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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.

ROBERT DUENAS,

Defendant and Appellant.

B234997

(Los Angeles County
Super. Ct. No. BA347638)

APPEAL from a judgment of the Superior Court of Los Angeles County.
William C. Ryan, Judge. Affirmed.

Lise M. Breakey, 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, Eric E. Reynolds, and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Duenas appeals from a judgment which sentences him to 23 years in state prison for one count of assault with a semiautomatic firearm in addition to various firearm and gang enhancements. We affirm the judgment.

FACTS

Dontae Thomas, who is African-American, was shot outside of a laundromat by a Hispanic man on September 22, 2008, at approximately 1:45 p.m. The shooter was standing between two parked cars. Thomas was hospitalized for nine days as a result of his injuries, which required surgery on his large and small intestines and 36 staples. He was unable to walk for three weeks.

In an interview at the hospital, Thomas told the police that the shooter asked him “Where are you from?” when he approached Thomas. When Thomas replied that he “didn’t bang,” the shooter said, “Fuck you” and shot him with a black handgun. Thomas also advised the police that he believed it was either a member of “SCK” (South Central Klaneros) or “MKN” (Mexican Klan or Mexicans Killing Niggers) who was the shooter because those gangs controlled the neighborhood surrounding the shopping center. The officer showed Thomas two photo books of SCK and MKN members. Thomas picked out Duenas’s photograph from 30 or 40 photographs. At trial, Thomas testified that the shooter referred to “either MKN or SEC or something like that,” and then shot him with a chrome semiautomatic. Thomas described the shooter as between 5’5” and 5’8” tall. Duenas is 5’2” tall.

Sonia D. was sitting in her car parked near the laundromat when she heard shots being fired and saw a tall Hispanic man with a shiny metal object in his hand running away. Sonia picked Duenas’s photograph out of a photographic line-up and wrote on the back that he was the person she saw. At trial, Sonia testified she had chosen Duenas’s photograph as “closest to the person that I saw running, not as the person, which is different.” She also said she did not see the shooter present at trial. She testified that the shooter was overweight and muscular and at least 5’10” tall. Sonia claimed she was not afraid for her safety and that she was not influenced to testify in a specific manner. On rebuttal, the prosecution offered the testimony of the two police officers who

interviewed Sonia. They testified that Sonia did not hesitate when she identified Duenas in the photographic lineup and that she was not influenced by them or told what to write on the photograph.

Two .25 caliber bullet casings from a semiautomatic weapon were recovered from between the parked cars near the laundromat. A search of Duenas's home revealed 44 rounds of .38 caliber ammunition, but no .25 caliber bullets. Police officers also found a photograph of seven or eight Hispanic men with "Klaneros" written on it and a notepad with the letters "SCK" inscribed on it.

Duenas was charged by information dated August 31, 2009, with one count of assault with a firearm (Pen. Code, § 245, subd. (a)(2))¹ and one count of assault with a semiautomatic firearm (§ 245, subd. (b)). The information further alleged that Duenas personally used a firearm (§§ 667.5, subd. (c)(8), 1192.7, subd. (c), 1203.06, subd. (a)(1), 12022.5, subd. (a)), personally inflicted great bodily injury (§ 12022.7, subd. (a)), and committed these crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

At trial, the prosecution presented evidence as described above. Duenas's older sister, R.C., testified on behalf of the defense. She testified that she picked up Duenas, his wife, and their children from their home after she left work at 12:30 p.m. on the day in question. She typically drove Duenas and his family because they did not own a car. That day, she drove Duenas and his family to run errands, including visiting Duenas's mother, picking up his son from kindergarten at 1:30 p.m., and cashing Duenas's unemployment check. R.C. drove Duenas and his family to cash the check at the Maple Liquor Store on 24th and San Pedro. They then went back to Duenas's mother's home to visit from 2:30 to 3:50 p.m.

