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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RICARDO DIAZ JUAREZ, Defendant and Appellant.	2d Crim. No. B263348 (Super. Ct. No. 2012014196) (Ventura County)

Ricardo Diaz Juarez appeals his conviction, by jury, of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),[1] assault with a deadly weapon (§ 245, subd. (a)(1)), street terrorism (§ 186.22, subd. (a)), and resisting a peace officer. (§ 148, subd. (a)(1).) He was sentenced to state prison for an aggregate term of 30 years. A prior trial arising from the same incident resulted in a mistrial after the jury was unable to reach a verdict on these charges. Appellant was acquitted of attempted murder in that trial.[2] He contends the trial court erred when it admitted evidence that his co-defendant

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

[2] The jury in appellant's first trial convicted his co-defendant, Jesus Levya Rodriguez, of attempted murder and assault with a semiautomatic firearm. The jury further found that Rodriguez committed these offenses for the benefit of a criminal street gang, personally inflicted great bodily injury and personally discharged a firearm. We affirmed Rodriguez's conviction in an unpublished opinion, *People v. Rodriguez*, B256431.

in the first trial, Jesus Rodriguez, was convicted of attempted murder, assault with a semiautomatic firearm and resisting arrest. He further contends the trial court erred when it denied his motion for a new trial based on jury misconduct. We affirm.

Facts

Benny Huerta grew up in the Ventura Avenue neighborhood of Ventura, California. Although he had been a member of Ventura Avenue Gangsters in his youth, Huerta testified he left the gang in 1995. On the evening of April 17, 2012, Huerta was walking on McFarlane Avenue toward his parked car, after visiting his friend, Christopher Hannegan. Two men approached Huerta before he reached his car. They exchanged words and a fist fight broke out. Within moments, Hannegan heard two gun shots. The two men ran away as Huerta stumbled down the street, looking for help. Blood was gushing from what turned out to be a stab wound to Huerta's right arm. He had also been shot twice in the torso. One bullet went through his stomach and exited the left side of his back. The other entered Huerta's right flank area and lodged in his pelvis. Onlookers came to Huerta's aid while Hannegan called 911. Hannegan told the responding police officers that one of the men was wearing a Rams football jersey and black pants. The other man was wearing a Dodgers baseball cap.

Huerta told the responding police officer that he was walking down McFarlane when two men approached him and asked him where he was from. Huerta responded that he was from Ventura and was not a gang member. The two men shot and stabbed Huerta and then ran away.

The shooting and stabbing occurred at about 6:50 p.m., while it was still light outside. Sara Morales had picked up her children from her mother-in-law's house on McFarlane and was sitting in her car with them when she saw two men and a woman walk past. She heard yelling and the sound of people fighting. Morales looked in the side mirror of her car and saw the two men who had just passed her fighting with a third man in the street, in front of her mother-in-law's house. Then she heard two gunshots. Morales started her car, drove around the block and parked on Ventura Avenue. While she was parked, she saw the same two men from the shooting run down Ventura Avenue

toward the Red Barn Liquor store. One was carrying a shirt in his hands. Morales called 911 and reported what she had seen.

Surveillance camera video from the Red Barn Liquor Store on Ventura Avenue shows appellant and Jesus Rodriguez run across the store's parking lot at about 6:52 p.m. Appellant is carrying a dark shirt in his hand. Before he enters the store, appellant stashes the shirt behind a scale that is standing near the store's front door. Once inside, the men convince a customer to lend them his cell phone. Rodriguez talks with other customers while appellant makes a call and paces back and forth near the front door. They leave the store three minutes later, running down Sunnyway Drive, a side street. Appellant and Rodriguez were arrested a few blocks away from the liquor store, while hiding behind an apartment building.

About one week later, on April 25, a homeowner who lived on Sunnyway Drive was trimming the high, thick grass and weeds in his front yard when he found a handgun lying near a fence. The gun was a .25 caliber semiautomatic handgun with two rounds missing from its seven-round magazine. Analysis later determined that cartridge casings found at the scene of the shooting had been fired from this gun. DNA testing of samples from the gun leads to the conclusion that Rodriguez could have contributed to the matter, but excluded appellant and the victim, Huerta, as contributors.

Officers also recovered the sports jersey that appellant "stashed" near the front door of the Red Barn Liquor store. An analysis of blood splattered on the jersey determined that victim Huerta was included as a major contributor to the DNA profile while appellant and Rodriguez were excluded as major contributors. A blue Dodgers cap, and black Dodgers cap, and a black sweatshirt were recovered near the site of appellant's arrest. Huerta was the major contributor of blood that stained the black baseball cap; appellant was a possible contributor of DNA found on the inside front rim of the cap. Rodriguez tested positive for gunshot residue on his hands; appellant did not.

