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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DWAYNE RICE, Defendant and Appellant.	B230942 (Los Angeles County Super. Ct. No. GA 077054)

APPEAL from a judgment of the Superior Court of Los Angeles County, Janice Croft, Judge. Affirmed.

Robert E. Boyce, 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, Assistant Attorney General, Linda C. Johnson and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Dwayne Rice of the first degree murder of David Crosby and found true gang and firearm allegations. The court sentenced appellant to a total of 50 years to life in state prison. Appellant contends that the trial court erred in (1) admitting evidence of a prior act of violence that was not against the victim in this case, and (2) failing to remove a juror who expressed concerns about serving on the jury. We affirm.

STATEMENT OF FACTS

The Squiglies gang and the Pasadena Denver Lane (PDL) gang are rivals. Crosby, the victim, was a Squiglies member. Appellant is a member of PDL.

On May 29, 2009, a funeral for Darryl Stephens was held at the New Revelations church in Pasadena. Stephens had committed suicide. Crosby was Stephens's cousin and was present at his funeral. C.C. is Crosby's brother and was also at Stephens's funeral. C.C. saw appellant at Stephens's funeral.

After the funeral, some of Stephens's family members, including C.C. and Crosby, went to the Atlantis restaurant. Appellant came into the restaurant with five or six other people. C.W. was among appellant's group. C.W. and some other PDL gang members, including appellant, went up to Crosby and told him he had to leave. Crosby responded that it was a family event and he did not have to leave. Someone in the group took a swing at Crosby. Crosby swung back, and appellant jumped in and shot Crosby. C.C. saw appellant shoot Crosby the first time, then he dropped to the ground and heard four or five more shots.

Several other eyewitnesses testified that appellant shot Crosby that day at the Atlantis restaurant. C.W. said that he and appellant went to Atlantis restaurant with at least nine other PDL members. He saw appellant shoot Crosby after Crosby refused to leave. Crosby fell to the ground and started to crawl away. Appellant leaned over him and shot him as he was trying to crawl away. Appellant was grinning as he shot him.

F.S. went to Stephens's funeral and to the Atlantis restaurant afterward. She said that she saw appellant shoot Crosby at the restaurant as Crosby was crawling away. She called 911.

R.C. was Crosby's sister and was at the Atlantis restaurant that day. She also saw appellant shoot Crosby. He fell to the ground and was crawling after appellant shot him once, and then appellant shot him again.

Crosby died of gunshot wounds to the back and chest.

DISCUSSION

1. The Trial Court Did Not Err in Admitting Evidence of a Prior Act of Violence, and Counsel Was Not Ineffective for Failing to Object to It

a. Background

At a hearing outside the presence of the jury, the prosecutor explained that he wanted to put on evidence of an incident that occurred in May 2009 when appellant purportedly pistol-whipped Stephens. The prosecutor said that the pistol whipping occurred when appellant and Stephens were arguing over a woman. He stated that the evidence would show there was "bad blood" between appellant and Stephens, and appellant would have no good reason to come to Stephens's funeral. The prosecutor explained that he had an eye witness to the pistol whipping, and two witnesses who saw Stephens with injuries the day after. Defense counsel did not object and instead stated: "If that's all it is and if they produce those witnesses, obviously I think the court is justified in allowing the testimony."

At trial, C.W. testified that appellant and Stephens did not get along. Stephens was "messing with" S.B. S.B. was dating appellant. Approximately two weeks before Stephens's funeral, C.W. saw appellant and Stephens arguing. Appellant pistol-whipped Stephens. Stephens's brother testified that he saw Stephens on May 3, 2009, with a swollen face. It appeared that he had been struck repeatedly in the face.

The court instructed the jury that "evidence of other behavior by the defendant that was not charged in this case, that the defendant allegedly assaulted Mr. Stephens with a gun," could be considered, but only "for the limited purpose of deciding whether or not the defendant acted with the specific intent to commit the offense alleged . . . or the defendant had a motive to commit the offense alleged." (See CALCRIM No. 375.)

b. Analysis

Appellant contends that the trial court erred in admitting evidence that he pistol-whipped Stephens because it was irrelevant, inadmissible character evidence, and inadmissible pursuant to Evidence Code section 352. We are not persuaded.

Preliminarily, appellant has forfeited this contention because he consented to evidence of the pistol whipping being admitted and did not raise an objection. (*People v. Thornton* (2007) 41 Cal.4th 391, 427.) While his brief states that appellant objected to the testimony based on hearsay and lack of foundation, his citation to the record does not show any objection to that testimony. Instead, the record shows that defense counsel told the court it was "justified in allowing the testimony." Nevertheless, we consider the claim on the merits because of appellant's alternative argument that counsel was ineffective in failing to raise an objection.

