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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. VICTOR LUEVANOS et al., Defendants and Appellants.	B270781 (Los Angeles County Super. Ct. No. BA420337)

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant Victor Luevanos.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant Juan Carlos Hernandez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Yun K. Lee and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Luevanos and Juan Hernandez were convicted of second degree robbery with gang and firearm enhancements. On appeal, they argue that the prosecution introduced case-specific testimonial hearsay statements prohibited by our Supreme Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Luevanos also argues the trial court improperly denied his requests for a continuance made in conjunction with his motion to represent himself (*Faretta* motion).[1] We find no reversible error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 8, 2014, an information was filed charging Luevanos and Hernandez with two counts of second degree robbery (Pen. Code, § 211.)[2] The information further alleged as an enhancement to each count that the appellants had personally used a firearm (§ 12022.53, subd. (b)) and had committed the crimes in furtherance of an unlawful street gang (§ 186.22, subd. (b)(1)(C)).

At trial, one of the robbery victims, Bryan Portillo, testified that the robbery took place next to Grand Vista Street which separates two housing complexes, the Estrada Courts Housing Project (Project) and the Wyvernwood Apartments (Apartments). The street also separates the respective territories of two criminal street gangs, the Varrio Nuevo Estrada ("VNE") and the Eighth Street gang. The VNE claimed the Project, and the Eighth Street gang the Apartments.

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1 *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

2 All further statutory references are to the Penal Code unless otherwise stated.

On the evening of December 26, 2013, Portillo and his wife, Donna Ramos, were walking to their car in the Project's parking lot when Luevanos, Hernandez, and a third man approached them. Luevanos and Hernandez were both holding shotguns. Luevanos pointed his gun at Portillo's head and said, " 'Where you from?' " and " 'You from VNE?' " Portillo responded that he was from " 'nowhere' " and denied being from VNE. One of the three men told Portillo to lift up his shirt where Portillo had a gang tattoo, but Portillo refused to do so. The third man then started punching Portillo while Hernandez tried to push him to the ground. Hernandez then walked to Portillo's left side where Portillo had a VNE gang tattoo on the back of his ear. Hernandez said " 'He's from VNE' " and hit Portillo with the butt of his shotgun near the tattoo several times.

Ramos stepped between Portillo and the other men with her arms outstretched and pled with them not to kill Portillo. Portillo crouched behind her and pled to be left alone. Luevanos said, " 'You know what? Just . . . give us your shit.' " Portillo tossed his wallet toward him and Ramos handed over her purse. The three men then walked away. Portillo testified that the men yelled "eighth street" and threw up gang signs as they walked away. Ramos testified that, while the men were departing, Hernandez yelled " 'eighth street' " in Spanish and made the Eighth Street gang sign.

The prosecution's gang expert, Officer Ruben Zaragoza, testified that VNE and the Eighth Street gang were rivals. The Eighth Street gang had about 125 members, and its principal activities included assaults with and without deadly weapons, burglaries, robberies and shootings.

Officer Zaragoza was familiar with two Eighth Street gang members named Jose Luis Torres and Jarol Vasquez. Zaragoza knew of Torres through conversations with other officers who said Torres had admitted to being a member of Eighth Street. Torres had been convicted of assaults. Officer Zaragoza's knowledge of Vasquez came through his conversations with other officers as well as his review of field identification (FI) cards and police reports.[3] Officer Zaragoza testified that Vasquez was a member of Eighth Street and had been convicted of burglary.

Officer Zaragoza had never met the appellants. He knew of Luevanos through conversations with other police officers and his review of FI cards. He knew that Luevanos had admitted to being a member of the Eighth Street gang. Booking photos of Luevanos showed a tattoo of "calle ocho"[4] across his stomach, an "eighth street" tattoo on his right leg, a "Wyvernwood" tattoo on that leg, and a Mayan symbol for the number eight on his face. Officer Zaragoza opined that these tattoos means that Luevanos was a member of the Eighth Street gang. A photo of Luevanos with other individuals showed Luevanos "throwing up the sign of the 8th street gang."

Officer Zaragoza testified that he knew of Hernandez through talking with other officers and reviewing FI cards. Hernandez had admitted to being a member of the Eighth Street gang.

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[3] According to Officer Zaragoza, FI cards are filled out by police when they have personal contact with a gang member and want to record information about the gang member "for later use and further investigations."

