Filed 9/24/13 P.v . Castillo CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESSE CASTILLO, Defendant and Appellant.	B243416 (Los Angeles County Super. Ct. No. TA119307)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed as modified.

John P. Dwyer, 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, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jesse Castillo appeals from the judgment entered upon his conviction by a jury of second degree murder with a finding that he personally and intentionally discharged a firearm, causing great bodily injury and death. He contends the prosecutor prejudicially erred by suggesting, through her questions and closing argument, that he was a member of a street gang and that his gang membership provided a motive for the shooting. We conclude that defendant forfeited his claim by failing to request a jury admonition and, in any event, defendant has not established prejudice. We direct the trial court to correct a clerical error in the abstract of judgment and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 10, 2011, defendant was charged by information with murder in violation of Penal Code section 187, subdivision (a).[1] The information also alleged that defendant personally and intentionally discharged a firearm, causing great bodily injury and death to Esteban Munoz (§ 12022.53, subds. (b), (c), (d)), and defendant was a minor who was at least 16 years old at the time of the offense.

Prior to trial, defense counsel asked that "nobody be allowed to mention gang, gang membership, tagging crew membership, tagging crew affiliation with gangs, or anything that could lead the jury to believe there could have been a gang tie to this." The prosecutor agreed: "It's possible one of [the] witnesses is going to blurt something out, but I don't think any gang or tagging crew affiliation is relevant, at least not based on the facts I know." The court ruled that evidence of gang membership or an alleged gang motive would not be admitted.

Trial commenced on May 31, 2012. The relevant testimony was as follows.

---

[1] All further statutory references are to the Penal Code.

I. Prosecution Case

A. Fernando Flores

Fernando testified that on June 20, 2011, his "homie," Esteban Munoz, was shot in an alley. At the time of the shooting, defendant, "Angel," "Roger," and "Joey" were also present.

Fernando said that on the day of the shooting, he and the others began hanging out and smoking "bud" (marijuana) in an alley at about 12:00 noon. Esteban joined the group after school. Over the course of the day, Fernando smoked "four blunts, five blunts"; all of the others smoked too.

When defendant joined the group, he had a loaded Glock .40 handgun with him. He was "flossing it"—"[s]howing it to us." Fernando knew the gun was loaded because he saw defendant take out the clip. Fernando saw defendant "pull out the clip, then clocked the gun back, then he pointed to him [Esteban]. Then he acted like he was going to shoot it but it didn't really shoot. It just kind of clinked, no bullet." The gun was an inch or two from Esteban's heart. Esteban thought defendant was joking around, and he "kind of put his hands to his heart as if he got shot." Defendant turned and walked behind a black gate. Fernando and his friend Angel then began walking away because Angel was going to get a haircut. As he turned to leave, Fernando heard a gunshot. He turned to look back and saw defendant holding the gun in his hands and Esteban stumbling backwards. Defendant looked for something on the ground and then took off running. Defendant's friend Alex, known as "Sinfre," also ran. Fernando approached Esteban, who was bleeding from his chest, and called the police. Fernando said there had been no issues or problems between Esteban and defendant.

The prosecutor played a video Fernando had seen posted on You Tube "[l]ike a week after Foke [Esteban] passed away." Fernando said the shooter in the video was defendant, who was using the same gun he had used to kill Esteban. Fernando said he was surprised when he saw the video because defendant appeared to be "having a good time." The video suggested to Fernando that the shooting of Esteban was not an accident because "he had done that twice. . . . With the gun he clocked it twice and the second

time it actually happened." The prosecutor clarified, and Fernando agreed, that he believed the shooting was not an accident because the first time defendant "clocked" the gun he took the bullets out, but the second time he did not.

Fernando said that to his knowledge, Esteban never had any problems with defendant. They were part of the same "big group of guys that hung out together [and] smoked some pot." Fernando did not hear any discussion that Esteban or anyone else was going to keep the Glock .40 in his house. Defendant did not point the gun at any other member of the group.

Fernando said he was 15 or 20 feet away from Esteban when Esteban was shot. He did not see defendant pull the trigger, but when he turned in the direction of the shooting, he saw defendant holding the gun. The gun was smoking. Esteban fell to the ground about eight seconds after being shot; no one was near him when he fell. Fernando did not see defendant approach Esteban after he shot him. By the time Fernando reached Esteban, defendant had already run away.

In response to a question by the defense attorney, Fernando said the You Tube video depicting defendant was titled "77th Street Indio." Without objection, the prosecutor followed up on redirect as follows:

"Q Fernando, who is Indio?

