Filed 8/22/13 P. v. Byers CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CORNELIUS BYERS,<br><br>Defendant and Appellant. | 2d Crim. No. B241319<br>(Super. Ct. No. BA354447)<br>(Los Angeles County) |

Cornelius Byers appeals his conviction by jury of first degree murder (Pen. Code, §§ 187, subd. (a), 189)[1] and willful, deliberate and premeditated attempted murder (§§ 664/187, subd. (a)) with gang enhancement findings (§ 186.22, subd. (b)(1)(C)) and special findings that he personally used and intentionally discharged a firearm causing death or great bodily injury to the victims (§ 12022.53, subds. (b)-(d)). The trial court sentenced appellant to state prison for 75 years to life plus life with possibility of parole. We affirm.

*Facts & Procedural History*

On the evening of March 11, 2009, Jerrell Green and Jazper Hudson were shot entering a Louisiana Fried Chicken restaurant at the corner of Arlington and Jefferson Boulevard in Los Angeles. A young African-American man wearing a gray

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

hoodie and black pants fired 14 shots and ran to a Chevy Lumina parked in the restaurant alley. Green died from a gunshot to the forehead and Hudson was shot in the torso and leg.

Before the shooting, Elizabeth Ayon saw the African-American man cut in and out of traffic and park in the restaurant alley. The alley was covered with gang graffiti. Ayon heard five or six gunshots and saw the man run back to the Chevy Lumina carrying a semi-automatic firearm.

Ayon called 911 and gave the operator a physical description of the shooter. Two weeks later, Ayon circled appellant's photo in a photo six pack and said it looked similar to the shooter's facial features and complexion. At the preliminary hearing, Ayon was "positive" that appellant was the shooter.

Hudson was driven to the hospital by his mother and girlfriend a few minutes after the shooting. Before surgery, Hudson told his father, Louis Hudson, that "Cornelius" shot him and that Cornelius lived at 7th Avenue and Jefferson and had a red porch light.

Hudson told the police he did not know who shot him. Hudson's father talked to the police, agreed to wear a wire, and asked Hudson about the police interview. Hudson said that Cornelius's (appellant's) photo was in the photo six-pack. "They wanted me to snitch on Cornelius. They wanted me to say that Cornelius shot me, and I'm not going to do it." At trial, Hudson denied saying appellant was the shooter and denied knowing what the word "snitch" meant.

On May 14, 2009, three days after the shooting, Hudson's girlfriend, Dewaynna Brown was concerned about her safety and gave an "anonymous" statement to the police. Hudson told her that Cornelius was the shooter and that he recognized Cornelius's face as soon as Cornelius pointed the handgun at him.

Dewaynna told the police that Hudson ran with the Rolling Thirties Crips gang and appellant was from the City Stones or Bity Stones gang. Dewaynna identified appellant in a photo six-pack and said that appellant and Hudson attended Dorsey High School together.

At trial, Dewaynna denied that Hudson told her Cornelius was the shooter, denied identifying appellant in the photo six-pack, and denied many of the statements she made in the recorded police interview. After Dewaynna's prior statement was played to the jury, Dewaynna admitted that Hudson told her that Cornelius was the shooter.

In a recorded phone interview, Zerma Brown, Dewaynna's sister told Detective Brian Calicchia that she drove with Hudson, Hudson's mother, and Dewaynna to the hospital. On the way to the hospital, Hudson told them that Cornelius, who went by the hood name "Sock Out," shot him. Hudson indicated that he and Cornelius were enemies and that may be why he was shot.

At trial, Zerma could not remember talking to Detective Calicchia. Zerma stated that the woman in the recorded interview was snitching and saying "something like that can get me killed."

Appellant was arrested March 23, 2009, at home, seven blocks from the murder scene. In appellant's bedroom was a photo of appellant throwing a Black P-Stones hand sign. The police also found a T-Mobile cell phone, a pair of sneakers with red shoe laces, a gray hooded sweatshirt, and a black baseball cap with the letter "P." The T-Mobile cell phone was registered to "Corne B" at appellant's home address and in service from February 3, 2009 to March 29, 2009. Phone records indicated that the cell phone was used on March 11, 2009, the day of the shooting. The cell phone had photos of appellant, gang graffiti photos, rap lyrics, text, and chat log entries in which appellant called himself "Sockout" and used the screen name stonelove5xs.