[4] We take judicial notice of the fact that the Spanish phrase "calle ocho" is translated as "eighth street."

When given a hypothetical question tracking the facts of the robbery, Officer Zaragoza opined that the robbery had been committed for the benefit, at the direction of, and in association with the Eighth Street gang.

A jury found appellants guilty of both counts and found both enhancement allegations to be true. Hernandez was sentenced to state prison for a term of 30 years, 8 months, calculated as follows: (1) on count one, the midterm of 3 years plus 10 years for the firearm enhancement and 10 years for the gang enhancement, and (2) on count two, a base term of 1 year (one-third of the midterm sentence of three years), plus 3 years, 4 months for the firearm enhancement (one-third of the ten years) and 3 years, 4 months for the gang enhancement (one-third of ten years). Luevanos was sentenced to state prison for a term of 29 years, 8 months, calculated as follows: (1) on count one, the low term of 2 years plus 10 years for the firearm enhancement and 10 years for the gang enhancement, and (2) on count two, a base term of 1 year (one-third of the midterm sentence of three years) plus 3 years, 4 months for the firearm enhancement (one-third of ten years) and 3 years, 4 months for the gang enhancement (one-third of ten years).

Appellants timely appealed.

DISCUSSION

1. *Gang Enhancement*

A gang enhancement under section 186.22, subdivision (b) requires proof of two elements: "(1) that the defendant committed a felony for the benefit of, at the direction of, *or* in association with any criminal street gang and (2) that he did so with the intent to promote, further, or assist in criminal conduct by gang members." (*People v. Mejia* (2012) 211 Cal.App.4th 586,

613.) "In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the [STEP Act[5]]; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

Appellants argue that Officer Zaragoza's testimony about appellants', Torres's and Vasquez's membership in the Eighth Street gang violated both state hearsay rules and the confrontation clause under our high court's recent decision in *Sanchez*.[6] "While gang membership is not an element of the gang enhancement, evidence of [the] defendant's [gang] membership and commission of crimes in [the gang's] territory bolstered the prosecution's theory that he acted with intent to benefit his gang . . . ." (*Sanchez*, *supra*, 63 Cal.4th at pp. 698–699, citation omitted.) Evidence of Torres's and Vasquez's gang membership

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[5] This acronym is a reference to the California Street Terrorism Enforcement and Prevention Act. (§ 186.20 et seq.; *Sanchez*, *supra*, 63 Cal.4th at p. 672, fn. 3.)

[6] Respondent argues appellants forfeited this issue by failing to object on confrontation clause grounds in the trial court. Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert "basis" evidence does not violate the confrontation clause. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1128–1131.) We will therefore address the merits of this claim.

supported the prosecution's theory that the Eighth Street gang engaged in a pattern of criminal gang activity.

Sanchez held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. omitted.)

In so holding, the court explained that "[o]ur decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

Rather, "[w]hat an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

Appellants first argue that Officer Zaragoza's testimony about appellants' gang membership was barred under state and federal law because it was based entirely on out-of-court statements by other officers and FI cards prepared by other officers. Officer Zaragoza conceded he had no prior personal contact with appellants. He testified he had learned from conversations with other officers and FI cards that appellants had admitted their membership in the Eighth Street gang.

Under *Sanchez*, an expert does not err in relying on case-specific facts asserted in hearsay statements when those facts are independently proven by competent evidence. Here, assuming Officer Zaragoza's testimony as to appellants' gang membership was case-specific and testimonial, it was not barred under *Sanchez* because those facts were independently proven by other competent evidence. There was photographic evidence of Luevanos's tattoos spelling "eighth street" and Wyvernwood or symbolizing the number eight. Officer Zaragoza testified that the tattoos mean that Luevanos was a member of the Eighth Street gang. He also testified that in another photo, Luevanos was throwing the Eighth Street gang sign.

Evidence as to appellants' actions during the robbery showed appellants' gang membership. Portillo testified that when Luevanos pointed the shotgun at him, Luevanos asked, "You from VNE?" and that Hernandez then confirmed, "He's from VNE." Hernandez then hit Portillo with the butt of his shotgun. Ramos testified that when Luevanos and Hernandez were walking away after the robbery, Hernandez shouted "eighth street" and threw the Eighth Street gang sign. Portillo testified that all three of the men were shouting "eighth street" and throwing the gang sign when they walked away. In the context

of Portillo's testimony that the robbery occurred on the border between Eighth Street and VNE gang territories, and Officer Zaragoza's testimony that these gangs were rivals, appellants' actions indicated that they were members of the Eighth Street gang.