At the time of the shooting, appellant and Rodriguez were staying on East McFarlane with appellant's girlfriend and her family. Sometime between 10:00 p.m. on April 16, 2012 and about 8:00 a.m. on April 17, the walls of a nearby parking structure

were tagged with graffiti consisting of the names "Goofy," and "Slings 3" and the word "vasura." Rodriguez goes by the moniker "Slings 3." Appellant is known as "Goofy."

A detective from the Ventura Police Department testified that the shooting occurred in a neighborhood "claimed" by the Ventura Avenue Gangsters, a street gang. Huerta was a known member of that gang in the early 1990s. Rival gangs sometimes refer to Ventura Avenue Gangsters by the derogatory term, "vasura," a reference to the Spanish word for trash.

Cody Collet, a detective from the Oxnard Police Department, testified as an expert witness on the Colonia Chiques gang and on gang culture in general. He explained that gang members commit crimes and acts of violence to earn respect from one another, to promote the gang and to spread fear and intimidation in the community. Members of Colonia Chiques often wear Dallas Cowboys' clothing and use the Cowboys' star in tattoos, writing and graffiti.

Detective Collet opined that appellant was a member of Colonia Chiques at the time of the shooting. Appellant used the moniker "Goofy," had Colonia Chiques tattoos and had admitted his membership in the gang. Rodriguez also had Colonia Chiques tattoos, gang nicknames of "Baby Slings," and "Slings III," and prior admissions to law enforcement of gang membership. In a video posted to You Tube, appellant and Rodriguez rap together about the Colonia gang and their willingness to use guns and violence on its behalf.

With regard to the street terrorism charge, Collet described six felonies or "predicate offenses" committed between 2005 and 2012 by members of Colonia Chiques. One predicate offense was appellant's own 2008 conviction of second degree robbery with a gang enhancement. Another was the attempted murder conviction of appellant's co-defendant, Jesus Rodriguez, in the first trial relating to the attack on Benny Huerta. The other four felonies were convictions of attempted murder and assault with a deadly weapon sustained by Colonia members in unrelated cases. In response to a hypothetical based on the facts of this case, Detective Collet also opined that the shooting would have been committed for the benefit of and in association with the Colonia Chiques gang.

Discussion

Evidence of Co-Defendant's Conviction

Appellant contends the trial court violated his federal due process rights and Evidence code section 352 when it admitted evidence of Rodriguez's conviction from their first trial because the probative value of that evidence was substantially outweighed by the danger it would create undue prejudice against appellant. He further contends the evidence was cumulative of other predicate offenses committed by Colonia Chiques members.

Section 186.22, which criminalizes active participation in a criminal street gang, requires that the gang at issue engage in a "pattern of criminal gang activity." (§ 186.22, subd. (f).) It defines "'pattern of criminal gang activity'" as the commission, attempted commission, conspiracy to commit, or solicitation by gang members or associates of two or more criminal offenses enumerated in the statute. (§ 186.22, subd. (e).) Here, the prosecution introduced evidence of six such predicate offenses committed by members of Colonia Chiques. These include appellant's 2008 conviction of robbery and Rodriguez's conviction, in the first trial, of the attempted murder of Huerta. We review the trial court's decision to admit evidence for abuse of discretion, there is none. (*People v. Lomax* (2010) 49 Cal.4th 530, 581; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

Respondent contends that appellant forfeited review of this issue because his trial counsel did not expressly mention Evidence Code section 352 in his objections to the trial court. There was no forfeiture. While trial counsel did not cite directly to the statute, his objection was based on Evidence Code section 352. Trial counsel stated that he objected to the evidence "for the same reason I objected prior to the trial regarding [appellant's prior conviction]." That objection was based on Evidence Code section 352. Counsel further stated, "I think that the use of this conviction, the bias to the jury, far outweighs its probative value and [the prosecutor] has maybe four or five other predicate offenses he's using." These statements were sufficient to "fairly apprise[] the trial court

of the issue it is being called upon to decide" and, therefore, to preserve the issue for review. (*People v. Scott* (1978) 21 Cal.3d 284, 290.)

The trial court did not abuse its discretion when it admitted evidence of Rodriguez's conviction. As appellant concedes, the facts underlying Rodriguez's conviction are highly probative of appellant's own guilt. Appellant was standing beside Rodriguez when Rodriguez shot Huerta. Both men had previously admitted they were members of Colonia Chiques and both were wearing tattoos and clothing indicative of their continued gang membership. The additional fact that Rodriguez was found to have acted for the benefit of a criminal street gang was relevant to prove that his companion, appellant, was also acting for the benefit of that gang.

