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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.

DAMETREAS DOBY,

Defendant and Appellant.

2d Crim. No. B286228
(Super. Ct. No. BA427208)
(Los Angeles County)

Dametreas Doby appeals from the judgment after a jury convicted him of first degree murder (Pen. Code,¹ §§ 187, subd. (a), 189, subd. (a)) and shooting from a motor vehicle (§ 26100, subd. (c)), and found true allegations that he committed his crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and that a principal personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing death during the

¹ All further unlabeled statutory references are to the Penal Code.

commission of the crimes (§ 12022.53, subds. (b), (c), (d) & (e)(1)). The trial court sentenced Doby to consecutive terms of 25 years to life in state prison: 25 years to life on his murder conviction, plus a consecutive 25 years to life on the attached discharge of a firearm causing death sentence enhancement. It also ordered him to pay a \$10,000 restitution fine (§ 1202.4, subd. (b)), an \$80 court operations assessment (§ 1465.8), and a \$60 court facilities assessment (Gov. Code, § 70373).

Doby contends: (1) the trial court erroneously admitted evidence of a prior shooting, in violation of his rights to due process and a fair trial; (2) the court erred when it did not instruct the jury on the limited use of that evidence; (3) the gang expert impermissibly commented on his credibility; (4) the case should be remanded to permit the court below to exercise its discretion to strike or impose the firearm enhancements; (5) the court's imposition of the restitution fine violated his due process rights and the ban on excessive fines; and (6) imposition of the court operations and court facilities assessments violated his due process and equal protection rights. We reject all of these contentions.

FACTUAL AND PROCEDURAL HISTORY

The shootings of J.N. and M.M.

Doby and three friends—Jamon Carter, Clifton Floyd, and Ryan Shields—were members of the 55 Neighborhood Crips street gang. The gang claimed a small area of the Wildasin neighborhood of Los Angeles as their territory. Among their rival gangs were the Five Deuce Hoovers and the 54 Van Ness Gangsters.

Around 6:00 a.m. on July 4, 2014, J.N. was walking down the street in an area claimed by the 54 Van Ness

Gangsters. He was not a gang member. As J.N. walked, a car drove up and stopped in front of him. The passenger got out of the car and walked toward J.N. He was holding a gun.

The passenger asked J.N. where he was from. J.N. replied, "I don't gang bang." The passenger raised his gun. J.N. grabbed it, and a struggle ensued. The driver of the car then got out and walked toward J.N., also holding a gun. The passenger's gun fired, severing J.N.'s finger and striking him in the stomach.

Surveillance video from a nearby liquor store showed that J.N.'s assailants drove Doby's car. J.N. identified Shields as the driver. He could not identify the passenger.

Two hours later, E.C. and M.M. were talking outside M.M.'s aunt's house. The house was in Five Deuce Hoovers territory, about two miles east of where J.N. was shot. Neither E.C. nor M.M. was in a gang, and neither had gang tattoos.

Three or four men in a gold Pontiac drove past the house. The car made a U-turn at the end of the block and headed back toward them. As it approached, it slowed to a speed of two or three miles per hour. The man in the rear passenger seat yelled "Fuck Snoover" and fired four or five shots at E.C. and M.M. The car then drove off.

M.M. lay in the middle of the street. He had been shot two or three times. E.C. ran over and pulled him to the curb. Paramedics arrived and took him to the hospital, where he was pronounced dead.

Dispatch broadcast information about the Pontiac over police radio. Two officers realized that they had seen the car a few minutes earlier, and broadcast its license plate number. Another officer ran the number and discovered that the car was registered to Doby. He was arrested later that day.

Police impounded Doby's car. They found blood on the bumper, quarter panel, and taillight. They also found a discharged bullet casing on the floor of the passenger side in the rear of the car.

E.C. identified Doby's car as that driven by the men who killed M.M. He could not identify the shooter or anyone else in the car.

Doby's first police interview and subsequent investigation

Detectives interviewed Doby after his arrest. Doby told the detectives that he went to his mother's house around 8:00 a.m. on July 4. He stayed there for 15 or 20 minutes before going to North Hollywood. When the detectives told Doby that an officer had seen his car in Wildasin "way before" 8:00 a.m., Doby said he dropped off another friend there around 3:00 or 4:00 a.m.

Doby said that he was not a gang member. No one else used his car that morning. He knew nothing about the shootings of J.N. or M.M. He did not know why there was blood on his car. The detectives released Doby after the interview.

