

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ELEAZAR VILLEGAS,

Defendant and Appellant.

B237648

(Los Angeles County
Super. Ct. No. MA041428)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Kathleen Blanchard, Judge. Affirmed.

Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Eleazar Villegas was convicted by jury of one count of first degree murder of Paul Martinez (Pen. Code, § 187, subd. (a)). The jury also found true the special allegation that defendant personally used a deadly weapon, a knife, in the commission of the murder (*id.*, § 12022, subd. (b)(1)), and that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)). Defendant was sentenced to a term of 26 years to life in state prison.

Defendant raises three issues on appeal. Defendant contends the trial court committed reversible error by refusing his request for an imperfect self-defense instruction. Defendant further argues the court erred in denying his motion to bifurcate trial of the gang enhancement from the substantive offense. And, defendant contends there was insufficient evidence in support of the gang enhancement. We conclude there was no instructional error, no abuse of discretion in the denial of the bifurcation motion, and that substantial evidence supports the true finding on the gang enhancement. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 24, 2007, defendant, his brother Omar Villegas,¹ and their friend Jahaira Mendoza were “hanging out” and listening to music. They were sitting in a white SUV, parked behind a pawn shop near the intersection of East Palmdale Boulevard and Third Street in the city of Palmdale.

Sometime around 1:00 a.m., Ms. Mendoza, who was seated in the back of the SUV, saw three people walking by, about 30 to 40 feet away from where they were parked. After the three individuals walked past, Ms. Mendoza heard defendant and Omar talking about how they recognized one of the individuals as someone they knew, and did not like, called “Penguin.” The brothers also said that Penguin and his two friends would probably be coming back at some point.

¹ Due to the common surname, we will refer to Omar by his first name for clarity, meaning no disrespect by the informality.

Eventually, Penguin and the two others did walk by again and Ms. Mendoza thought she heard one of Penguin's group say something in their direction, but she was not sure. Defendant and Omar then got out of the SUV and started running after the three individuals, and eventually they ran out of sight. Ms. Mendoza stayed in the SUV. About five minutes later, defendant and Omar came back. Neither of them would tell Ms. Mendoza anything. They drove off and went to their aunt's house and started watching television. At some point while they were watching television, defendant and Omar told Ms. Mendoza they had gotten into a fight with Penguin or had "jumped" him.

Paul Martinez was known by the nickname "Penguin." Melissa Lora and Natalie Robles² were the two friends with Mr. Martinez that night. Around 1:00 a.m., the three of them had decided to walk to the 7-Eleven store on Palmdale Boulevard to buy some drinks. They were walking through a vacant lot near their apartment complex, headed in the direction of the store, when Ms. Lora noticed a white "Suburban" parked near the back wall of some stores. There were two males standing outside the SUV. She, Mr. Martinez and Ms. Robles continued walking to the store, without incident, and made their purchases.

On their way back through the vacant lot, they passed by the white SUV again. This time, Ms. Lora heard one of the males ask them if they knew where they could buy "any weed." Ms. Robles believed someone said, "Where's the bud at?" Ms. Robles may have responded with a quick "no." Ms. Lora recognized the voice of the person who asked the question as that of defendant. She knew defendant and his family, having had "problems" with them in the past.

Ms. Lora, Ms. Robles and Mr. Martinez kept on walking. They got about 20 to 30 feet ahead of where defendant and Omar were standing by the SUV, when Ms. Lora heard defendant yell, "What's up, Penguin?" Ms. Robles thought defendant yelled "Hey

² Ms. Lora is sometimes referred to in the record by her maiden name, Ms. Jeffrey. Ms. Lora refers to Ms. Robles as Sabrina, explaining that she "went by" that name as well.

Penguin, you fuck[in'] rata.” The three friends started walking faster, in the direction of their apartment complex. They then heard the sound of running behind them, so they started to run.