"A Jesse.

"Q How do you know he goes by that name?

"A That's what we used to call him.

"Q What's 77th Street?

"A Where he's from.

"Q What does that mean? Is that a neighborhood, a gang, what is it?

"A Like a street.

"Q When you say the video was called 77th Street Indio, was that the title of it?

"A Yeah, the title."

B. Rogelio (Roger) Mendoza

Roger was present when defendant killed his friend, Esteban, on June 20, 2011. Roger was 13 years old and Esteban was 18.

On June 19, 2011, the day before the shooting, Roger had seen defendant with a gun, "[t]aking out the magazine, counting the bullets." Defendant had not handed the gun to anyone else. He was "[p]laying with [the gun], "taking out the magazine, put[ting] it back in. Just trying to show off." At one point, defendant pointed the gun at Esteban, pulled the trigger like he was going to shoot, and laughed. The magazine was not in the gun at that time. Esteban told defendant not to do that again. When he saw this, Roger felt "[k]ind of nervous." To Roger's knowledge, there was no problem between defendant and Esteban.

Roger hung out with defendant and Esteban again on June 20. Defendant had the gun in his hands, and Roger saw him taking the magazine out and putting it back in. Defendant pointed the gun at Esteban "until [Esteban] got mad." After he saw this, Roger turned around and started walking away from the group. A few minutes later, he heard a gunshot. He turned around and saw Esteban hold his chest and then fall to the ground, bleeding from his upper chest. Roger saw defendant holding the gun and looking on the ground for the bullet casing. The gun was smoking. Defendant said, "Call an ambulance," and then he ran away. Joey called the police. When he spoke to the police, Roger identified Esteban as "Phoke."

C. Sergeant Howard Cooper

Sergeant Cooper was one of two lead investigating officers on this case. When he interviewed Roger, Roger said he heard defendant say, "Where's the bullets? Where's the bullets?" immediately after the shooting.

D. Monserrat Quintero

On June 20, 2011, Monserrat, then 15 years old, saw Alex Robles standing in the alley near Nadeau and Bell. Alex Robles was laughing and talking to someone else.

Alex said, "Caele," which means, "to do it fast," "hurry up." A second later, Monserrat heard a gunshot and then saw Alex and another guy, whom she identified as defendant, running away. Monserrat went out to the alley and saw Esteban lying on the ground, bleeding from his chest. She called 911.

E. Angel Jaramillo

Angel testified that he was present when his friend Esteban was killed. Prior to the shooting, Angel had been smoking with his friends, whom he knew by their nicknames, Risky (Fernando) and Boom. Some other boys were also present. Angel's back was turned when Esteban was shot. Angel heard a big bang and turned around. He said everyone "disappeared, so I ran too." Angel said he was "not really testifying because I don't know what happened. I wasn't there when the gun — when it was pulled." He said he did not recall being interviewed by Sergeant Cooper or telling him that he had seen "Kloner" (defendant) playing with a gun and, later, holding the gun immediately after Esteban was shot.

While Angel was on the stand, the prosecutor played a recording of an interview Angel gave Detective Cooper on July 5, 2011. During the interview, Angel described the events of June 20 in great detail. He referred to Esteban as "Foke" or "Pelon," and defendant as "Kloner." He said after the shooting, Alex ("Druggie") ran away with defendant, "[s]o it was like they're [defendant and Alex] together. They're — They're homies like since they were small. So you know, they got their own homies' backs . . . . It was like we knew what's like — Hey, they're on their own little mission, like . . . they're doing their little thing." Angel said Alex and defendant were "from uh — Clique 77, 77th Street right there."

After the prosecutor played a tape of Detective Cooper's interview with Angel, Angel agreed it was his voice on the tape. The following colloquy then followed:

"Q Back on that day on July 5th when you spoke to Sergeant Cooper you remembered a lot more than you're telling us here in court, right?

"A Right.

"Q What is 77th? You said Clique 77, is that a crew? Is that a gang?

"[Defense counsel]: Objection. Side bar.

"The Court: Sustained.

"The Witness: It's a street.

"The Court: Next question.

"Q You said Kloner and Alex are from 77th, right?

"[Defense counsel]: Objection.

"The Court: Sustained.

"Q In your interview with Sergeant Cooper you named the names of all the people you were hanging out with that day, right?

"A Right.

"Q Roger, Fernando, Joey, Alex, and Kloner, right? Was there anyone else?