Doby's phone was in his impounded car at the police station. Police searched it and saw that Doby spoke with Floyd and Shields several times before and after M.M.'s murder. He sent a text message about six weeks before saying that he "had just dropped [his] gun off to [his] homie." There were pictures of Doby throwing gang signs on the phone. There was also an image with two Roman numeral fives that referenced a "nickel."

Police found two bullet casings in the street in front of M.M.'s aunt's house. They later recovered a bullet from M.M.'s body. Forensic testing showed that the bullets from the casings had been fired from the same gun as the casing found inside Doby's car. So had the bullet recovered from M.M.'s body.

Doby's second police interview

On July 15, Doby returned to the police station to retrieve belongings from his car. A detective requested a second interview with him. During the interview, Doby again denied any knowledge of J.N.'s shooting or M.M.'s murder. The detective then told Doby about the evidence police had collected, and showed him a photograph of his car near the scene of J.N.'s shooting. The detective also told him, falsely, that a witness had identified him from a six-pack photo array.

Doby told the detective that he was not in the car during J.N.'s shooting. He was drunk when Shields and Carter asked him to drive them that morning. Half asleep, he handed his keys to Shields. Shields and Carter then left in his car.

Later that morning, Doby drove Shields and Carter to pick up Floyd. After they picked him up, Floyd directed Doby to drive through Five Deuce Hoovers territory. When they passed E.C. and M.M., Floyd told Doby to stop and let him out of the car because he thought the two men were Hoovers. Doby said, "No, let me turn around." As they drove back down the street, Floyd "unexpectedly" shot out of the rear passenger-side car window. Doby did not remember if he said anything. Doby did not see the gun, and did not know Floyd had it until he shot it. Doby drove to North Hollywood after the shooting.

Doby admitted that he was a member of the 55 Neighborhood Crips. Carter, Floyd, and Shields were his friends and fellow gang members. They were not "hunting" in rival gang territory when Floyd killed M.M.

Doby continued to deny that he was in the car when Carter shot J.N. He first heard Carter and Shields talk about that shooting when they were in North Hollywood after M.M.'s

murder. Shields and Carter claimed that they thought J.N. was a member of the 54 Van Ness Gangsters.

Prosecution case

Prosecutors charged Doby with M.M.'s murder and with shooting from a motor vehicle at M.M. They did not charge him with any crime related to J.N. The trial court nevertheless determined that evidence related to J.N.'s shooting was admissible to impeach Doby's credibility and to show that he had a relationship with Shields and Carter, that he was in a gang, and that he acted with the knowledge, intent, and purpose to benefit the gang. Doby agreed to the use of the evidence for these purposes. He later objected to its admission, however, but did not state the basis for his objection.

A police officer testified as an expert on the 55 Neighborhood Crips. He said the gang's primary activities included narcotics sales, robberies, assaults, attempted murders, and murders. One of their identifying symbols was the number 5.

The expert said that 55 Neighborhood Crips were expected to "put in work" and commit crimes for the gang. They were also expected to go on "missions," trips to rival gang territory to instill fear in the gang and surrounding community. Putting in work and going on missions would elevate a member's status in the gang. Committing a crime in a rival gang's territory would also elevate the member's status.

Gang members would not drive through rival gang territory unless they were putting in work or going on a mission. Nor would they go into rival territory on the rival gang's "hood day"—the date when members had parties and initiated new members—without arming themselves; doing so was more

disrespectful and dangerous than usual. July 4 was hood day for the Five Deuce Hoovers.

The expert said that Doby, Carter, Shields, and Floyd were all members of the 55 Neighborhood Crips. Each man had gang tattoos. There were pictures of the men throwing gang signs on Doby's phone. The image with two Roman numeral fives was also a gang symbol.

Given a hypothetical scenario based on the facts of this case, the expert opined that a murder like M.M.'s was committed to benefit a criminal street gang. The murder increased the gang's notoriety and instilled fear in the community. Each person in the car had a role to play in the crime, such that each was putting in work.

The prosecutor asked specifically about the driver: "[A]ssume that the driver later claims that he didn't know the gun was in the car or that there would be a shooting; does that make sense within this scenario, with all the facts being what they are?" The expert replied, "[w]ith the totality of the circumstances, being the hood day, no." The prosecutor followed up: "Is it just because it's the hood day? Or does the fact that it's a rival's neighborhood and driving pattern and all that play a part?" The expert said, "[I]t all plays a part."

Defense case

Doby testified in his own defense. He said that he had been a member of the 55 Neighborhood Crips since he was 16 years old. He was not jumped into the gang, and did not have to put in work to maintain his membership. He did not live in the gang's territory. His tattoos had non-gang meanings.