Mr. Martinez was faster and therefore was running ahead of Ms. Lora and Ms. Robles. Defendant and Omar ran past the young women toward Mr. Martinez. Mr. Martinez tripped and fell to the ground, which allowed defendant and Omar to catch up to him. Defendant reached Mr. Martinez first. Before Mr. Martinez could get up, defendant was standing over him. Defendant made three to four downward stabbing motions with a knife that looked like some type of kitchen knife. The knife looked to be about six to seven inches long. While defendant was making the stabbing motions, Omar kicked Mr. Martinez. Defendant and Omar then abruptly stopped their assault and started running back in the direction of the young women. As they ran past, defendant slapped Ms. Robles on her buttocks and also yelled “Palmas Trece.” Both Ms. Robles and Ms. Lora knew Palmas Trece to be a local street gang.

Mr. Martinez was able to get up from the ground and made it to the driveway of his apartment complex, where he collapsed. Ms. Robles felt blood on his back when she put her arms under him. Mr. Martinez told her, “They stabbed me.” Ms. Lora started screaming for help and banging on doors asking someone to call 911. Sheriff deputies and an ambulance arrived and took Mr. Martinez to the hospital, where he eventually died from the multiple stab wounds he received.

Defendant was charged by amended information with one count of murder (Pen. Code, § 187, subd. (a)). It was also specially alleged that defendant personally used a deadly weapon, a knife, in the commission of the murder (*id.*, § 12022, subd. (b)(1)), and that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)).³ Defendant pled not guilty.

³ In the original information, defendant was charged jointly with his brother Omar. However, the charges against Omar resolved separately and Omar is not a party to this appeal.

Before trial, defendant moved to bifurcate trial of the gang enhancement from the substantive charge, claiming the gang evidence, particularly from an expert gang witness, would never be admissible solely on the substantive charge, and that the evidence would only serve to inflame and prejudice the jury against defendant. The court denied the motion, explaining the gang evidence, including the evidence the gang name was called out in connection with the murder, would be “largely cross-admissible” and that, “as a matter of judicial economy, it’s better to try the gang allegation along with the substantive charge.”

The court granted defendant’s request to offer expert testimony as to defendant’s mental condition and cognitive functioning. After lengthy discussions with counsel, the court expressly limited the permissible scope of the defense expert testimony in accordance with Penal Code sections 28 and 29.

Trial by jury commenced in October 2011. Ms. Mendoza, Ms. Lora and Ms. Robles testified to the events they witnessed on May 24, 2007. Ms. Lora and Ms. Robles also testified they did not originally implicate defendant and his brother as the perpetrators because they feared retaliation from defendant, the people he “affiliated” with, and the gang, Palmas Trece. Ms. Robles also explained that she eventually decided to speak to law enforcement about the incident after she moved away from the area, and because Mr. Martinez’s family told her she needed to tell the truth about who killed him.

A portion of defendant’s recorded statement to the police describing the incident was played for the jury during the testimony of Detective Frank Salerno, the investigating homicide detective. In his statement, defendant admitted he stabbed Penguin several times in the back and side. Defendant explained that Penguin had been “disrespecting” his family for a long time, that he and Omar saw Penguin walk by, and Omar mentioned how he had been disrespecting them. At first, defendant told Omar, “[W]ho cares, leave ‘em alone.” They kept talking about Penguin, and then defendant said: “[A]ll right then. Then I grabbed the knife, and then they came back and then they were right there, they were still talking, like whispering and saying all this and then they had said something stupid and then my brother, we just ran at them.”

Defendant explained he had the knife, which was like a kitchen knife, in the SUV, and when Penguin and the young women came back about 20 minutes later, he grabbed the knife and yelled at Penguin. Penguin looked back and put his hand in his pocket. Defendant explained, “I thought he had a gun when we were chasing him.” Defendant said he and his brother ran, basically side-by-side, eventually caught up to Penguin, and defendant stabbed him while Omar kicked him. He and his brother then ran back to the SUV and, while running back, defendant threw the knife somewhere out in the vacant lot. Defendant told Detective Salerno he was telling the truth because he was scared for his brother, who was “gang-affiliated too,” and that he did not want his brother to “go down by himself.”

The prosecution also presented the expert testimony of Detective Tyrone Berry, a gang investigator for the Los Angeles County Sheriff’s Department, with almost 22 years of experience as a peace officer. Detective Berry testified that Palmas Trece is a documented criminal street gang that originated in Palmdale approximately 14 years ago. It is primarily a Hispanic gang, with its territory in east Palmdale, inclusive of the area in which the incident occurred.