Even if it were error for Officer Zaragoza to attest to the information learned from other officers, it was harmless because of the substantial independent evidence of appellants' gang membership. Any error was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at p. 698 [applying federal harmless error standard to confrontation clause violation].)

Appellants next argue that Officer Zaragoza's testimony about the Eighth Street gang's pattern of criminal activity based on convictions of other gang members—Torres and Vasquez—was also based on inadmissible hearsay. In particular, they challenge Officer Zaragoza's testimony, based on other officers' statements and FI cards, that Torres and Vasquez were members of the Eighth Street gang. We conclude this evidence was not case-specific such that it constituted hearsay under *Sanchez*.

As we recently held, "[u]nder *Sanchez*, facts are only case specific when they relate '*to the particular events and participants* alleged to have been involved in the case being tried,' which in *Sanchez* were the defendant's personal contacts with police reflected in the hearsay police reports, STEP notice, and FI card. [Citation.]" (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174–1175, review granted March 22, 2017, S239442, on other grounds, but ordered the opinion remain precedential (Cal. Rules of Court, rule 8.1115(e)(3)).) Here, Officer Zaragoza's testimony about Torres and Vasquez was unrelated both to appellants and to the robbery in question and, thus, was not case-specific.

Even if the admission of Officer Zaragoza's testimony as to the gang membership of Torres and Vasquez was error, it was also harmless beyond a reasonable doubt because the crimes committed by appellants also qualified as predicate offenses. "Under the [STEP], the pattern of criminal activity can be established by proof of 'two or more' predicate offenses committed 'on separate occasions, *or* by two or more persons.' " (*People v. Loeun* (1997) 17 Cal.4th 1, 9.) "[W]hen the prosecution chooses to establish the requisite 'pattern' by evidence of 'two or more' predicate offenses committed on a single occasion by 'two or more persons,' it can . . . rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member." (*Id.* at p. 10.) Accordingly, Hernandez's and Luevanos's commission of robbery on December 26, 2013 was sufficient to establish a pattern of criminal activity by the Eighth Street gang.

2. *Denial of Luevanos's Requests for Continuances*

Luevanos contends the trial court erred in denying his requests for continuances in conjunction with his *Faretta* motion. We conclude the trial court did not abuse its discretion.

Luevanos was arraigned on April 8, 2014. The case was initially called for trial on October 27, 2014. A mistrial was declared mid-trial based on the prosecution's failure to turn over discovery.[7] On January 6, 2015, the court discussed trial dates with counsel and trial was set for mid-February. Luevanos

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[7] During trial, the detective informed the district attorney for the first time that the interviews with the victims and the third suspect had been tape-recorded. The district attorney immediately gave those recordings to defense counsel.

informed the court he wished to represent himself and asked for a continuance of a "couple of months" to "look over some stuff and get my stuff together." The court stated that Luevanos could represent himself but it would not grant such a long continuance given the case was already "nine months old." Luevanos then made a *Marsden* motion[8] and the court held the *Faretta* motion in abeyance. The *Marsden* motion was denied that day.

On February 3, 2015, Luevanos reasserted his request to represent himself and asked for a two-month continuance because "there might be some" motions to file. The court advised Luevanos of the perils of self-representation, explained he would not receive a continuance, and informed him that trial would start on February 25, 2015. The court granted the *Faretta* motion and denied the request for a continuance. Luevanos was ordered to appear the following day so that defense counsel could turn over discovery.

On February 25, 2015, Luevanos requested a continuance to hire a private investigator to "interview witnesses" and "file numerous pretr[ia]l motions." He also filed a motion seeking further discovery.[9] The court found that all discovery had been

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8 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

9 Luevanos sought discovery regarding the third suspect in the robbery who had been dismissed from the case. He argued that the discovery would show that the victims had made a false identification. The People stated that the third defendant had an identical twin. The People had decided not to proceed with charges against him based on uncertainty as to whether the "right twin" had been identified. The court denied Luevanos's motion on the ground that any relevancy "would be greatly

turned over to Luevanos on February 4, 2015. The motions were denied. Luevanos then relinquished his right to represent himself and standby counsel was appointed.