Shields, Floyd, and Carter were also members of the 55 Neighborhood Crips. Doby did not know whether they put in

work for the gang. The gang did not require its members to put in work, and committing crimes did not elevate a member's status.

Doby said the text message about dropping off his gun with his homie was not actually about a gun. Giving a gun to another gang member would not qualify as putting in work.

Doby said he was in North Hollywood until around 3:00 a.m. on July 4, 2014. He and Carter then took a friend home and picked up Shields. Doby fell asleep after that.

A few hours later, Shields asked Doby to give him and Carter a ride. Doby was drunk and half asleep, so he let Shields and Carter take his car. When they returned, they woke Doby and told him they needed to pick up Floyd. Doby did not ask where they had taken his car.

Doby drove Shields and Carter to Floyd's house. When he got in the car, Floyd asked Doby to drive through Five Deuce Hoovers territory. Doby knew it was the Hoovers' hood day, but was not worried because it was daylight.

Doby did not see E.C. and M.M. the first time he drove past them. Floyd told Doby to let him out of the car, but Doby offered to turn around instead. When Doby drove past E.C. and M.M. again, he did not slow down. Floyd yelled "Fuck Snoover" and began shooting. Doby was shocked. He did not know that Floyd had a gun, and did not expect him to shoot anyone. He panicked and drove to North Hollywood, where he stayed until 1:00 or 2:00 p.m.

Closing arguments

During closing arguments, the prosecutor referenced J.N.'s shooting several times. She reminded jurors that Doby was not charged in that shooting because there was no evidence

that he was there. It was only “relevant because it paint[ed] the whole picture of that day.”

Shields got out of the car to help Carter when he struggled with J.N. for the gun. J.N.’s resistance helped to explain why Doby made a U-turn rather than let Floyd out of the car when they saw E.C. and M.M.: It was an effort not to repeat such a struggle. J.N.’s resistance also helped to show the importance of gang members backing each other up when going on missions together in rival gang territories.

Sentencing

Aware that Senate Bill No. 620 would go into effect in January 2018, Doby moved to continue his November 2017 sentencing for two months so the trial court could exercise its discretion to strike or impose the firearm enhancements found true by the jury. The court denied Doby’s motion:

. . . I’m not saying that there would never be a case where the court would, you know, not—I mean, there are cases—I can envision myself exercising the discretion to strike a gun enhancement, particularly where somebody might just be in the car; they weren’t the driver and they weren’t the shooter. And I have had cases like that.

But this is not that case.

. . . [W]ithout [Doby’s] specific activity and the manner of driving and so forth, this crime in my opinion would not have taken place. So as an aider and abettor, he is wholly culpable.

The jury's decision was appropriate.

The motion to strike the enhancement, or to continue this [case] so that I could strike the enhancement, is denied at this time.

The court then sentenced Doby to 50 years to life in state prison: 25 years to life on his murder conviction, plus a consecutive 25 years to life on the enhancement for the personal and intentional discharge of a firearm causing death. It noted that it was "really a firm believer [that] if someone is going to do and commit the kind of crime that happened here, then the sentence is appropriate. I mean, you took that chance; you made those decisions. And now you have to pay the consequences."

Pursuant to section 654, the trial court imposed and stayed a sentence of 32 years to life on Doby's shooting from a vehicle conviction: the upper term of seven years in prison on the conviction itself, plus a consecutive 25 years to life for discharging a firearm causing death. The court did not impose sentence enhancements on any of the other firearm allegations found true by the jury. It ordered Doby to pay a \$10,000 restitution fine, an \$80 court operations assessment, and a \$60 court facilities assessment. Doby did not object to imposition of the fine or assessments.

DISCUSSION

Evidence of J.N.'s shooting

Doby contends the trial court erred when it admitted evidence of J.N.'s shooting because the evidence was irrelevant and unduly prejudicial. But prior to trial, he consented to the admission of the evidence. And when he later objected, he did not

state the grounds for his objection. He has forfeited his contention. (*People v. Marks* (2003) 31 Cal.4th 197, 228 [general objection to the admission of evidence does not preserve claim for appeal]; *Thompson v. Thompson* (1963) 218 Cal.App.2d 804, 808 [party cannot challenge evidence on appeal if they consented to its admission at trial].)