"A Nope.

"Q You said Kloner and Alex were on their own mission. What did you mean by that?

"A I don't recall."

Subsequently, the prosecutor asked as follows:

"Q Angel, are you from any particular neighborhood or group?

"A No.

"Q Or any gang?

"[Defense counsel]: Objection.

"The Court: Sustained."

Angel testified that "snitches" get killed. A "snitch" is someone who "[g]o to court and say something." He agreed that if he went to court and identified someone who shot his friend, that would make him a snitch and he could get killed.

At a sidebar following Angel's testimony, the court said, "In regards to those objections, and I'll note for the record why I sustained them, is I'm doing my best to make sure we avoid the specter of gangs coming in on this issue, because both counsel indicated this is not a gang case. We told the jurors it is not a gang case. I'm concerned

about the jury all of a sudden hearing this information and maybe it impacting them in a way that I don't know who it would benefit or who it would not benefit, but it's something they don't need to be concerned about. Whether he's afraid to testify, certainly that could be relevant. But anything beyond that, I think would be inviting the jury to consider whether this clique or street was a gang and whether there are any gang-like implications with that, so that was why I sustained his objection."

The prosecutor responded: "I do think the door has been opened a little bit with regard to — not gangs because we're not dealing with gangs. At most we're dealing with tagging crews. But I think to the extent that there are monikers being used by the witnesses, I want my [investigating officer] to be able to explain who Kloner is and why he knows." The court responded, "He can do that, that's fine, without saying gang nicknames. They all have nicknames. He said out in the street what he's known by, it can be done in that fashion." The prosecutor agreed that approach was appropriate: "I agree with the court. At least I have no evidence there's any gang motive in the case. I just want to be able to explain the terms that have come out."

F. Sergeant Howard Cooper

Sergeant Cooper is one of the investigating officers assigned to the case. He testified that the victim was referred to as both "Phoke" and "Pelon." Defendant was referred to as "Kloner" and "Indio."

G. Special Agent David Hamilton

Agent Hamilton works for the Department of Justice, Bureau of Alcohol, Tobacco, and Firearms (ATF). He testified that a Glock semiautomatic pistol cannot be fired unless both the safety and trigger are depressed. One of the advantages of a Glock "is it is impossible for the gun to go off if it is accidentally dropped. The only way it can be fired is if that trigger is pulled." Agent Hamilton has heard of people accidentally discharging a Glock .40, usually during cleaning or while reholstering the gun.

II. The Defense Case

Defendant said he bought the gun that killed Esteban about a month before the shooting. He was 16 years old. He wanted a gun "[j]ust to have it" for "protection or something." He was not being threatened, but said "[t]he streets are not safe." He kept the gun at home for the month before the shooting. He did not like walking with it because he constantly got stopped by the police.

On July 19, the day before the shooting, defendant had the gun with him. He spent the night at Esteban's house and Esteban held the gun for him. Defendant's friend, Alex Robles, also spent the night at Esteban's house. On the morning of July 20, defendant went back to his house to put the gun away. He then "came back" and "[s]tarted hanging out again, smoking." Esteban, Alex, Fernando, and Angel were already in the alley, hanging out and smoking pot. Later, Roger and Angel's brother joined them. Defendant did not initially have his gun with him, but at some point he went and got it. He did not know what happened to make him feel unsafe, but he said there had been a "lot of drama" the day before and he and Alex had started arguing with some other people whom he did not know and who said they could not hang around there.

When defendant returned to the alley, he took the gun from his waistband and showed it to his friends in the alley. He put it back in his waistband, and then took it out again and began playing with it. At some point, he unloaded the gun and pointed it at Esteban. He was certain the gun was not loaded because the trigger "wasn't fully all the way up." He dry fired the gun by pointing it at Esteban, and the gun "went click." Later, defendant put the magazine back into the gun and worked the slide. He then removed a bullet from the chamber and pulled the slide back. He did not see another bullet enter the chamber. Defendant cleaned the bullet and put it back in the magazine. He cleaned it "[s]o it wouldn't have my fingerprints or nothing on it," and he thought he had cleared the chamber by pulling the slide back.

