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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANTHONY SANCHEZ,

Defendant and Appellant.

B231337

(Los Angeles County
Super. Ct. No. VA112718)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed.

Law Offices of Russell S. Babcock and Russell S. Babcock, 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, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Raymond Anthony Sanchez (defendant) appeals from a judgment entered against him following a jury trial. Defendant was convicted of three counts of second degree robbery (Pen. Code, § 211)¹ and three counts of false imprisonment (§ 236). The jury found that all offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). As to the robbery offenses, the jury found that a principal was armed with a firearm and a principal personally used a firearm (§§ 12022, subd. (a)(1), 12022.53, subds. (b), (e)(1)). As to the false imprisonment offenses, the jury found that a principal was armed with a firearm (§12022, subd. (a)(1)).

The trial court found that appellant had two prior “strike” convictions (§§ 667.5, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior serious felony conviction (§ 667, subd. (a)(1)), and had served a prior prison term (§ 667.5, subd. (b)). The trial court sentenced defendant to 31 years to life in prison.

We affirm.

CONTENTIONS

Defendant contends that the trial court erred in admitting appellant’s in-hospital identification due to the suggestive circumstances of that identification. Further, defendant contends that the trial court committed prejudicial error when it refused to bifurcate defendant’s gang charges.

STATEMENT OF FACTS

1. Prosecution evidence

The robbery

On October 24, 2009, at approximately 12:30 a.m., Cole Carter (Carter), Josh Paige (Page), and Marcus Aldecoa (Aldecoa) were sitting in Paige’s parked car on Harrell Street near the intersection of Amistad Street in Pico Rivera.² The three were waiting for Aldecoa’s friend to join them after a six-hour drive from Sacramento. They

¹ All further statutory references are to the Penal Code, unless otherwise noted.

² At trial, only Carter and Paige were available to testify, but Aldecoa’s preliminary hearing testimony was read to the jury.

had been waiting there for about 45 minutes. During that time, they were smoking marijuana. Aldecoa was in the driver's seat, Carter was in the front passenger seat, and Paige was in the back passenger seat.

At about 12:30 a.m., defendant and codefendant Phillip Patron (Patron) pulled up next to Paige's car in a white Toyota Camry.³ Defendant and Patron got out of their car and approached Paige's car. Aldecoa said that he heard someone shout "BA." Patron wore a Rams jersey and had a tattoo on the back of his head of the letters "BA."

Patron opened the front driver's side door of Paige's car and pushed a gun into Aldecoa's stomach. Patron grabbed Aldecoa by the shoulder, slapped his hand that held a cell phone, and told him to get out of the car.

Defendant had been standing in front of the car while Patron ordered Aldecoa out. Patron then ordered Carter to get out of the car. Defendant walked around to the passenger side of the car and told Carter to empty his pockets. Defendant hit Carter in the head because he was taking too long. Defendant took a cell phone and a can of chewing tobacco from Carter.

Patron and defendant took the car keys, some marijuana and a water pipe from Paige. They also took Aldecoa's cell phone and iPod touch. They tried to take Aldecoa's shoes, but he fought back. They took a BB gun from the front passenger door slot that belonged to Paige's father. They then told Carter, Paige and Aldecoa to lie on the sidewalk, and drove away in the Camry.

Aldecoa memorized the license plate of the Camry. Paige wrote it down on a cup. Aldecoa called 911 on Paige's cell phone. Los Angeles County Deputy Sheriff Steve Valenzuela arrived about 20 minutes later.

The victims described the vehicle and gave the license plate number to Deputy Valenzuela. Deputy Valenzuela then took the victims to Whittier High School, where other police officers gathered to interview them about the robbery. After about an hour at Whittier High School, Deputy Valenzuela took the victims to the police station.

³ Defendant was tried with codefendant Patron, who is not a party to this appeal.

Defendant's arrest

After running the license plate number of the Camry, it was determined to be registered to an address a few miles away on Pasadena Street in Whittier. The police located the car at that address and set up a containment of the area. They made announcements for the occupants of the house to come out. After a few minutes, two people came out. One of them said that there were four adults and a six-year-old boy still inside the house.