Detective Berry explained that Palmas Trece is a “very active” gang involved in robberies, attempted murders, narcotics trafficking, and stolen vehicles. Detective Berry attested to two predicate crimes in which Palmas Trece members were convicted of felonies: a residential burglary in March 2007 and an assault with a semi-automatic firearm in May 2007. He also stated his opinion that defendant and his brother were members of the gang. When asked a hypothetical based on facts similar to the charged crime, Detective Berry opined such a crime would be for the benefit of the gang. He explained that part of gang culture is to expressly claim acts of violence on behalf of the gang in order to enhance the gang’s reputation in the community through fear and intimidation.

The defense presented one witness, Dr. Raymond E. Anderson, a clinical psychologist. He attested to defendant’s low score on the Shipley Institute of Living Scale Test, a standardized test for assessing intellectual functioning. He also attested to

defendant's display of symptoms evincing a compromised ability to perform mature decisionmaking, similar to juvenile bipolar disorder. However, Dr. Anderson confirmed that he did not make any differential diagnosis that defendant suffered from any specific mental illness.

During the court's discussion with the parties to finalize jury instructions, defense counsel requested an instruction on imperfect self-defense. Counsel argued that defendant's statement to police in which he claimed he thought Mr. Martinez had a gun in his pocket was sufficient to support the instruction being given to the jury. After a lengthy discussion with counsel, the court denied defendant's request, explaining the record lacked an evidentiary foundation for the instruction.

The jury returned a verdict finding defendant guilty of the first degree murder of Mr. Martinez. The jury also found true the special allegations that defendant personally used a knife in the commission of the murder, and that the murder was committed for the benefit of, at the direction or, or in association with a criminal street gang.

The court sentenced defendant to a term of life on the murder charge, with a minimum eligibility for parole of 25 years. The court imposed a consecutive one-year term for the personal use of a deadly weapon allegation, and also imposed a consecutive 10-year term on the gang enhancement. However, the court then struck the 10-year term pursuant to *People v. Lopez* (2005) 34 Cal.4th 1002 [holding first degree murder is violent felony punishable by imprisonment for life and therefore not subject to 10-year enhancement for being gang related]. Defendant's aggregate sentence was 26 years to life in state prison. The court awarded defendant 1651 days of custody credits and imposed various fines and penalties.

This timely appeal followed.

DISCUSSION

1. Imperfect Self-Defense

Defendant contends the court committed prejudicial error by refusing to instruct the jury on imperfect self-defense. We review a claim of instructional error de novo.

(*People v. Alvarez* (1996) 14 Cal.4th 155, 217; accord, *People v. Booker* (2011) 51 Cal.4th 141, 181 (*Booker*).) We find no error.

“Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.” (*In re Christian S.* (1994) 7 Cal.4th 768, 771.) The Supreme Court cautioned that “the doctrine is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense. We also emphasize what should be obvious. Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant’s fear must be of *imminent* danger to life or great bodily injury. ‘ “[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*” ’ ” (*Id.* at p. 783.)

Defendant contends his statement to police in which he said he thought Penguin (Mr. Martinez) had a gun was sufficient evidence to warrant an instruction on imperfect self-defense. Defendant contends given his negative history with Penguin, it was for the jury to resolve whether he actually, but unreasonably, believed Penguin was a threat to him, which required an immediate response. We are not persuaded. There must be legally significant evidence to warrant the instruction. (*People v. Souza* (2012) 54 Cal.4th 90, 116; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1232 [duty “ ‘arises only where there is substantial evidence that the defendant killed in unreasonable self-defense, not when the evidence is “minimal and insubstantial” ’ ”].)

All of the witnesses to the incident testified that Mr. Martinez was *walking away* from defendant. Ms. Mendoza, Ms. Lora and Ms. Robles all testified that defendant and Omar initiated the chase, running after Mr. Martinez when he was already leaving the area. Ms. Lora and Ms. Robles testified that Mr. Martinez had not said anything to

defendant or otherwise provoked defendant in any way, but that defendant was the one who called out Mr. Martinez by his nickname of Penguin, and then started to chase him.

