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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LEROY ROBERTS,

Defendant and Appellant.

2d Crim. No. B272177
(Super. Ct. No. BA428448)
(Los Angeles County)

Leroy Roberts appeals from the judgment entered after his conviction by a jury of first degree murder (count 1 - Pen. Code, §§ 187, subd. (a), 189)¹ and willful, deliberate, and premeditated attempted murder (count 2 - §§ 664, subd. (a), 187, subd. (a)). As to count 1, the jury found true an allegation that he had personally discharged a firearm causing death. (§ 12022.53, subd. (d).) As to count 2, it found true an allegation that he had personally used a firearm. (§ 12022.53, subd. (b).) The jury was unable to reach a verdict on an enhancement allegation that the

¹ All statutory references are to the Penal Code.

crimes had been committed for the benefit of or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C).) On count 1 appellant was sentenced to prison for 50 years to life. On count 2 he was sentenced to a consecutive term of life imprisonment plus 10 years for the firearm enhancement.

Appellant contends that the trial court erroneously denied his section 995 motion to set aside the gang enhancement for insufficiency of the evidence at the preliminary hearing. In addition, he contends that the trial court erroneously refused to give his pinpoint instruction on eyewitness identification and to modify CALCRIM No. 315, the standard instruction on eyewitness identification. We affirm.

Evidence Presented at Preliminary Hearing

In June 2014 at about 7:25 p.m., Demetrius Bonier, Reginald Pitts, and Chris Hooks were talking to each other on a street in a residential area. Bonier looked to his right and saw appellant “standing there with a pistol aiming towards us.” Appellant is a member of the Rollin 40s, a criminal street gang affiliated with the Neighborhood Crips, an umbrella gang. Appellant was in territory claimed by a rival gang, the V.N.G. (Van Ness Gangsters) Bloods.

Appellant tried to fire the gun, but it jammed. Bonier, Pitts, and Hooks ran away. Bonier saw a car that appeared to be “about to chase [him] so [he] hopped over the fence.” Appellant was “outside of the vehicle.” The vehicle belonged to Lamont Lewis, who is associated with the Rollin 40s.

While attempting to “unjam the gun,” appellant chased Pitts. Pitts slipped and fell onto the sidewalk. Appellant “finally got his gun unjammed and he just shot, like, probably . . . five or six shots . . . into [Pitts].” Pitts was killed.

Appellant said nothing during the incident. Neither Bonier nor Hooks had seen him before.

Officer Robert Smith, a gang expert, assisted in the investigation of the shooting. The prosecutor presented a hypothetical based on the facts of the case. Smith opined that the crimes were committed for the benefit of and in association with the Rollin 40s. Smith explained: “The association part is that [the shooter] was inside a vehicle with other members of the Rollin 40s gang, and they were driving through rival territory, [where] they know it is a good chance . . . they can come in contact with someone from a rival gang.” The shooter “exited the vehicle and assaulted these people, who could be easily assumed as members of the rival gang.” The assault benefits the Rollin 40s “by advertising that these guys are willing to go this far to assault someone out in public like that.” This creates fear within the community and increases “respect” for the gang. “[R]ival gangs would be in fear of . . . retaliation from them.” Witnesses would be “afraid to report criminal activity” by Rollin 40s gang members.

The Evidence Is Sufficient to Support the Gang Enhancement

Appellant claims that the trial court erroneously denied his section 995 motion to set aside the gang enhancement for insufficiency of the evidence at the preliminary hearing. Appellant argues that, because of the erroneous denial of the motion, “the prosecution was permitted at [the] jury trial to present irrelevant but highly inflammatory evidence about [his] membership in a violent criminal gang.”

A defendant is entitled to make a section 995 motion challenging the sufficiency of the evidence to support a gang enhancement. (*Salazar v. Superior Court* (2000) 83 Cal.App.4th

840, 845-846.) “[T]he showing required at a preliminary hearing is exceedingly low.” (*Id.* at p. 846.) To prevail on a section 995 motion, “the defendant must establish that he was committed without reasonable or probable cause. [Citation.] To establish probable cause . . . , the People must make some showing as to the existence of each element of the charged offense [or enhancement]. [Citation.] . . . Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. [Citations.] An [enhancement] will not be set aside . . . if there is some rational ground for assuming the possibility that” it is true. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 545, internal quotation marks omitted.)

“On appeal following the denial of a section 995 motion, we review the preliminary hearing magistrate’s determination directly and disregard the judge’s 995 ruling. [Citation.]” (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 813.) We may not “reweigh the evidence or determine the credibility of the witnesses. [Citations.] . . . “Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information.” . . . [Citations.]” (*Salazar v. Superior Court, supra*, 83 Cal.App.4th at p. 842.)

Section 186.22, subdivision (b)(1) provides that the gang enhancement applies only if the defendant “is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” Appellant asserts that the preliminary hearing evidence is insufficient to establish these requirements “because Officer Smith’s testimony was too speculative and insubstantial.”