We review a trial court's determination of whether evidence is admissible for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Evidence of a person's character generally is inadmissible when offered to prove that person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Thus, "'[i]t is an established principle of evidence law that evidence of other criminal acts or misconduct of a defendant may not be admitted at trial when the *sole* relevancy is to show defendant's criminal propensities or bad character as a means of creating an inference that defendant committed the charged offense.'" (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1444, italics added.) Evidence of other misconduct may be admitted, however, when relevant to prove some fact other than a defendant's disposition to commit the charged offense, "such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." (Evid. Code, § 1101, subd. (b).)

The evidence that appellant argued with Stephens over S.B. and pistol-whipped him several weeks before his funeral was relevant and admissible to prove motive and intent. The prosecution argued at trial that appellant went to Stephens's funeral not to pay his respects, but to stir up trouble because Stephens had been having an affair with appellant's girlfriend. Appellant showed up at the funeral and then the Atlantis restaurant

with a number of other PDL gang members. He carried a gun with him and targeted Stephens's cousin, Crosby. The evidence of appellant's prior act of violence gave rise to an inference that appellant preplanned and intended a confrontation and had a very personal motive for intimidating and attacking Stephens's mourners (in addition to the gang rivalry between appellant and the victim).

Appellant's argument that the prior act evidence was more prejudicial than probative is unavailing. """Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. . . . "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. . . .['"] . . . ["'T]he statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]"'" (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, citations omitted.) The evidence that appellant argued with and pistol-whipped Stephens was no more prejudicial than the evidence that he shot Crosby in the back as Crosby was on the ground attempting to crawl away from him. (*People v. Leon* (2010) 181 Cal.App.4th 452, 462.) The trial court could have reasonably concluded that prior act evidence would not "so inflame the emotions of the jurors that they would '"reward or punish one side because of the jurors' emotional reaction."' [Citation.]" (*Ibid*.)

Additionally, the argument that the prior act evidence was too time consuming and confusing lacks merit. We were able to summarize the evidence in one brief paragraph, and it amounted to only a few pages of transcript in a trial that lasted six days. This was not an "undue consumption of time." (Evid. Code, § 352.) Appellant asserts that the evidence was confusing because the prosecutor mistakenly referred to Stephens as the victim of the murder once during trial. One accidental slip on the prosecutor's part does not mean that the contested evidence confused the issues for the jury. The trial transcript

is replete with references to Stephens, given that the charged murder occurred the day of his funeral, where his mourners were gathering, and involved his cousin.

All this is to say that appellant has not shown ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, appellant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that counsel's deficient performance prejudiced the defense, i.e., absent counsel's error, there was a reasonable probability that the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Jackson* (1989) 49 Cal.3d 1170, 1188.) Counsel is not ineffective for failing to raise an objection that would have been fruitless or meritless. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463; *People v. Jackson, supra,* at p. 1189.) Here, appellant cannot demonstrate prejudice from counsel's failure to object to the admission of the contested evidence. Any objection would have been essentially fruitless and unlikely to result in a more favorable outcome because the evidence was relevant and admissible.

2. The Trial Court Did Not Err in Failing to Replace Juror No. 6

a. Background

After the jury had been sworn, Juror No. 6 expressed to the court in a sidebar conference that he had "grave concerns" about serving on the jury. The court asked why. The juror stated that he was concerned for his and his family's safety. The court responded: "Yeah. But, you know, in 25 years that I've been on the bench, no one has ever been threatened. Nobody has retaliated against any jurors. It's never happened in the 25 years we've been on. I do gang cases in this court day in and day out, and there's never been any juror ever intimidated." Juror No. 6 responded that he "still fe[lt]" there was "an element of risk." The court stated: "Okay. It's unreasonable, sir; so just take your seat. It's unreasonable. Thank you."

b. Analysis

Appellant contends that the court erred because it failed to inquire into the reasons for or the source of Juror No. 6's concerns, and it failed to replace the juror with an alternate. We reject this argument.

Preliminarily, appellant has forfeited this contention because he did not object to the trial court's treatment of the issue during trial, when the court could have timely addressed any error. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 427.)

Even if appellant had preserved the claim for appeal, we would reject it on the merits. The decision whether to investigate the possibility of juror bias, incompetence, or misconduct -- and the ultimate decision to retain or discharge a juror -- rests with the sound discretion of the trial court. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A hearing is required only when the court possesses information which, if proven true, would constitute "good cause" to doubt a juror's ability to perform his or her duties and would justify removal from the case. (*Ibid.*)

The trial court satisfied its duties here. When Juror No. 6 said he had grave concerns, the court asked why, and the juror said only that he had nonspecific safety concerns. The trial judge explained that he had never seen jurors threatened or intimidated in his experience. In response, the juror did not say that he had been subjected to threats or intimidation. He said that he still felt there was an element of risk. The clear implication was that juror had not been subjected to any outside influence, but had concerns precipitated by what he knew about the facts of the case. The trial court was not presented with evidence that constituted good cause to doubt the juror's ability to perform his duties, nor was there evidence that there had been any attempt to influence the juror. The court did not err.

DISPOSITION

The judgment of conviction is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.