After everyone had left, defendant was going to "hand the gun to Esteban to put it away." Defendant and Esteban were standing about four feet apart, and defendant began

to hand the gun to Esteban. Defendant said, "I had my hand fully extended, like, I had my finger on the top of the, like, the — in front of, like, the trigger but not in front of the trigger, but, like, there's this thing [the trigger guard]." As defendant handed the gun to Esteban, he "noticed the trigger was pulled up and I got scared, so I pulled back with force and when I did that I pulled the trigger too." When the gun went off, defendant was stunned. He tried to apologize to Esteban, but "I seen his eyes rolling back so I couldn't, like, so after that I got scared and ran." Defendant knelt down next to Esteban and held his head and told Angel to call an ambulance. He did not look for a shell casing, and he never said, "Where is the bullet?" After the shooting, defendant and Alex ran away and hid. Defendant threw the gun away because "I didn't like holding it no more."

When defendant was interviewed by sheriff's deputies, he lied and said he had been in Las Vegas at the time of the shooting because he was afraid. He feels sad and hurt about Esteban's death. He did not deliberately shoot his friend; the shooting was an accident.

On cross-examination, the prosecutor asked defendant the following:

"Q Why do they call you Kloner?

"A Just like a tagging.

"Q What do you mean, a tagging name?

"[Defense counsel]: Objection.

"The Court: Sustained."

At sidebar, defense counsel asked the court to admonish the prosecutor not to suggest gang activity. "We agreed pretrial that that was off limits, and yet counsel tried [t]o do it twice during cross-examinations. At some point something is going to slip out and it's going to impact the jury." The prosecutor responded that she could not prove the case was gang-related and "I'm not trying to get out anything gang. I'm just trying to explain the terms we heard."

III. Verdict

On June 11, 2012, the jury found defendant guilty of second degree murder in violation of section 187, subdivision (a). It also found true the allegation that defendant personally and intentionally discharged a firearm causing great bodily injury and death, within the meaning of section 12022.53, subdivisions (b), (c), and (d).

The court sentenced defendant to an indeterminate term of 40 years to life, calculated as 15 years to life for second degree murder, plus an additional 25 years to life for gun use causing death to the victim. (§ 12022.53, subd. (d).) Pursuant to section 654, the court stayed the 10-year and 20-year sentences mandated by section 12022.53, subdivisions (b) and (c). The court additionally ordered defendant to pay restitution to the victim of $5,000, and imposed a mandatory restitution fine of $5,000, a court security fee of $40, a building construction fee of $30, and a parole revocation fine of $5,000, which was stayed.

Defendant timely appealed.

DISCUSSION

I. The Prosecutor Did Not Prejudicially Insinuate That the Shooting Was Gang-related

Defendant contends that some of the prosecutor's questions of Angel suggested that the shooting was gang-related and, thus, rendered the trial fundamentally unfair. For the following reasons, we do not agree.

"'Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citation.] By contrast, our state law requires reversal when a prosecutor uses "deceptive or reprehensible methods to persuade either the court or the jury" [citation] and "'it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct'" [citation]. To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and

ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.' (*People v. Davis* (2009) 46 Cal.4th 539, 612 . . . .) A claim will not be deemed forfeited due to the failure to object and to request an admonition only when 'an objection would have been futile or an admonition ineffective.' (*People v. Arias* (1996) 13 Cal.4th 92, 159.)" (*People v. Thomas* (2012) 54 Cal.4th 908, 937.)

Defendant contends that the prosecutor's questions and statements improperly suggested to the jury that the shooting was gang-related. Specifically, defendant points to the following:

- "What is 77th? You said Clique 77, is that a crew? Is that a gang?" The court sustained a defense objection, and the witness then said, "It's a street."
- "You said Kloner [defendant] and Alex are from 77th; right?" The court sustained a defense objection.
- "Angel, are you from any particular neighborhood or group?" Angel answered, "No." The prosecutor then asked, "Or any gang?" The court sustained a defense objection.
- "You said Kloner and Alex were on their own mission. What did you mean by that?" The defense did not lodge an objection.
- "What does it mean to go on a mission?" The court sustained a defense objection.
- During closing argument, the prosecutor said, "Angel told Sergeant Cooper Alex was Jesse's homie. They back each other up. They're there to do a mission." During rebuttal, the prosecutor said, "Alex is the backup that Jesse needed. And Angel even said that, they're homies. They back each other up. They're on a mission. And they were on that day."

We note as a preliminary matter that defense counsel did not object to the prosecutor's statements during closing argument and, although he objected to some of her questions, he did not ask the trial court to admonish the jury to disregard any improper question or remark. Thus, defendant's claims of error are forfeited unless an objection

would have been futile or an admonition ineffective. (*People v. Thomas*, *supra*, 54 Cal.4th at p. 937.)