Luevanos now contends that once the court granted his motion to proceed pro se, the denial of a continuance violated his right to due process and his right to counsel. "[T]he trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citations.] A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence. [Citations.] . . . The trial court's denial of a motion for continuance is reviewed for abuse of discretion. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037 (*Jenkins*).) " 'Discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered.' " (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) A request for a continuance must demonstrate good cause. (*Ibid*.)

Luevanos contends that once a trial court grants a *Faretta* motion, it must also grant a continuance to allow the defendant sufficient time to prepare for trial. In fact, " 'it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel.' [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge . . . .' [Citation.]" (*Jenkins*, *supra*, 22 Cal.4th at p. 1039; see, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 102–103 ["the court acted within its discretion in concluding

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outweighed by the confusion and undue consumption of time on an issue where somebody has an identical twin."

that defendant could represent himself only if he was ready to proceed to trial without delay"].)

Here, Luevanos moved for self-representation nine months after his arraignment and two months after his first trial ended in mistrial. The grounds he gave for continuing trial were he needed to "look over some stuff and get my stuff together," "there might be some" motions to file, and he needed to "interview witnesses" and "file numerous pretr[ia]l motions." He did not identify what motions he needed to file or which witnesses needed to be interviewed. We agree with the trial court that Luevanos did not demonstrate good cause for any delay.

Luevanos cites to *People v. Wilkins* (1990) 225 Cal.App.3d 299 (*Wilkins*) for the holding that when the trial court exercises its discretion to grant a *Faretta* motion "in close proximity to trial," it is an abuse of discretion to deny a request for a "reasonable continuance to allow the [*pro per*] defendant to prepare a defense." (*Id.* at p. 304.) *Wilkins* is distinguishable. In *Wilkins,* the defendant made a *Faretta* motion on the date trial was scheduled to begin and was unable to make the motion earlier. (*Id.* at p. 306.) The court refused to grant any continuance. (*Ibid.*) On appeal, the court held the denial of the continuance had violated his right to counsel and due process. (*Id.* at p. 306.)

Here, by contrast, Luevanos was not forced to go to trial with inadequate time to prepare. He knew six weeks prior to trial that the court would grant his *Faretta* motion if his *Marsden* motion did not succeed, his *Marsden* motion was denied that same day, and the court formally granted his *Faretta* motion three weeks prior to trial. All discovery was turned over to him

the day after his *Faretta* motion was granted.[10] Luevanos's counsel had indicated himself ready for trial in October 2014 and Luevanos did not state any intent to present a different defense in the second trial. His request for a continuance of multiple months was not "reasonable" given that he gave no specific grounds explaining why he needed the continuance.

Under these circumstances, the trial court did not abuse its discretion in denying Luevanos's requests for continuances, and those denials did not violate due process or his right to counsel. (See *People v. Jackson* (1978) 88 Cal.App.3d 490, 502, disapproved on other grounds in *People v. Barnum* (2003) 29 Cal.4th 1210 [no abuse of discretion to deny request for continuance in conjunction with grant of *Faretta* motion when the defendant "had reason to believe he would be representing himself 73 days prior to trial and was given 10 days to prepare his defense after his *Faretta* motion was formally granted"].)

Nor has Luevanos demonstrated that he was prejudiced by the court's denials of his requests for continuances. In his motion for a new trial, he argued that, had he been granted the continuances, he could have called his employer to testify that he was at work at the time of the crime. However, at the hearing on the motion, his counsel admitted he did not know if the employer was willing to attest to this fact.

Accordingly, Luevanos has not shown that, had a continuance been granted, it is reasonably probable the outcome

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[10] Luevanos argues he was "precluded from engaging an investigator or subpoenaing witnesses." The record shows that Luevanos represented to the court that he had a private investigator "willing to serve" his witnesses, and the trial court said it would ensure the investigator was "appointed" and "available to serve" those witnesses.

of the trial would have been more favorable to him. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 945 overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101 [the defendant must demonstrate that, had a continuance been granted, there is a reasonable probability of a more favorable trial outcome].)

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

SORTINO, J.