The kindergarten teacher at Duenas's son's school testified that Duenas usually picked his son up from school and his son was present on September 22, 2008, though school was dismissed at 1:04 p.m. on that day and not 1:30 p.m. The owner of the Maple

¹ All further section references are to the Penal Code unless otherwise specified.

Liquor Store testified that Duenas typically cashed his unemployment checks at the store but had no definite memory of Duenas being there on September 22, 2008. However, his records showed that the bank cleared Duenas's unemployment check on September 23, 2008, and he testified he typically takes the day's checks to the bank every afternoon between 2:30 and 4:30 p.m. and would not have taken a check from anyone other than the person to which it was made payable.

The defense also presented testimony from an expert specializing in eyewitness identification. Dr. Robert Shomer testified that facial recognition and memory between strangers is only accurate 50 percent of the time. Identification is affected by light, distance, duration, stress, weapons focus, and cross-racial factors. He also testified that there is no correlation between confidence and accuracy.

The jury found Duenas guilty of the second count of assault with a semiautomatic firearm and found all the special allegations true as to that count. The trial court dismissed the first count, assault with a firearm, as a lesser-included offense. Duenas was sentenced to the mid-term of six years on count 2 with an additional ten years for the gang enhancement, four years for firearm enhancement, and three years for the great bodily injury allegations for an aggregate term of 23 years. The trial court also ordered a restitution fine of \$2,000 under section 1202.4, subdivision (b), and a stayed a parole revocation fine of \$2,000 under section 1202.45. Additional fees were imposed. Duenas timely appealed on July 29, 2011.

DISCUSSION

Duenas contends on appeal that the admission of gang evidence during trial on the substantive charges violated his federal due process rights because it induced the jury to convict him based on weak identification testimony. We conclude the gang evidence was properly admitted and that Duenas was not denied due process of law.

I. Procedural History

Prior to trial, defense counsel moved to bifurcate the trial on the gang allegation. The prosecution objected, arguing that gang evidence was independently admissible even without the gang allegation because it was probative on motive and identification.

More specifically, the prosecutor pointed out that Thomas told the investigating officer that the shooter belonged to a specific gang and asked him “where are you from,” which was a term of art in criminal gang culture and indicated a gang challenge.

The trial court denied the motion to bifurcate, explaining that “I usually will not bifurcate it, and I’m not inclined to do it in this case because it’s offered not just for the gang allegation but for motive for the substantive offenses.” The trial court warned the prosecutor not to put on his gang evidence until he had put on all other evidence of the substantive offenses. The trial court further limited the expert’s testimony to the gangs in question, but that “if it’s affiliated with the Mexican Mafia, he can talk about Mexican Mafia because they all run together[.]” The trial court stressed that the gang testimony must be focused and be presented last, after all other prosecution evidence, so that the jury would not be influenced by it as much. As a result, the prosecution presented testimony, as described above, from Thomas, Sonia, and the three responding police officers before the gang expert.

II. Expert Testimony

The prosecution’s gang expert, Kevin Raines, then testified. He said he was a gang investigator with the Los Angeles Police Department. Raines confirmed he was familiar with the SCK gang, which he viewed as a small gang, with between 20 and 30 documented members. SCK claims a territory bordered by Central Avenue, 22nd Street, Adams Boulevard and Griffith Avenue. SCK members use “Klaneros,” “Klan Life,” and “SCK-23” in their tagging. Raines also testified that SCK members are friendly with the MKN or Mexican Klan gang, which approximately 30 members and whose territory is about 15 or 20 blocks from SCK’s territory. Thomas was shot in MKN territory.

Raines testified that he believed Duenas was an active member of SCK at the time of Duenas’s shooting because he admitted his membership to police in 2008. He also had tattoos of the letters “S,” “C,” and the word “Klan Life” on his arms. Gang paraphernalia was also found at his home, including a photograph with “Klaneros” written on it and a notebook with the letters “SCK” inscribed on it. Duenas also had tattoos of “V,” “K,” and “13” on the base of his left index finger. Raines testified that this tattoo stood for

Vario Klan 13, which “is symbolic for being a Southern California Mexican gang member . . . with allegiance to the Mexican Mafia.” Raines explained that a non-member who had a gang tattoo would be killed or beaten up.