It also fails on the merits. “Relevant evidence” is evidence that has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of [an] action.” (Evid. Code, § 210.) Such evidence must “logically, naturally, and by reasonable inference” tend to prove a material fact. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) If it does, the evidence is admissible unless “its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time or . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, §§ 351, 352.) We review the trial court’s determinations that the evidence of J.N.’s shooting was relevant and not unduly prejudicial for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 74.)

There was no abuse of discretion here. “Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related.” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 (*Samaniego*).) Evidence of J.N.’s shooting tended to show that Doby had a relationship with Shields and Carter. It showed that he trusted them with his car, and that he was willing to put in work for the gang by lending it to them. This was directly relevant to the gang allegations and charges against Doby, as it tended to show the depth of his relationship with fellow gang members and the

gang-related motive for M.M.'s murder. The evidence was admissible. (*People v. Valdez* (2012) 55 Cal.4th 82, 131.)

The evidence was also relevant to the issue of Doby's credibility because it helped to show that he was willing to lie for fellow gang members. (*Samaniego, supra*, 172 Cal.App.4th at p. 1168.) During his first interview with police—which took place *after* Doby knew about J.N.'s shooting—Doby said that he was not in a gang. He said that no one else had used his car that morning. And he said that he knew nothing about the blood on his car. Evidence of J.N.'s shooting showed that these statements were false, rendering it relevant to Doby's credibility. (*People v. Houston* (2005) 130 Cal.App.4th 279, 305.)

The evidence was not unduly prejudicial. Presentation of the evidence related to J.N.'s shooting was brief, comprising about 45 pages of a reporter's transcript more than 900 pages long. The evidence was unlikely to confuse the jury, as the parties repeatedly stressed that Doby was not involved in the shooting. The evidence was not cumulative, as it provided context for M.M.'s subsequent murder. And it was not overly inflammatory when compared to M.M.'s murder. It therefore was not unduly prejudicial. (*People v. Williams* (2017) 7 Cal.App.5th 644, 678.)

The trial court thus did not abuse its discretion when it admitted the evidence. (*Samaniego, supra*, 172 Cal.App.4th at p. 1168.) And because the evidence was properly admitted, Doby's constitutional claims fail. (*People v. Winbush* (2017) 2 Cal.5th 402, 458.)

CALCRIM No. 375

Doby next contends the trial court erred when it did not sua sponte instruct the jury pursuant to CALCRIM No. 375

on the limited use of the evidence of J.N.'s shooting. Alternatively, he contends counsel provided ineffective assistance because he did not request the instruction. We reject both contentions.

CALCRIM No. 375 is used when the prosecution presents evidence of the *defendant's* prior crimes pursuant to Evidence Code section 1101. The evidence related to J.N.'s shooting was not admitted pursuant to Evidence Code section 1101; there was no evidence that Doby was involved in that shooting. CALCRIM No. 375 was thus inapplicable. (*People v. Farnam* (2002) 28 Cal.4th 107, 173.) Accordingly, the trial court did not err when it did not provide the instruction, and defense counsel did not provide ineffective assistance when he did not request it. (*Ibid.*; see also *People v. Price* (1991) 1 Cal.4th 324, 387 [counsel not ineffective for failing to make unmeritorious request].)

Moreover, the trial court instructed the jury on the limited use of the gang evidence presented in the case. (See CALCRIM No. 1403.) CALCRIM No. 1403 told jurors that evidence related to 55 Neighborhood Crips gang activity, like that of J.N.'s shooting, could be used "only for the limited purpose[s] of deciding whether[] [¶] [Doby] acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged, or [¶] [whether Doby] had a motive to commit the crimes charged," or whether he was credible. It also told jurors that they could not "conclude from th[e] evidence [that Doby] is a person of bad character or that he has a disposition to commit crime." Those instructions properly limited the jury's consideration of the evidence of J.N.'s shooting. (*Samaniego, supra*, 172 Cal.App.4th at pp. 1169-1170.)

Gang expert testimony

Doby consistently denied knowing that Floyd had a gun in the car and that he intended to use it. When given a scenario based on the facts of this case, the gang expert said that it did not “make sense” that the hypothetical driver would not know there was a gun in the car or that there would be a shooting. Doby asserts that this was an impermissible comment on his credibility. (Cf. *People v. Curl* (2009) 46 Cal.4th 339, 359 [expert may not opine on a party’s credibility].)

Not so. The gang expert was not commenting on Doby’s credibility; he was opining about a hypothetical person. His opinion about what that hypothetical person knew was proper. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045-1049.) To the extent *People v. Killebrew* (2002) 103 Cal.App.4th 644—on which Doby relies—suggested otherwise, our Supreme Court has disapproved it. (*Vang*, at p. 1047, fn. 3.) The expert’s testimony was proper. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947.)