Vanessa Gonzales (Gonzales), who lived in the house with Angela Delgado (Delgado) and Priscilla Sanchez (Ms. Sanchez), came out of the house first. Deputy Valenzuela interviewed Gonzales in the back of his patrol car. She said that three males were in the house, and that one had a Rams sports jersey and tattoos on his head. She said that the white Camry belonged to Delgado, who was appellant's girlfriend. Gonzales also said that Delgado, Patron and defendant had left about 30 minutes before the police arrived and had just come back to the house.

A SWAT team arrived at the scene. For four to five hours, the police made announcements for the occupants to come out of the house. Eventually, as the SWAT team was preparing to enter the house, defendant opened the front door and said that he was in charge and would come out when he wanted. Three people exited the house, followed by defendant, who was holding the six-year-old boy. Defendant released the boy to the police. However, defendant became uncooperative when the police attempted to arrest him, so a police dog was released. The dog bit defendant and took him to the ground. Defendant was taken into custody and to a hospital to treat his dog bite injury.

The police searched the house and found a Rams jersey between the cushions of a couch in the living room. They also found a cell phone, a pair of glasses covered in blood near where the police dog bit defendant, and ammunition in Delgado's dresser drawer.

The hospital identifications

On the night of the robbery, Detective Hank Ortega interviewed the three victims at the police station. He prepared a six-pack photographic display containing Patron's photograph and showed it to them. Each of them identified Patron as the perpetrator.

Detective Ortega also prepared a six-pack photographic display containing defendant's photograph. However, the photograph was seven years old, and defendant had a shaved head at the time of the photograph and long hair at the time of the robbery. Detective Ortega showed the photographic display to two of the victims, but they were unable to make an identification. Detective Ortega then took the three victims to the hospital, where defendant was lying on a bed sleeping. Defendant was in a hospital gown, with many of his tattoos showing. There was a police officer standing guard at defendant's hospital room. Each of the victims separately identified defendant as the perpetrator.

Gang evidence

Detective Ortega testified as a gang expert. He testified that the Brown Authority, also known as the Brown Assassins, was a gang in Pico Rivera that had about 30 members. The primary activities of the gang included murder, assaults with firearms, robberies, and graffiti. The prosecutor presented documents showing that members of the Brown Authority had been convicted of attempted murder, carrying a loaded firearm, and robbery. The gang's main rival was the Pico Viejo gang. Harrell Street was a disputed area between the two gangs' territories.

Field identification cards indicated that defendant was a member of the Brown Authority gang and that his moniker was "Yogi." Defendant had the letters "B" and "A" and the words "Union Street" tattooed on his stomach. "Union Street" was a clique of the Brown Authority. Defendant also had the letters "P" and "S" tattooed on his back. The letters stood for "Pico Side," which is also a clique of the Brown Authority.

Field identification card and arrest records showed that Patron was also a member of the Brown Authority gang and that his moniker was "Boy." He had the letters "B,"

“X,” and “A” tattooed on his head, which was a common tattoo for Brown Authority gang members. He also had “Union Street” tattooed on his hand.

Detective Ortega opined that the crimes against Carter, Paige and Aldecoa were committed for the benefit of the Brown Authority gang. The crime let the rival gang know that defendant’s gang was controlling the area.

Ms. Sanchez, who lived at the house where the police arrested defendant, testified that defendant was a gang member.

The court instructed the jury that it should consider the gang evidence for the limited purpose of proving that the robbery was committed for the benefit of the gang.

2. Defense evidence

Neither defendant nor Patron testified at trial.

Defense counsel cross-examined the victims. None of them had a medical marijuana prescription. The marijuana the victims smoked was stronger than what was available on the street. Carter admitted that marijuana affected his perception, and that he felt the effects that night. Carter and the other victims had smoked marijuana out of a two-foot high water pipe bong 30 minutes before the robbery.

The closest street light was 40 feet away. Carter had trouble remembering many facts about the robbery, such as what defendant wore and who wrote the license plate information on a cup. Both Carter and Paige remembered that defendant wore glasses, but Carter described them as thick, rectangular glasses while Paige described them as thin, wire-rimmed glasses.

The defense pointed out that none of the stolen property was recovered from the house. The Rams jersey found in Delgado’s house had the number 8 on it, and the victims had described the jersey the robber wore as having number 80. The police did not find anything linked to the robbery in the white Camry that was parked in front of Gonzales’s house.

Ms. Sanchez was at the Pasadena Street house with defendant and Patron. She testified that appellant had a special bond with her six-year-old son who is severely

autistic and very particular with people. That is why defendant took the boy out with him on the night of the arrest.