To prove the gang enhancement, Raines: testified that SCK members were known to commit crimes of vandalism, tagging, carrying loaded firearms in public, assault with deadly weapons, attempted murder, and murder; described crimes committed by an active SCK member named Abraham Gomez, who was found carrying a concealed firearm in December 2007 and who committed grand theft auto in 2008; testified that SCK member Juan Cajero was also arrested for carrying a loaded firearm in public; and alluded to an unnamed SCK member who committed a murder in 2007 near where Thomas was shot but who fled the country and was never convicted. Raines noted that both of Gomez’s crimes were committed near where Thomas was shot.

When given a hypothetical which closely tracked the facts of this case, Raines opined the shooting was committed for the benefit of the SCK gang. Raines explained, “when [members of a street gang] commit a shooting like this in the face of the community, it’s pretty much telling everyone around them they’re willing to go and do whatever it takes or commit whatever level of violence they need to gain respect or gain fear, and . . . The more fear a street gang [engenders], the better off they are. [¶] They’ll have less challenges from their rivals. People in the community will be less likely to confront them or even go to the police if they have to deal with them.” Raines also testified that witnesses sometimes changed their story when they are forced to come to court and face a gang member.

At the end of trial, the judge instructed the jury, in pertinent part: “[y]ou may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose or knowledge that are required to prove the gang-related crimes and enhancements or the defendant had a motive to commit the crimes charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider

this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

III. The Gang Evidence was Properly Admitted at Trial

From what we can discern after reading his briefs, Duenas attempts to argue the aforementioned gang evidence was improperly admitted on a somewhat novel basis. First, correctly citing to *People v. Hernandez* (2004) 33 Cal.4th 1040, 1050 (*Hernandez*), he acknowledges that the California Supreme Court issued a definitive opinion in this area of the law, making it clear that bifurcating a trial on gang allegations from the underlying substantive charges is disfavored. Owing to the clarity of California law on this point and the state of the evidence in this case, Duenas does not claim the trial court abused its discretion in denying bifurcation in this case. Instead, he finds two other means to argue that admission of the gang evidence resulted in a denial of due process. He first relies on *People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*), a case in a unique and entirely different procedural posture than the instant case. Second, because there is no applicable federal authority on point, he analogizes the denial of bifurcation in this case to federal cases involving severance of charges and contends the failure to bifurcate the gang allegation resulted in unfairness so gross as to amount to a denial of due process. We decline to follow Duenas down his misguided path.

California courts have long recognized the potentially prejudicial effect of evidence relating to gang membership. However, case law also indicates that this does not mean gang evidence should be excluded as a matter of course. In *Hernandez, supra*, 33 Cal.4th at pages 1049-1050, the California Supreme Court explained that “[i]n cases *not* involving the gang enhancement, . . . evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. 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.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]” The court further held that the burden was on the defendant to show that there was a substantial danger of undue prejudice if the trial on the gang allegations was not bifurcated and that the trial court had broad discretion to deny a motion to bifurcate. (*Ibid.*) In reaching this conclusion, the *Hernandez* court held that a gang enhancement is “attached to the charged offense and is, by definition, inextricably intertwined with that offense.” (*Id.* at p. 1048.) Here, Duenas concedes that some of the gang evidence was relevant and admissible to establish the charged offenses—evidence of the gang challenge, the identification of Duenas from a book of SCK photographs and the gang-related items found at his home. Given the holding of *Hernandez* and the state of the evidence in this case, Duenas wisely does not contend the trial court’s ruling on bifurcation was an abuse of discretion.

Instead, Duenas argues that the evidence of crimes committed by his fellow gang members and of his association with ‘Mexicans Killing Niggers’ and the Mexican Mafia was not relevant because it did not prove that he was the person who shot Thomas, or establish a motive for him to kill Thomas. He claims “[a]ll of this testimony was nothing more than saying that Mr. Duenas committed the crime because he was the sort of person who would shoot an inoffensive stranger of another race and who associated with other violent, racist people.” As such, he argues he was denied due process by admission of the evidence. Not so.

