is unable to satisfy the prejudice prong of the *Strickland* analysis.

II. Exercise of Discretion Regarding Firearm Enhancements

On October 11, 2017, Governor Brown signed Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended sections 12022.5 and 12022.53 to provide trial courts with the discretion to strike a firearm enhancement or finding. (Stats 2017, ch. 682.) Senate Bill No. 620 added the following language to both statutes: “The

court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats 2017, ch. 682, §§ 1–2.)

Defendant contends, and the Attorney General agrees, that the amendments to sections 12022.5 and 12022.53 apply to defendant. (See, e.g., *People v. Vieira* (2005) 35 Cal.4th 264, 305.) Since there is no final judgment in this case and in order to give the change in legislative policy “full effect” (*People v. White* (1969) 71 Cal.2d 80, 84), we remand the case to the trial court in order to permit it to conduct a new sentencing hearing limited to the issue of the firearm enhancements. (*People v. Francis* (1969) 71 Cal.2d 66, 75–79.)

DISPOSITION

The case is remanded to the trial court, in order to permit it to consider whether to exercise its discretion with respect to striking the firearm enhancements, in light of the amendments to Penal Code sections 12022.53 and 12022.5. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.