Delgado explained that defendant was with her the night of the robbery. Delgado and defendant left the house that night to have drinks at a restaurant. After they returned, eight or nine people, including several adult males, were at the house drinking and having a bonfire. Delgado left the house to get tacos and then returned. At some point, the police came to the house and told Delgado to keep the noise down.

Delgado and Gonzales both said at separate times to the police that they were in the white Camry at some point during the evening.

DISCUSSION

I. The hospital identification

Defendant first argues that the trial court erred in admitting into evidence the victims' identifications of defendant which took place at the hospital several hours after the crime occurred.

A. Defendant's Evidence Code section 402 motion to exclude evidence of the identifications

Before trial, defendant's counsel brought an Evidence Code section 402 motion to exclude the victims' identifications of defendant that occurred nine to ten hours after the robbery while defendant lay unconscious in a hospital bed, handcuffed to the bed, with his gang tattoos exposed and a police officer next to his bed. Defendant's counsel argued that the evidence was more prejudicial than probative under Evidence Code section 352, and that the evidence did not amount to a field showup because it was in a hospital. The court denied the motion, holding that the hospital field showup was no different from a field show-up in the back of a police car.

During trial, defendant's counsel requested rehearing on the issue, arguing that the hospital showup was suggestive because defendant was in a hospital gown with his tattoos exposed. Counsel also argued that the police officer who stood guard at the foot of defendant's bed tainted the procedure. Further, defendant's counsel argued that police officers told the victims the defendant's name before they went to the hospital, which

created an inference that defendant was guilty. The court held that it would rule on the issue when the police officer testified.

Outside the presence of the jury, Detective Ortega explained that he was the only police officer present when the victims identified defendant. Defense counsel argued that the procedure was suggestive because Detective Ortega stood so close. The trial court denied the motion and allowed the testimony.

B. Evidence regarding the hospital identification

Defendant argues that the victims' testimony regarding the hospital identification contradicted Detective Ortega's statement that he was the only police officer in the room. Carter said that another police officer was in the room and stood at the foot of the bed. Paige said that a police officer was watching outside the room, but not standing over the bed. Paige said that Detective Ortega was standing outside the hospital room.

Detective Ortega said that he took the victims into defendant's hospital room one by one. Appellant was not awake. Before taking the victims in for an identification, Detective Ortega admonished them that the person in the hospital room might not be the suspect. Detective Ortega assumed that defendant was handcuffed. Detective Ortega admonished the victims not to draw any conclusions from the fact that defendant might be handcuffed. However, there was no evidence that any of the victims saw that defendant was handcuffed. Detective Ortega escorted each of the victims outside the hospital and asked each of them individually if defendant was the man who robbed them. All three men said "yes."

C. The pretrial identification was not impermissibly suggestive

Defendant argues that the hospital identification was so suggestive that the results were not reliable. Defendant recognizes that a single person showup is not inherently unfair. (*People v. Floyd* (1970) 1 Cal.3d 694, 714, overruled on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) "A defendant who claims an unnecessarily suggestive pretrial identification bears the burden of showing it caused 'a very substantial likelihood of irreparable misidentification.' [Citations.]" (*People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072.) Defendant must show unfairness as a

demonstrable reality, not just speculation. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 (*Carlos M.*), citing *People v. Perkins* (1986) 184 Cal.App.3d 583, 589.)

Defendant argues that although Detective Ortega said he was the only officer in the room, the victims stated that a second officer was at the foot of defendant's bed. Further, defendant was handcuffed to the bed, with his gang tattoos exposed. Defendant admits that these conditions alone are insufficient to create an unduly suggestive identification. (See *Stovall v. Denno* (1967) 388 U.S. 293, 302 (*Stovall*), overruled on other grounds in *Griffith v. Kentucky* (1987) 479 U.S. 314 [taking defendant to the hospital, where the victim lay in bed, was not too suggestive]; *In re Richard W.* (1979) 91 Cal.App.3d 960, 969-971 (*Richard W.*) [the mere presence of handcuffs on a detained suspect is not so unduly suggestive so as to taint the identification].)

In determining whether a pretrial identification procedure violates due process, the inquiry is whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law (*Stovall, supra*, 388 U.S. at pp. 302-303.) Defendant describes the test as a two-prong test: (1) was the initial identification procedure suggestive, and (2) assuming suggestive circumstances, were they impermissible or unnecessary?