The bottom line is this: the gang evidence he points to as having been inappropriately admitted was offered to prove the elements of the gang enhancement allegation. The gang allegation required proof that an “ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one of more of [certain enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (Pen. Code, § 186.22, subd. (f).) Evidence of past or present conduct by

gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) As a result, Duenas is simply wrong in arguing that the gang evidence was not relevant in this trial -- where a gang enhancement was alleged. Had this evidence been excluded from trial, it would have prohibited the People from proving their case.

Further, gang motive was essential to understanding the charged offenses, because the evidence showed the shooting was prompted by someone asking, "where are you from" or stating "either MKN or SEC [*sic*] or something like that[.]" It was not enough for Thomas to testify that the shooter made a gang challenge. Without evidence explaining that the question "where are you from" is a challenge to fight in gang culture, the jury would not have been given context to Thomas's testimony. Moreover, evidence of Duenas's membership in SCK would not have explained his presence and conduct in MKN territory. Raines's testimony about the close association between these two gangs was vital to presenting the case for the substantive charges as well as the gang enhancement.

In any event, the court properly instructed the jury that it was not permitted to consider the gang evidence to prove defendant has a bad character or is disposed to commit a crime. We, of course, presume the jury understood and followed the court's instruction in the absence of any showing to the contrary. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Duenas's reliance on *Albarran, supra*, 149 Cal.App.4th 214 for a different result is also misplaced. In that case, Albarran was found guilty of attempted murder, shooting at an inhabited dwelling and attempted kidnapping for carjacking. As to each count, a gang enhancement allegation was found true. Thereafter, a motion for new trial was granted as to the gang allegations, but the trial court found sufficient evidence to support each of the underlying convictions. On appeal, Division Seven of this District determined that the trial court should have granted a new trial as to the underlying convictions as well because the gang evidence, properly admitted to prove the gang allegations which were

subsequently dismissed, prejudiced his trial on the underlying charges. (*Id.* at pp. 230-231.) Obviously, this case is entirely different because the gang allegations were never dismissed and we are not called upon to determine, in hindsight, whether the gang evidence prejudiced the proof of the underlying charges as a result.

Turning to the federal cases to which Duenas cites, *United States v. Lane* (1986) 474 U.S. 438, 449 (*Lane*) and *Kotteakos v. United States* (1946) 328 U.S. 750 (*Kotteakos*), we also find them inapplicable to this case. Both *Lane* and *Kotteakos* addressed the concepts of joinder and severance under federal law. The U.S. Supreme Court held that “an error involving misjoinder ‘affects substantial rights’ and requires reversal only if the misjoinder results in actual prejudice because it ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” (*Lane, supra*, 474 U.S. at p. 449, quoting from *Kotteakos, supra*, 328 U.S. at p. 775.)

In each case, the issue was whether the trial of *other* crimes committed by *other* defendants should have been joined or severed from the case involving the appellant. Here, by contrast, the gang enhancement evidence is “attached to the charged offense and is, by definition, inextricably intertwined with that offense.” (*Hernandez, supra*, at p. 1048.) *Lane* and *Kotteakos* are also distinguishable on the basis that they address severance and joinder while this case involves bifurcation. The *Hernandez* court has held federal issues of severance to be an imperfect analogy to bifurcation. (*Hernandez, supra*, at p. 1050.) We decline to apply an imperfect analogy to the bifurcation issue when the *Hernandez* court has addressed it squarely. In any case, due process is not violated when evidence is properly admitted to prove a charge against a defendant. Simply put, a defendant does not suffer a fundamentally unfair trial when gang evidence is admitted to prove a gang enhancement allegation.²

² Because we find Duenas’s due process rights were not violated, we need not address his argument that the Attorney General cannot prove beyond a reasonable doubt that the violation did not contribute to the verdict.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.