At trial, the People introduced evidence that Hudson belonged to the Rolling Thirties Crips and appellant was an active member of the Black P-Stones, a rival Blood gang. Los Angeles Police Officer Brian Thayer, a gang expert, testified that the Black-P Stones is a criminal street gang and the primary gang at Dorsey High School. The gang uses the St. Louis Cardinals (STL) logo which signifies "stone love," a phrase used by Black P-Stone gang members. Black-P Stone gang members commonly wear red shoelaces or a red belt and the Boston Red Sox logo ("B for Black P-Stones) or the Pittsburg Pirates logo ("P" for P-Stones.)

Officer Thayer testified that the shooting occurred in Rolling Thirties gang territory and that Black-P Stone gang members "put in" work for the gang by committing acts of violence to gain respect and advance themselves in the gang. People who talk to the police or testify are known as "snitches" and can be beaten or killed for snitching. Witnesses are afraid to testify because gang retaliation is common.

Officer Thayer was familiar with the Black P-Stones and stated that appellant was an active member of the gang, went by the moniker "Sockout," and belonged to the Bity Stones gang clique. Officer Thayer reviewed the chat logs, text messages, rap lyrics, and photos on appellant's cell phone and verified that they were gang related. Gang members commonly use Twitter and My Space to boast about their gang affiliation, violence, and gang rivalries. Appellant used the screen name "stonelove5xs" to show his loyalty to the Black-P Stones and, in chat sessions, expressed hatred for the Rolling Thirties. Based on a hypothetical about the shooting and appellant's gang membership, Officer Thayer opined that the shooting was committed for the benefit of, at the direction of, or in furtherance and in association with the Black-P Stones, with the intent to promote and further criminal conduct by gang members.

Appellant asserted an alibi defense and claimed that he was attending group counseling at "A Home For Us" from 4:30 to 9:30 p.m. when the shooting occurred. In rebuttal, the People introduced evidence that appellant's T-Mobile cell phone was used the day of the shooting to make calls from the Black P-Stone gang territory and near the crime scheme. At 4:46 p.m., the cell phone was used outside the "A Home For Us" cell tower sector. After 5:00 p.m., four calls were made in a cell tower sector not encompassing the "A Home For Us" location. The next call was made at 6:42 p.m., 22 minutes after the shooting, from a location not connected to the T-Mobile cell site network.

*CALCRIM 521 - Second Degree Murder*

Appellant argues that the trial court gave a CALCRIM 521 pattern instruction that failed to explain the difference between first and second degree murder, leaving the jury with the all or nothing choice of convicting or acquitting him on first

degree murder and attempted first degree murder. Appellant forfeited the alleged error by not objecting to the instruction or requesting a modification or amplification. (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

On the merits, there was no instructional error. The trial gave CALCRIM 520 on first or second degree murder with malice aforethought. The instruction set forth the elements of murder and express and implied malice, and stated: "If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree." (See *People v. Johnigan* (2011) 196 Cal.App.4th 1064, 1092 [CALCRIM 520 is an accurate and complete statement of the law.] )

CALCRIM 521 followed and instructed that in order to convict for first degree murder, the prosecution had to prove appellant acted willfully, deliberately, and with premeditation. The jury was instructed: "The requirements for second degree murder based on express or implied malice, are explained in CALCRIM No. 520. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." CALCRIM 521 instructed that the distinction between first degree and second degree murder rested on whether "the People have proved that [the defendant] acted willfully, deliberately, and with premeditation." It is presumed that the jury understood and followed the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.))

Appellant complains that the jury was not instructed that "[a]ll other murders are of the second degree," which is in the 2009-2010 version of CALCRIM 521. The sentence does not appear in the 2011 version of CALCRIM 521 used by the trial court when appellant was tried in 2011.

The "[a]ll other murders are of the second degree" language is based on section 189 which defines various crimes that fall within first degree murder such as felony murder, murder by torture, murder by lying in wait, and murder by use of a explosive device or poison, and states: "All other *murders* are of the second degree." (Italics added.) The sentence has no application here because the People's case was not

based on alternative theories of first degree murder. Read together, CALCRIM 520 and 521 instruct that first and second degree murder require express or implied malice, but first degree murder requires the prosecution to prove that appellant acted willfully, deliberately, and with premeditation. The jury was instructed that "[t]he requirements for second degree murder, based on express or implied malice, are explained in CALCRIM No. 520." The trial court had no sua sponte duty to add language (i.e., "all other murders are of the second degree") that was surplusage, argumentative, duplicative, or potentially confusing. (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

Assuming, arguendo, that the trial court erred in not instructing that "[a]ll other murders are of the second degree," the error was harmless under any standard of review. (See e.g., *Neder v. United States* (1999) 527 U.S. 1, 17-18 [144 L.Ed.2d 35, 52-53 [overwhelming evidence rendered alleged instructional error harmless beyond a reasonable doubt]; *People v. Breverman* (1998) 19 Cal.4th 142, 177-178 [harmless error].) The evidence shows that the murder and attempted murder were willful, premeditated and deliberate. Appellant drove to rival gang territory, parked in a restaurant alley covered with Rolling Thirties gang graffiti, and got out of the vehicle with a loaded semi-automatic handgun. As the victims approached the restaurant gate, appellant shot Green in the forehead and Hudson in the leg and torso.

The manner of killing - 14 shots quickly fired at unarmed victims at relatively close range - is compelling evidence of planning, premeditation, and deliberation. (*People v. Silva* (2001) 25 Cal.4th 345, 369; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1463-1464 [multiple shots shows planning, preexisting thought, and reflection].) Where the shooting involves a gang rivalry, premeditation and deliberation may be inferred even though the time between the sighting of the victim and the actual shooting is very brief. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) "A studied hatred and enmity, including a preplanned, purposeful resolve to shoot anyone in a certain neighborhood wearing a certain color, evidences the most cold-blooded, most calculated, most culpable, kind of premeditation and deliberation." (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001.) Had the trial court instructed that "[a]ll other murders

are second degree," it is not reasonably probable that appellant would have obtained a more favorable verdict. (*People v. Manriquez* (2005) 37 Cal.4th 547, 586.)

*Gang Enhancement*

Appellant contends that the true finding on the gang enhancement is not supported by the evidence because he acted alone and there is no credible evidence that the shooting was committed for the benefit of the Black P-Stone gang. Although there is no requirement that the defendant act in concert with another gang member, the prosecution must prove that the shooting was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Gradeley* (1996) 14 Cal.4th 605, 617.)

"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). [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 63.) Specific intent to promote, further or assist in any criminal conduct by gang members can be based on expert testimony about gang culture and habits, the size and composition of the gang, gang turf or territory, the primary activities of a specific gang, rivalries between gangs, retaliation or intimidation, and whether and how a crime was committed to benefit or promote a gang. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-659.)

The evidence shows appellant was an active Black P-Stone gang member and ambushed a gang rival in Rolling Thirties gang territory. The graphic images, rap lyrics, and chat logs on the cell phone showed that appellant was loyal to the Black P-Stones and hated the Rolling Thirties Crips. In chat sessions, appellant bragged about death to Crips and Crips "getting domed" (shot in the head). In one chat log, appellant identified himself as "Sockout and "O'Killa," and declared that he hates the Rolling Thirties. The cell phone had photos of Rolling Thirties graffiti crossed out and a text reference to "TIP" (Thirties in Peace) expressing a death wish for Rolling Thirties gang members. One text message stated: "I'm the doc for this street surgery. . . , now my

bullets is on the run. . . as they hit you niggas in the dome." Detective Calicchia explained that the expression "getting domed" means being shot in the head.

Expert testimony was received that Black P-Stone gang members "put in work" for the gang and enhance the reputation of the gang by shooting rival gang members and terrorizing citizens and businesses. Gang graffiti is a form of advertising and gangs tag walls, buildings and sidewalks to claim territory or show the gang is fighting a rival gang.

Officer Thayer opined that the shooting was brazen and carried out in broad daylight to empower the Black P-Stones and show the shooter's intent to kill for the gang. "[A]n active gang [member] that's out there willing to kill someone in broad daylight in their own neighborhood and even be brave enough to get out and walk up on foot in a knowing rival territory, and shoot 14 rounds and be by yourself, and then . . . get out" is sending a message. "[T]he Rolling Thirty Crips . . . are going to immediately know it was probably a rival that did it."

After the shooting, the police found gang graffiti painted over and crossed in the restaurant alley. Officer Thayer testified that it is not uncommon for gang graffiti to appear after a violent crime. It is a gang's way of taking credit for the crime. The restaurant alley had CSBK (City Stone Blood Killer) and BPSK (Black P-Stones Killer) graffiti. Officer Thayer opined that the Black P-Stones graffiti showed who did the shooting and the violent rivalry between the Black P-Stones and Rolling Thirties.