We disagree. Bonier testified, “[A] car came, and at the time it was like it was about to chase me so I hopped over the fence.” Appellant was “outside of the vehicle.” It is reasonable to infer that the car’s occupants were gang members involved in the shooting. The car belonged to Lamont Lewis, who was associated with the Rollin 40s. Thus, the magistrate could conscientiously entertain a strong suspicion that the crimes were committed “in association with [a] criminal street gang” and that appellant had the specific intent to promote criminal conduct by gang members. (§ 186.22, subd. (b)(1).) In *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, the court concluded that “the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.” Moreover, “if substantial evidence [a higher standard inapplicable to preliminary hearings] establishes that the defendant is a gang member who intended to commit the charged felony in association with other gang members, the jury may fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members. [Citation.]” (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-354; see also *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [“Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime”].)

For preliminary hearing purposes, Officer Smith’s opinion was sufficient to show that the crimes were committed for *the benefit of* the gang. “Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the

conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1). [Citations.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 63.)

Pinpoint Instruction

Appellant claims that the trial court erroneously refused to give his pinpoint instruction on eyewitness identification. Pinpoint instructions “relate particular facts to a legal issue in the case or ‘pinpoint’ the crux of a defendant’s case, such as mistaken identification or alibi. [Citation.]” (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Appellant asked the trial court to give a pinpoint instruction listing 16 factors that the jury may consider in determining the accuracy of a witness’s identification. Instead, the court gave CALCRIM No. 315, which lists 14 factors. The court concluded that the pinpoint instruction was “argumentative.”

Appellant argues that “the refused pinpoint instruction set forth three critically important factors that were omitted from [CALCRIM No. 315]. Those factors were relevant to evidence presented at trial concerning the accuracy of Demetrius Bonier’s identification of appellant.” The three factors were (1) “the number of prior confrontations between the witness and the defendant,” (2) “the effects of “distinctive cue omission,” if any,” and (3) “the effects of “carry over effect,” if any.”

Appellant asserts that the first factor is relevant because Bonier viewed appellant four times after the shooting - at a photo lineup, a live lineup, the preliminary hearing, and the jury trial. Doctor Scott Fraser, appellant’s expert on eyewitness identification, testified that “if the same person is displayed [on multiple occasions] in recognition tests, . . . [the test subject’s]

sense of certainty or confidence that that is the person originally seen increases so it's a progression to higher and higher rates of confidence for certainty." This is called "progression of certainty."

Appellant's pinpoint instruction did not frame the first factor in Doctor Fraser's language. As stated in the instruction, the first factor is "the number of prior confrontations between the witness and the defendant." This could mean the number of confrontations prior to the defendant's commission of the crime. CALCRIM No. 315 covers this issue. It provides that the jury should consider, "Did the witness know or have contact with the defendant before the event?" "A trial court is not required to give pinpoint instructions that merely duplicate other instructions. [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 486.)

The second factor is "the effects of 'distinctive cue omission,' if any." Doctor Fraser testified that "distinctive cues" are "any feature of a person observed that's strange, unusual and weird, abnormal, atypical," such as tattoos. He explained, "The neuroanatomy of a human eye and the visual system is such that we detect first and foremost what's different about persons." Such distinctive cues have "the highest degree of fidelity of storage."

Appellant has tattoos on his neck and right hand. Bonier did not notice any tattoos on the person who shot Pitts. At trial Bonier testified, "I wasn't looking for tattoos." Appellant maintains that "the effects of 'distinctive cue omission,' if any,' [were] relevant to Bonier's failure to mention seeing tattoos on the gunman." Doctor Fraser opined that, if a gun were pointed at someone, "the eyes and the brain" of the victim would "pick up"

tattoos on the hand of the person holding the gun and on the person's neck. "[T]he detection of distinctive cues is automatic. . . . It's the way in which our visual system operates."

The third factor is "the effects of 'carry over effect,' if any." Doctor Fraser explained that "carry over effect" applies when a person appears in both a photo lineup and a subsequent live lineup. If a witness is shown the photo lineup but is unable to identify anyone, in the subsequent live lineup he is more likely to identify the person who appeared in the photo lineup. "So there's a bias toward picking the person that's re-shown," even if the witness "rejected the person in the first recognition test." Appellant argues that "carry over effect" is relevant because Bonier identified him at a live lineup after he had been unable to identify him at a photo lineup.

We agree with the trial court that, as to the second and third factors, the pinpoint instruction is argumentative. "The court must . . . refuse an argumentative instruction, that is, an instruction "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." [Citation.]" (*People v. Panah, supra*, 35 Cal.4th at p. 486.) The pinpoint instruction invites the jury to infer that, because Bonier did not notice tattoos on the shooter's neck and right hand ("distinctive cue omission") and identified appellant in a live lineup after failing to identify him in a photo lineup ("carry over effect"), his identification of appellant as the shooter may be inaccurate.

In addition, "the jury remained free to reject Dr. [Fraser's] testimony although it was uncontradicted. [Citation.] The trial court was not required - indeed, was not permitted - to

instruct the jury to view the evidence through the lens of [his] theor[ies].” (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232.)

Court’s Refusal to Modify CALCRIM No. 315

Pursuant to CALCRIM No. 315, the trial court instructed the jury to consider, “How certain was the witness when he or she made an identification?” Appellant argues that the court erroneously refused “to delete the requirement that the jury consider the eyewitness’s professed certainty as a factor bearing on his credibility.” Appellant asserts that this factor “is contrary to the findings of scientific research.” Our Supreme Court recently rejected the same argument in *People v. Sanchez* (2016) 63 Cal.4th 411, 461-462.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Douglas Sortino, Judge
Superior Court County of Los Angeles

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