Defendant admitted the victim was walking away and that it was he who grabbed the knife in the SUV, yelled out the victim's nickname, and then started chasing him. Defendant admitted that he overtook Mr. Martinez and started stabbing him, while his brother kicked him. He did not describe any physical aggression or use of force by Martinez at any time. He only said that "I thought he had a gun *when we were chasing him.*" (Italics added.) Defendant was otherwise consistent that he made the decision to arm himself with a knife and chase down Mr. Martinez, and said only once that during the time he was already in pursuit of Martinez, he thought Martinez might have a gun.

On such evidence, the trial court correctly determined there was insufficient evidence to warrant giving the jury an imperfect self-defense instruction. There was no evidence on which a finding could be based that defendant had any actual fear of an imminent threat from the victim. The evidence proffered by the defense "simply was not substantial enough to merit the requested jury instruction." (*Booker, supra*, 51 Cal.4th at p. 183 [defense request for imperfect self-defense instruction properly refused because evidence, including the defendant's own contradictory accounts of the stabbing, was not sufficiently substantial to support giving the instruction].)

2. Gang Enhancement

a. Motion to bifurcate

Defendant argues the court erred in denying his motion to bifurcate the gang enhancement from the trial of the substantive charge of murder. We disagree.

The Supreme Court has explained that a trial court's decision on a motion to bifurcate a gang enhancement from the charged offense is a matter of discretion. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).) In *Hernandez*, the Court compared a trial court's authority to bifurcate a gang enhancement to its discretion to bifurcate a prior conviction allegation from the trial of the substantive offense, as well as to motions to sever joined charges, citing the statutory authority emanating from Penal

Code section 1044⁴ and *People v. Calderon* (1994) 9 Cal.4th 69 (*Calderon*). (*Hernandez*, at pp. 1048-1050.) “A gang enhancement is different from the prior conviction at issue in *Calderon*. A prior conviction allegation relates to the defendant’s *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation.” (*Id.* at p. 1048.)

Where, as here, evidence would be cross-admissible, a trial court is well within its discretion to deny bifurcation. “To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (*Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.) *Hernandez* found the trial court properly denied the defendant’s motion to bifurcate because the defendant “himself injected his gang status into the crime.” (*Id.* at p. 1050.) Similarly here, defendant injected the relevance of his gang into the murder by yelling out the gang name after stabbing the victim. And, just like the expert gang detective in *Hernandez*, Detective Berry’s testimony assisted the jury’s understanding of the significance of defendant’s gang call-out to the commission of the murder, and was relevant to motive. (*Id.* at p. 1051.) We find no abuse of discretion in the trial court’s denial of defendant’s motion.

To the extent there was any error, it was harmless. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 931-932 [applying error analysis under *People v. Watson* (1956) 46 Cal.2d 818 to claims of error arising from motions to sever], overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 458-459.) Given the witness testimony and defendant’s own admission of having chased down and repeatedly stabbed the victim, it

⁴ Penal Code section 1044 provides: “It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.”

is not reasonably probable defendant would have obtained a more favorable verdict in the absence of the gang evidence.

b. Substantial evidence

Defendant contends the true finding on the gang enhancement is not supported by substantial evidence. Once again, we disagree.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 161 [same standard applies to review of claims challenging evidence supporting gang enhancements].)

Indulging all reasonable inferences in favor of the jury’s findings, the record contains solid evidence in support of the jury’s true finding on the gang enhancement allegation. Defendant shouted out the gang name, Palmas Trece, to Ms. Lora and Ms. Robles after fatally stabbing Mr. Martinez. In his statement to police, defendant also admitted his brother is “gang-affiliated too.” Detective Berry’s expert testimony provided corroborating evidence explaining the significance of defendant’s call-out of his gang name, and how gang members claiming violent acts benefit the reputation of the gang in the community. Detective Berry, a veteran detective, also provided detailed background on Palmas Trece, its primary activities, and two predicate offenses. The fact there was evidence in the record that defendant also personally disliked the victim and therefore may have acted in part from personal animus, does not lessen the significance or the weight of the evidence showing the gang overtones of the murder of Mr. Martinez.

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.