Firearm enhancements

Doby contends the case should be remanded to permit the trial court to exercise its discretion to strike or impose the firearm enhancements. We disagree.

At the time of Doby’s sentencing, section 12022.53, subdivisions (d) and (e)(1), required the trial court to impose a 25-year-to-life sentence enhancement on a defendant if a principal personally and intentionally discharged a firearm causing death during the commission of a murder. Since 2018, the court has had discretion to strike or impose that enhancement. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080; see § 12022.53, subd. (h).) Remanding the case to permit the exercise of that discretion is required unless the record “clearly indicates”

that the court would have imposed the enhancement even if it had the ability to strike it. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

The record here clearly indicates that the trial court would have imposed the 25-year-to-life sentence enhancement even if had the discretion to strike it. At sentencing, the court was aware that it would soon have discretion to strike or impose sentence enhancements on any firearm allegations found true. It nevertheless denied Doby's motion to continue sentencing until it had such discretion. Though it could envision a case in which it would strike a firearm enhancement, "this [was] not that case." A 50-year-to-life sentence was "appropriate." Remanding would therefore be a futile act. (See, e.g., *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [imposition of maximum sentence a clear indication court would not strike firearm enhancement]; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713 [statement that court would impose enhancement even if it could strike it a clear indication].)

Our review of the record does reveal two errors related to the firearm enhancements, however. First, because shooting from a motor vehicle is not a crime listed in section 12022.53, subdivision (a), the personal use of a firearm (*id.*, subd. (b)) and personal and intentional discharge of a firearm (*id.*, subd. (c)) allegations were not properly attached to that charge. The jury's true findings on those allegations must be vacated. Second, in addition to finding true the personal and intentional discharge of a firearm causing death allegation, the jury found true allegations that a principal personally used a firearm and personally and intentionally discharged a firearm during the murder. But the court did not impose and stay sentence

enhancements on those allegations, as required. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122-1123.) It must do so.

Restitution fine

Doby next contends the trial court violated his due process rights and the Excessive Fines Clause of the Eighth Amendment because it imposed a \$10,000 restitution fine without considering his ability to pay. (See *Timbs v. Indiana* (2019) 586 U.S. __, __ [139 S.Ct. 682, 686-687] [excessive fines]; *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164 (*Dueñas*) [due process].) The Attorney General argues Doby forfeited his contention because he did not object to the fine at sentencing. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*).) The latter is correct.

Whenever the trial court imposes a restitution fine above the \$300 statutory minimum, it may consider the defendant's ability to pay. (§ 1202.4, subd. (c).) Here, the trial court set Doby's fine at \$10,000—the statutory maximum. Doby had the opportunity to bring to the court's attention any factors relevant to his ability to pay. (*Avila, supra*, 46 Cal.4th at p. 729; see § 1202.4, subd. (d).) He did not do so. He accordingly forfeited his challenges to the restitution fine. (*Avila*, at p. 729.)

Court operations and court facilities assessments

Finally, Doby contends the trial court violated his due process and equal protection rights because it did not consider his ability to pay before it imposed an \$80 court operations assessment and a \$60 court facilities assessment. (See *Dueñas, supra*, 30 Cal.App.5th at p. 1164.) The Attorney General again argues that Doby forfeited his contention. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155.) We need not decide whether there was a *Frandsen* forfeiture because

under the circumstances present here, remand is unnecessary. As set forth above, Doby did not object that he had an inability to pay a \$10,000 restitution fine. “[H]e surely would not complain on similar grounds regarding an additional [\$140] in [court assessments].” (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.) Remand would be an idle act.

DISPOSITION

The trial court is directed to impose and stay sentence enhancements on the personal use of a firearm and personal and intentional discharge of a firearm allegations (§ 12022.53, subds. (b) & (c)) attached to Doby’s murder charge that were found true by the jury. His sentence on that conviction remains 25 years to life in state prison on the murder, plus a consecutive 25 years to life on the discharge of a firearm causing death enhancement. The jury’s true findings on the personal use of a firearm and personal and intentional discharge of a firearm allegations attached to Doby’s shooting from a vehicle charge are vacated. His sentence on that conviction remains 32 years to life in prison (seven years on the conviction itself, plus a consecutive 25 years to life for discharging a firearm causing death), and remains stayed pursuant to section 654. The clerk of the superior court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Kathleen Kennedy, Judge

Superior Court County of Los Angeles

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