Citing *In re Wing Y.* (1977) 67 Cal.App.3d 69 (*Wing Y.*), defendant asserts that an admonition would not have cured the alleged error because gang evidence is so inherently prejudicial. We do not agree. In *Wing Y.*, an appeal of a robbery conviction, the prosecutor was permitted to elicit extensive testimony from several witnesses, including a police officer assigned to a Chinese gang unit, that the defendant and his witnesses were members of a Chinese gang that engaged in extortion, robbery, burglary, and theft. The court held there was no error in permitting the prosecutor to question defendant's witnesses about their gang affiliation "as a means of attacking their credibility as witnesses, by establishing a bias in favor of the [defendant]." (*Id.* at pp. 76-77.) However, the gang expert should not have been permitted to testify that defendant was reputed to be a gang member because such evidence was hearsay and, therefore, inadmissible. (*Ibid*.) The error in admitting the irrelevant and hearsay testimony of the gang expert regarding the defendant's and his witnesses' gang membership, the court said, "constituted prejudice to the [defendant] of an irreparable nature." (*Id.* at p. 79.)

The present case is readily distinguishable. Most significantly for our purposes, in the present case there was—in stark contrast to *Wing Y.*—*no* testimony or other evidence that defendant was a member of a gang. That is, while the prosecutor in the present case twice asked whether "77th Street" was a gang, the trial court sustained defense counsel's objections to these questions, and the only testimony the jury heard about the identity of "77th Street" was that it was "[w]here he's from" and "a street." (See *People v. Parrison* (1982) 137 Cal.App.3d 529, 540 ["When the court warned the prosecutor to cease questioning the witnesses regarding gang membership, the prosecutor complied. There was no prejudice."].) Under these circumstances, we do not believe that the prosecutor's questions were so inherently prejudicial that an admonition would have been futile or ineffective. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 196 [no error in admitting evidence of defendant's gang membership where jury was admonished that the

testimony relating to gangs was allowed only for the limited purpose of showing motive or identity].)

Defendant also contends that an admonition would not have cured the error because the prosecutor's questions "provided jurors with a plausible motive that was otherwise lacking in this case." Again, we do not agree. As we have said, there was no *evidence* of any gang membership—there were simply *questions* about possible gang membership, to which the trial court sustained objections. Further, we do not agree with defendant that gang membership would have explained why defendant shot Esteban. All of the evidence suggested that defendant and Esteban were friends—indeed, the undisputed evidence was defendant had spent the night at Esteban's house the night before the shooting, and the two boys spent the day of the shooting hanging out together with a group of friends. Even if the jury had believed defendant was a member of a gang, no reasonable juror could have inferred that defendant and Esteban were members of *rival* gangs, and the jury heard nothing to suggest that gang membership would have explained why defendant shot Esteban. Thus, we do not believe that the prosecutor's questions regarding possible gang involvement suggested a motive for the shooting.

Defendant suggests finally that a jury admonition "only would have reinforced the jurors' understanding that the prosecutor thought it was gang related." Not so. As other courts have recognized, admonitions to disregard an attorney's questions "ordinarily are effective except in cases of extreme misconduct [citation], and we presume that the jury followed the instructions absent some indication to the contrary [citation]." (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1123.) We have no such indication here.

For all the foregoing reasons, the claim of error is forfeited. Even if it were not, however, any alleged prosecutorial error was harmless. Against the backdrop of the evidence in the present case—including the 16-year-old defendant's possession of a Glock .40 semiautomatic handgun, the witnesses' references to "homies," "77th Street," and "Clique 77," and the witnesses' use of monikers such as "Sinfre," "Indio," "Foke," "Pelon," "Kloner," and "Druggie"—the prosecutor's questions did not increase the

likelihood that the jury would assume the shooting was gang-related. To the contrary, the prosecutor's questions gave witnesses the chance to explain that "77th Street" was "a street"—not a "crew" or a "gang."

II. The DNA Fine Is Unauthorized

Defendant asserts, and the Attorney General concedes, that the $20 DNA fine was improper because, although the fine appears in the minute order, the reporter's transcript reflects that such fine was not imposed by the court. We agree. There is no suggestion in the reporter's transcript that the trial court imposed a DNA fine, and the court's oral pronouncement of a sentence, not the minute order, controls. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 ["Entering the judgment in the minutes being a clerical function (Pen. Code, § 1207), a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error."].)

DISPOSITION

The trial court is directed to correct the abstract of judgment by omitting the imposition of the $20 DNA fine, and the clerk is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.