Citing *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) and *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*) appellant argues that the gang expert testimony does not prove a gang enhancement if the testimony is based on speculation, conjecture or guesswork. (*Id.*, at p. 663.).[2] In *Ramon* the expert opined that defendant's receipt of a stolen car was committed for the benefit of a gang. The expert's testimony

[2] The Attorney General argues that *Ochoa* and *Ramon* were distinguished in *People v. Cabrera* (2010) 191 Cal.App.4th 276 (review granted March 23, 2011, S189414) but the case is no longer citeable.

was based on a hypothetical question devoid of facts. (*Ramon, supra,* 175 Cal.App.4th at p. 851.) In *Ochoa,* the expert had no experience with or knowledge about the gang and no hypothetical was posed. (*Ochoa, supra,* 179 Cal.App.4th at p. 664.)

Unlike *Ochoa* and *Ramon,* Officer Thayer's expert opinion testimony was based on hypothetical questions rooted in facts established by the evidence. (See *People v. Gardeley, supra,* 14 Cal.4th at p. 618.) Officer Thayer was a seasoned gang expert who worked 18 months undercover with an FBI task force targeting the Black P. Stone gang. He was well versed on the gang and and had testified as a Black P-Stone gang expert more than 100 times. In 2007, Officer Thayer interviewed and photographed appellant. Appellant said that he was "Sockout," that he was an active member of the Black P-Stones, and showed Officer Thayer his gang attire including a Black P-Stones belt with a "P" belt buckle.

On review, we do not reweigh the evidence or redetermine issues of credibility. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) Officer Thayer's expert opinion testimony constitutes substantial evidence that the shooting was committed for the benefit of the Black P-Stones, with the specific intent to promote or further criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1). (*People v. Albillar, supra,* 51 Cal.4th at p. 63.)

*Evidence Code Section 352*

Appellant argues that the gang evidence was unduly prejudicial and denied him a due process right to a fair trial. Federal due process rights are not implicated where the disputed evidence is relevant and admissible to show intent, motive, identity, knowledge, gang status, or why a witness is reluctant to testify. (Evid. Code, § 1101, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 122-123; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413-414.) The trial court did not abuse its discretion in concluding that the probative value of the gang evidence substantially outweighed the potential for undue prejudice. (Evid. Code, § 352.; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) "Evidence of the defendant's gang affiliation - including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the

like - can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Appellant argues that the photos, rap lyrics, and cell phone graphic images were cumulative and inflamed the jury, but it was no more inflammatory than the shooting. The fact that probative evidence reflects negatively on a defendant is not grounds for its exclusion. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) It is well settled that the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution. (*People v. Marks* (2003) 31 Cal.4th 197, 227.)

Assuming, arguendo that the complained of evidence should have been excluded, the error was harmless. It was uncontroverted that appellant and Hudson belonged to rival gangs and that Ayon saw appellant in the alley. Ayon heard gun shots and saw appellant run back to his car with the handgun. Hudson told his father, his mother, his girlfriend, and the girlfriend's sister that appellant was the shooter. Appellant makes no showing that the gang evidence was "so extraordinarily prejudicial, and of so little relevance to guilt, that it threaten[ed] to sway the jury to convict regardless of defendant's actual guilt." (*People v. Hernandez, supra,* 33 Cal.4th 1040 at p. 1049.)

*Faretta Motion*

At the November 18, 2011 sentencing hearing, appellant submitted a letter stating that he wanted to represent himself at sentencing and for purposes of filing a motion for new trial. Appellant claimed that he was denied effective assistance of counsel because his court appointed attorney failed to locate three witnesses that would have raised a reasonable doubt as to whether appellant was at the shooting. The letter stated: "I wish . . . to exercise my 'Feretta' right[,] Feretta v California and represent my self." (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562].) The letter did not ask the trial court to appoint new counsel.

Appellant's court-appointed attorney told the trial court that the ineffective assistance of counsel claim "is absolutely not true . . . ." The trial court conducted a *Faretta* hearing, questioned appellant about his education and background, and warned

appellant that lawyering is "complicated stuff." Appellant was warned that he would not receive special treatment if represented himself or be "entitled to a 'do over' because you didn't know."

The trial court strongly advised against self-representation and asked: "Do you still wish to represent yourself now?" Appellant answered: "I would like to, Miss. But also, if you could probably assign me to another lawyer, I would like that too." The trial court responded, "Well, it doesn't work that way. . . . You have a competent lawyer. I know that you feel she did not vigorously represent you; I beg to differ with that . . . I observed her performance throughout the trial. . . . [¶] . . .
[¶] I see no justification on my part to appoint a different lawyer to represent you."

Appellant was advised that he could hire another lawyer, "[b]ut you have a court-appointed lawyer right now. And I am not in any position to relieve her and appoint a different lawyer." Appellant stated that he understood and was asked "What is it you want to do, sir?" Appellant responded "To go pro per, Miss."

The trial court granted the *Faretta* request and, over the next five months, granted continuances and requests for discovery, an investigator, funds, and legal supplies. On May 7, 2012, appellant filed a motion for new trial claiming there was insufficient evidence that the shooting was gang-related and that his trial attorney failed to investigate certain evidence. At the May 16, 2012 hearing on the motion, appellant argued that the gang expert testimony lacked foundation and the prosecution failed to prove the shooting was gang related. Denying the motion, the trial court found there was substantial evidence to support the verdict and that appellant received competent and effective representation at trial.

Appellant argues that the trial court erred in not conducting a *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) hearing or appointing counsel to assist appellant. Appellant, however, stated that he wanted represent himself and twice confirmed it. "Requests under both *Marsden* and *Faretta* must be clear and unequivocal; the one does not imply the other. [Citations.]" (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051, fn. 7; *People v. Burton* (1989) 48 Cal.3d 843, 855-856 )

A motion for self-representation on the ground that defense counsel has been ineffective is not a *Marsden* motion. (*People v. Frierson* (1991) 53 Cal.3d 730, 741; *People v. Burton, supra,* 48 Cal.3d at pp. 855-856.) "The only determination a trial court must make when presented with a timely *Faretta* motion is whether the defendant has the mental capacity to waive his constitutional right to representation by an attorney with a realization of the probable risks and consequences. [Citation.] A request for self-representation does not trigger a duty to conduct a *Marsden* inquiry [citation] or to suggest substitution of counsel as an alternative. [Citation.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 854-855;) Appellant's unambiguous *Faretta* request and "fleeting reference to dissatisfaction with counsel because he was 'not getting a defense'" did not require the trial court to conduct a *Marsden* inquiry. (*People v. Mendoza* (2000) 24 Cal.4th 130, 157.)

Appellant raises a "heads I win, tails you lose" *Faretta-Marsden* paradox. Had the trial court treated the *Faretta* request as a *Marsden* motion and appointed substitute counsel, it would have to deny the *Faretta* request for self-representation. Appellant, however, stated that he was exercising his "Faretta" right and wanted to represent himself. When questioned about the request, appellant confirmed that he wanted to represent himself and said "if you could probably assign me to another lawyer, I would like that too."

Appellant was correctly advised that "it doesn't work that way" and that he already had a competent lawyer. Appellant did not have the right to both represent himself and be represented by co-counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1106; *People v. Clark* (1992) 3 Cal.4th 41, 97.) "[A] defendant either has an attorney or he is his own attorney - period. There should be no middle ground." (*Brookner v. Superior Court* (1998) 64 Cal.App.4th 1390, 1394.)

. Assuming the trial court erred in not conducting a *Marsden* hearing, the error was harmless beyond a reasonable doubt. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349.) Where a *Marsden* motion is made after trial, "the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the

*future*." (*People v. Smith* (1993) 6 Cal.4th 684, 695.) The motion for new trial was based on the theory that appellant's trial attorney failed to investigate three eyewitnesses and "third party culpability evidence" that appellant was incarcerated when the shooting occurred. The trial court determined that the motion was groundless and found that defense counsel "did not fall below the standard of an attorney representing someone in your position. [Counsel] was extremely well prepared on this case. She had represented you for years and had filed motions and conducted discovery and vigorously represented you during the trial."

Appellant makes no showing that he would have obtained a more favorable result had the trial court conducted a *Marsden* hearing or granted the alleged *Marsden* request for the appointment of substitute counsel. (*People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Appellant "was ably represented and the evidence him was nothing less than overwhelming. We cannot see how the appointment of a different attorney would have gained [appellant] a new trial, or could have had any effect on the sentence imposed." (*Ibid*.)

The judgment is affirmed,

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Kathleen A. Kennedy, Judge

Superior Court County of Los Angeles

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