As set forth above, a single person showup is not inherently unfair. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) In fact, "single-person show-ups for the purposes of in-field identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.]" (*Carlos M., supra*, 220 Cal.App.3d at p. 387.) Further, the mere presence of police officers does not make an identification suggestive. (*Richard W., supra*, 91 Cal.App.3d at pp. 969-970.) As explained above, there was no evidence that the victims saw that defendant was handcuffed. Detective Ortega testified that he did not see any handcuffs on defendant, but he assumed that defendant was handcuffed under the blanket. Even if the victims had noticed that defendant was

handcuffed, this did not make the identification unduly suggestive. (See *Carlos M.*, *supra*, 220 Cal.App.3d at p. 386 [“the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification”].)

Nor are we persuaded that the victim’s viewing of defendant’s tattoos rendered the identification unduly suggestive. None of the victims noted defendant’s tattoos during the robbery. Instead, they noticed that Patron had tattoos. Both Paige and Carter mentioned other characteristics when explaining why they identified defendant as the perpetrator. Carter testified that he recognized defendant because of his facial features and hair. Paige testified that he recognized defendant because he had the same hair, body build, and look of the perpetrator. Neither of the two victims who testified at trial mentioned defendant’s tattoos.

In addition, there is no evidence supporting defendant’s speculation that Detective Ortega’s mention of defendant’s name prior to the identification was unduly suggestive. Paige testified that he heard the police refer to one of the suspects as “Sanchez” earlier that night. There is no indication that this led him to identify defendant as the perpetrator. As set forth above, Paige recognized defendant by his hair, body build, and look -- not his name. Further, Paige was admonished that the person in the hospital room might not be the suspect.

Defendant argues that, under the second prong of the *Stovall* test, the procedures were not necessary. Because we have determined that the showup was not unduly suggestive, we need not reach the question of whether such procedures were unnecessary. Defendant argues that the hospital identification occurred more than eight hours after the robbery, therefore the victims’ recollections were not fresh. In fact, defendant argues, if the police had waited, the victims may have had a better recollection because they would no longer be feeling the effects of the marijuana they had smoked earlier. However, there is no evidence that the victims were at all hesitant or unsure about the identification. The robbery took place at about 12:30 a.m., and the identifications occurred later that morning after the sun came up. The victims were certain about their identifications, describing the precise features which caused them to recognize defendant. It took the police four to five

hours to arrest defendant; under the circumstances, the police performed the showup within a reasonable time. The victims' recollections of the incident were still fresh, and they remembered sufficient detail about defendant's features.

Even if the pretrial identification procedure was unnecessarily suggestive, the central question is whether, under the “‘totality of the circumstances’ the identification was reliable.” (*Neil v. Biggers* (1972) 409 U.S. 188, 199.) In evaluating the likelihood of misidentification, we consider “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” (*Id.* at pp. 199-200.) Considering these factors, we find that the identifications were reliable. The victims had ample opportunity to see the suspects at the time of the offense. The encounter was close up, and the victims had time to observe the robbers. The victims were paying enough attention to be able to describe the robbers, and Carter memorized the license plate of the car the perpetrators were driving. Hours passed between the time of the crime and the time of the identification, but the memory of the robbers was still likely to be clear in the victims’ minds.

In sum, we find that the pretrial identification procedure was not unduly suggestive. We further find that, even if it was unduly suggestive, the identifications were reliable under the totality of the circumstances.

D. Any error was harmless

Even if the pretrial identifications of defendant were erroneously admitted, any error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) The prosecution was not relying solely on the pretrial hospital identifications in order to convict defendant. Instead, all three victims identified defendant in court as the perpetrator. Thus, even without the hospital identifications, there was compelling independent evidence that defendant was one of the perpetrators of the crime.

Defendant argues that but for the victims’ in-court identifications, the prosecutor did not present any evidence that linked defendant to the robbery. This is inaccurate.

Defendant was at the house where the perpetrators' car was found, and defendant's girlfriend was the owner of that car. In addition, there was evidence that defendant refused to surrender to the police, and resisted arrest. Considering this evidence, along with the in-court identification of defendant by all three victims, we conclude that any error in the admission of the pretrial identification was harmless.