The evidence was not unduly prejudicial. "'Prejudice,' as used in Evidence Code section 352, is not synonymous with damaging. (*People v. Coddington* (2000) 23 Cal.4th 529, 588 [97 Cal.Rptr.2d 528, 2 P.3d 1081].) Rather, it refers to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and has little to do with the legal issues raised in the trial. (*Ibid.*)" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) Evidence that is unduly prejudicial is evidence that invites the finder of fact to prejudge a person or cause on the basis of extraneous factors. (*People v. Tran* (2011) 51 Cal.4th 1040, 1048, citing *People v. Doolin* (2009) 45 Cal.4th 390, 439.) The statute "requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect. 'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)" (*People v. Tran*, *supra*, 51 Cal.4th at p. 1047.)

Here, the evidence is not unduly prejudicial because it does not invite the jury to make findings based on emotional bias or other extraneous factors. Instead, it adds credibility to the evidence that Rodriguez acted for the gang's benefit when he shot Huerta.

Nor was the trial court obligated to exclude the evidence as "cumulative." As our Supreme Court noted in *People v. Tran* (2011) 51 Cal.4th 1040, the prosecution

was not required to "forgo the use of relevant, persuasive evidence to prove an element of a crime because the element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute. [Citations.] But the prosecution cannot be compelled to '"present its case in the sanitized fashion suggested by the defense."' (*People v. Salcido* (2008) 44 Cal.4th 93, 147.) When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion." (*People v. Tran*, *supra*, 51 Cal.4th at p. 1049.)

Alleged Jury Misconduct

The jury was provided with Exhibit 75, the certified record of Rodriguez's conviction of attempted murder in the first trial. Included within that record was a copy of the Information filed against Rodriguez and appellant which, in turn, includes allegations that appellant was convicted of robbery in 2008, of vehicle theft in 2003 (Veh. Code, § 10851, subd. (a)), and of second degree burglary (§ 459), in 2006. During deliberations, the jury asked the trial court, "Please describe for us in simple terms the charges for which Mr. Juarez was convicted in pages 5 to 11 of this report." The trial court instructed the jury to "Please disregard the information on pages 5 to 11 of Ex. 75." Defense counsel later moved for a new trial based on the inadvertent disclosure of appellant's prior convictions. The trial court denied the motion for new trial, reasoning that neither party objected to Exhibit 75 despite having been aware of its content and that the jury presumably followed its admonition to disregard information concerning appellant's prior convictions.

A motion for new trial may be granted if, "the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property." (§ 1181, subd. 2.) For example, a juror's inadvertent receipt of information outside of court proceedings gives rise to a rebuttable presumption of prejudice. (*People v. Stanley* (2006) 39 Cal.4th 913, 950.) Whether that misconduct resulted in prejudice to the defendant """"depends upon whether the jury's impartiality has been adversely

affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed.'"'" (*Ibid.*) Whether misconduct was prejudicial "is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Appellant forfeited his claim of jury misconduct because he did not raise it in a timely manner in the trial court. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1242.) Exhibit 75 was admitted into evidence without having been redacted and without objection. Defense counsel also did not object to the trial court's answer to the jury's question, nor did counsel request that the jurors be questioned further about the exhibit and its impact on their deliberations. (*People v. Ramirez* (2006) 39 Cal.4th 398, 460 [appellate review forfeited where counsel did not request inquiry into the effect that the death of a juror during deliberations had on other jurors' ability to deliberate].)

Had the contention not been forfeited, we would reject it because the trial court did not abuse its broad discretion when it found no prejudicial misconduct occurred. (*People v. Dykes* (2009) 46 Cal.4th 731, 809; *People v. Engstrom* (2011) 201 Cal.App.4th 174, 182.) First, there was no misconduct. Jurors do not commit misconduct by reviewing evidence inadvertently provided to them. (*People v. Cooper* (1991) 53 Cal.3d 771, 836.) Second, like the trial court, we are not convinced the exhibit prejudiced jurors against appellant. Appellant was not convicted because of "guilt by association". This was, and is, a fact driven case. The "street terrorism" charge allows "association" evidence and the People may prove this crime by using the substantive offense committed by a fellow gang member. (See e.g., *People v. Loeun* (1997) 17 Cal.4th 1, 10.) Moreover, we observe that Information lists appellant's prior convictions, but that list does not describe the offenses by their common names. It consists only of statutory references. The trial court properly concluded that jurors were unlikely to have understood enough about the prior convictions to have been prejudiced by them. The

trial court acted within its discretion when it denied the motion for new trial on the ground that there had been no prejudicial jury misconduct.

Cumulative Error

Appellant contends the cumulative effect of these two errors requires reversal. We disagree, because there was no error to cumulate. (*People v. Avila* (2009) 46 Cal.4th 680, 718; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Jeffrey Bennett, Judge

Superior Court County of Ventura

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

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