II. Bifurcation of gang allegations

Before trial, defendant's counsel asked that the gang enhancement allegations be bifurcated from the allegations regarding robbery and false imprisonment. The People argued that the gang allegations were intertwined with the underlying crimes, given that the individuals announced their gang name as they carried out the crime. The court asked the People whether part of the victims' identifications depended on tattoos, and the prosecutor responded affirmatively as to Patron.⁴ The court found that because the defendants announced the gang name at the outset of the crime, the gang allegations were "intrinsic to the whole nature of the case." The court reasoned that the defendants announced that they were committing the crime on behalf of the gang "for the purposes of intimidation . . . , as well as securing compliance from their victims." Thus, the court denied the motion to bifurcate.

Defendant argues that this was error due to its prejudicial effect on the jury. In considering whether the court committed error in declining to bifurcate the gang allegations, we use the abuse of discretion standard. (*People v. Price* (1991) 1 Cal.4th 324, 388.) Even if a trial court's failure to bifurcate constitutes a correct ruling when made, we must reverse the judgment if the failure to bifurcate resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

Defendant argues that, under Evidence Code section 352, the trial court was required to carefully scrutinize the gang evidence. The court based its decision not to

⁴ The prosecutor explained that for defendant it was more "the hair and overall appearance" whereas for Patron it was "tattoos on the back of his head."

bifurcate the gang evidence on the basis of the following testimony by Aldecoa at the preliminary hearing:

“[Counsel]: . . . Did the defendant say anything to you?

“[Aldecoa]: I heard ‘B-A,’ but I wasn’t too sure.

“THE COURT: You heard what?

“[Aldecoa]: I heard someone say B-A.

“THE COURT: B-A?

“[Aldecoa]: Yes.

“THE COURT: That’s boy?

“[Aldecoa]: Yes.”

Defendant argues that this preliminary hearing testimony shows that Aldecoa may have heard “boy” instead of “BA.” Thus, defendant argues, the trial court’s analysis of the testimony did not meet the standards required by Evidence Code section 352.

Defendant argues that the gang evidence was not necessary to show identity, since the victims identified both defendant and Patron. In addition, the gang evidence was not necessary to show motive. At trial, only Carter testified that he heard the “BA” announcement, and he was unaware that BA was a gang.⁵ Therefore, defendant argues, the announcement could not have intimidated or scared Carter. Finally, defendant argues, the gang information was only tangentially relevant to prove *modus operandi*. Although Detective Ortega testified that it was common for members of the Brown Authority gang to have a driver when committing a crime, this behavior is not exclusive to gangs. In sum, defendant argues, the gang evidence was not relevant to prove any issues pertinent to guilt of the charged crime. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 (*Hernandez*).)

⁵ As noted above, Aldecoa testified at the preliminary hearing but was not available to testify at trial.

We find that the trial court did not err in denying defendant's motion to bifurcate the gang allegations. As the trial court noted, the defendants announced their gang name at the time of the crime, thereby establishing that they were committing the crime on behalf of the gang. Thus, the defendants "injected [their] gang status into the crime." (*Hernandez, supra*, 33 Cal.4th at pp. 1050-1501.) By doing so, they identified themselves as gang members and "attempted to use that status" in robbing the victims. (*Id.* at p. 1051.) Gang membership was used as a "means to accomplish the robbery." (*Ibid.*) Detective Ortega's testimony "helped the jury understand the significance of [the defendants'] announcement of [their] gang affiliation, which was relevant to motive and the use of fear." (*Ibid.*) This is true regardless of whether the victims were aware of the existence of the Brown Authority gang.

Because the gang evidence was relevant and, in fact, central to the charged crimes, and because defendant did not clearly establish a substantial danger of prejudice if the gang allegations were not separately tried, the trial court properly exercised its discretion in denying defendant's motion to bifurcate.

Even if the trial court had abused its discretion, any error would be harmless. (*Chapman, supra*, 386 U.S. at p. 24.) There was overwhelming evidence that defendant was a perpetrator of the crime. The victims identified him at the hospital the morning of the crime, all three victims identified him in court, and he was found at a house near the crime scene where the perpetrators' car was found. This is not a case where highly prejudicial evidence has been admitted "into a trial in which the question of guilt or innocence is a close one." (*Id.* at p. 22.)

In addition, we note that the jury was specifically instructed that the gang evidence could be considered "only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang" There is no evidence that the jury considered the gang evidence for an improper purpose, therefore we presume that the jury followed the limiting instruction. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725.) No abuse of discretion occurred.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST