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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BRANDON GONZALEZ-LOREDO, Defendant and Appellant.	B232472 (Los Angeles County Super. Ct. No. PA066378)

APPEAL from a judgment of the Superior Court of Los Angeles County. Shari K. Silver, Judge. Affirmed.

Adrian M. Baca for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Brandon Gonzalez-Loredo of attempted premeditated murder and assault with a deadly weapon. He challenges his convictions on a number of grounds. We affirm.

FACTS AND PROCEEDINGS BELOW

Angel V. was attacked and stabbed on May 8, 2009, as he left a party and was walking to a restaurant with two friends. The attacker got out of a car that pulled over to the curb ahead of Angel and issued a gang challenge: "Do you guys bang?" The attacker called Angel by name—"Oh, you're that bitch-ass Angel" and stabbed Angel four times as he tried to run away. Angel and his two friends, Eric and Michael, told the police that a high school student they knew as "Blanco" was the attacker. Defendant was a member of the Brown Familia gang and that his gang moniker was Blanco.

Defendant testified and denied attacking Angel and claimed he acted in self-defense against an attack by Angel. He testified that he was walking home from the same party when he was attacked by three unidentified persons. Someone knocked him down, and as he drew himself into a ball, he felt blows to his head and back. He managed to pull his Swiss Army Knife© from his pants pocket and started swinging it. He hit the side of the person on top of him. Defendant then managed to get up and run to his father's house nearby.

The evidence conflicted whether Angel was a member of a criminal street gang, the Lancas.

After an evidentiary hearing, the court denied defendant's motion to suppress statements defendant made to detectives at his home before he was arrested and *Mirandized*.

The jury convicted defendant of attempted premeditated murder, assault with a deadly weapon and found true the special allegations that defendant personally used a deadly weapon, personally inflicted great bodily injury and committed the offenses for the benefit of a criminal street gang. The court sentenced defendant to prison for a term of 15 years to life.

DISCUSSION

I. THE COURT CONSIDERED DEFENDANT'S YOUTH IN DECIDING WHETHER THE DETECTIVES SHOULD HAVE *MIRANDIZED* HIM BEFORE THE FIRST INTERROGATION.

Prior to trial, defendant moved to exclude all of his statements to the detectives who questioned him on the ground that they initially subjected him to a custodial interrogation without advising him of his *Miranda* rights.[1] A hearing on the motion produced the following evidence.

Two Sheriff's Department detectives came to defendant's home at approximately 7:00 a.m. the day after the attack on Angel. Detective O'Neill asked defendant to step outside on the porch which he did. The detective testified that he would not have allowed defendant to go back inside his house and shut the door. He knew that defendant was 16 years of age.

Detective O'Neill told defendant he wanted to ask him some questions about a stabbing that occurred the previous Friday night. The detective did not advise defendant of his *Miranda* rights. Defendant answered Detective O'Neill's questions without objection. He admitted that he belonged to the Brown Familia gang and stated that his moniker was "Blanco."[2] Defendant told Detective O'Neill that he cut school on Friday and hung out with three friends until approximately 8:00 p.m. and was at home with his mother the rest of the evening.

The detectives detained defendant as a juvenile and transported him to the local police station where he was placed in an interview room and for the first time advised him of his *Miranda* rights. Defendant waived those rights and made additional statements to the detectives, then decided he wanted to speak to an attorney and the interrogation ended.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] Angel, Eric and Michael referred to the attacker as "Blanco."

The court denied the suppression motion on the ground that defendant was not in custody when Detective O'Neill interviewed him on the porch of his home. The court stated that in making that determination, it applied the factors "set forth in the *Yarborough v. Alvarado* decision"[3] for determining whether, under the facts presented, "the reasonable person likely would feel that they had the right to terminate the interrogation and walk away."

Defendant contends the court committed prejudicial error in relying on *Yarborough*, which left open the issue of whether a suspect's age should be considered in conducting a custody analysis under *Miranda,* and should have relied instead on *J.B.D. v. North Carolina* (2011) __ U.S. __, __ [131 S.Ct. 2394, 2406, 180 L.Ed.2d 310, 322] in which the court held "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test."

Defendant's contention fails.

The record shows that the court did consider defendant's youth in making its custody decision. Defendant claims the court merely "heard" about the defendant's age but did not "consider" it. The record refutes this claim. Among the facts the court stated led it to conclude a reasonable person would not have believed he was in custody, the court noted: "The defendant was close to his 17th birthday."

II. DEFENDANT FAILED TO ESTABLISH GROUP BIAS IN THE PROSECUTOR'S PEREMPTORY CHALLENGES TO THE ONLY AFRICAN-AMERICAN PROSPECTIVE JURORS.

The prosecutor exercised two of her first 10 peremptory challenges to exclude the only African-Americans in the 79-member venire. Defendant made a "*Wheeler*" motion[4], claiming the prosecutor's challenges were the result of group bias against African-Americans. (See *People v. Sims* (1993) 5 Cal.4th 405, 428.) The trial court

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[3] *Yarborough v. Alvarado* (2004) 541 U.S. 652.

[4] *People v. Wheeler* (1978) 22 Cal.3d 258.

found that defendant had made a prima facie showing of group bias and ordered the prosecutor to show permissible, race-neutral justifications for her challenges. (See *People v. Cruz* (2008) 44 Cal.4th 636, 655.)

The prosecutor stated she removed prospective juror 0313 because she had served on a hung jury "which is a huge problem for the People" and because her son was adjudicated a delinquent for a joyriding offense and "I don't want somebody who . . . might be very sympathetic to juvenile delinquents who commit crimes." As to prospective juror 4309, the prosecutor stated that she removed her "in an abundance of caution" because she has a close relationship with a cousin who works "in probation," does not have a close relationship with her cousin who is a deputy district attorney, has another cousin who was shot in connection "with drug dealings" and has an uncle who robbed banks in the 1960s and 70s.

After hearing argument from both sides, the court denied the motion. The court stated it found that the prosecution's reasons for excusing the jurors were "legitimate and reasonable" but observed that the defendant's arguments in support of his motion were also "legitimate and reasonable." On balance, the court stated, "I don't think that the prosecution's stated reasons are a cover-up of some other intent to eliminate African-Americans from the jury."

Defendant agrees that the prosecution offered legitimate, race-neutral reasons for challenging the two African-American potential jurors. Nevertheless, he argues, the court failed to make a "sincere and reasoned effort" to evaluate the prosecutor's justifications (*People v. Watson* (2008) 43 Cal.4th 652, 670-671) and, in particular, failed to engage in a comparative analysis between the two African-Americans challenged and six non-African-American jurors with similar backgrounds who were not challenged (*People v. Lenix* (2008) 44 Cal.4th 602, 622).

We disagree with defendant's claim that "the prosecutor's stated reasons for challenging [the African-Americans] were unconvincing." A reason is genuine, not sham, if it is "clearly related to the particular case being tried" (*People v. Rodriguez*

(1999) 76 Cal.App.4th 1093, 1114) and borne out by the record (*People v. Long* (2010) 189 Cal.App.4th 826, 846). Here, the case being tried involved a minor defendant and prospective juror 0313 testified that she had a minor son who had been adjudicated for taking a car for a "joyride." Juror 0313 had also served on a hung jury. The latter experience "'constitutes a legitimate concern for the prosecution.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 138.) Juror 4309 testified that she had two relatives who had been involved in serious criminal activity—drug dealing and bank robbery. She also had a close relationship with a cousin who worked in a probation department, which the prosecutor could reasonably believe might make juror 4309 more sympathetic to the defendant. Circumstances suggesting that a prospective juror would be sympathetic to the defense are sufficient to rebut a prima facie case. (*Hancock v. Hobbs* (11th Cir. 1992) 967 F.2d 462, 466.)

Defendant cannot properly fault the trial court for not conducting a comparative analysis because he never asked the court to do so. Nevertheless, such an analysis can be undertaken on appeal to the extent that the record is adequate to permit the comparisons and subject to the rule that the appellate court will accord deference to the trial court's ultimate finding of no discriminatory intent. (*People v. Lenix, supra,* 44 Cal.4th at p. 624.)

The record in this case is not adequate to permit the comparisons defendant asks us to make. Defendant's brief includes two "exhibits" which purport to show that at the time the two African-Americans were struck from the venire, there were seven other non-African-American prospective jurors with family members who had been arrested or convicted of crimes and that six of these prospective jurors were on the final panel. Defendant's "exhibits" contain no record citations to back up his claims so we will not consider them. (Cal. Rules of Court, rule 8.204(a)(1)(C) provides that each brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].)

III. THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE OF EIGHT PREDICATE CRIMES IN SUPPORT OF THE GANG ENHANCEMENT.

The prosecution alleged that defendant committed the crimes of attempted murder and assault with a deadly weapon for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1).[5] In order to prove the street gang enhancement, the prosecution had to prove among other things that at least one of Brown Familia's "primary activities" is the commission of one or more of the crimes listed in the gang statute (commonly referred to as "predicate offenses"). (*People v. Perez* (2004) 118 Cal.App.4th 151, 159.) The prosecution can prove the "primary activities" element by producing evidence that the gang's members "'consistently and repeatedly'" commit the predicate crimes. (*Id*. at p. 160, emphasis omitted.)

The court allowed the prosecutor to introduce evidence of five predicate crimes committed by members of the Brown Familia gang, none of which were committed by defendant. Defendant contends allowing evidence of five predicate crimes was fundamentally unfair and denied him his right to a fair trial and due process. We disagree.

As our Supreme Court has explained, undue prejudice is not the prejudice or damage to the defendant that naturally flows from relevant, highly probative evidence. Rather, it is the prejudice that flows from extraneous factors. (*People v. Tran* (2011) 51 Cal.4th 1040, 1048) "That the evidence provided direct evidence of some of the elements of the prosecution's case thus does not weigh against its admission." (*Ibid.*) This is especially so when the evidence goes to the predicate offenses of an alleged criminal street gang that did not involve the defendant. (*Ibid*.)

Here we cannot say that the court abused its discretion in admitting evidence of five relevant crimes, none of which involved defendant. (Cf. *People v. Hill* (2011)

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[5] All statutory references are to the Penal Code except where otherwise stated.

191 Cal.App.4th 1104, 1138-1139 [evidence of eight predicate offenses not unduly prejudicial].)

IV. EVEN IF THE COURT ERRED IN ADMITTING MYSPACE PAGES BELONGING TO UNKNOWN PERSONS, THE ERROR WAS HARMLESS.

Over defendant's objection, the court allowed into evidence printouts of 12 pages from the website MySpace. The purported relevancy of these pages was to support the prosecution's gang expert's opinion that defendant was a member of the Brown Familia gang. It was undisputed that the MySpace pages did not belong to defendant, that they were posted after defendant was incarcerated awaiting trial and that he had no control over the pages. (There was no evidence as to whose pages they were.) Defendant contends the pages should not have been admitted because they were irrelevant and lacked foundation. Alternatively, he argues the pages should have been admitted only with a specific limiting instruction. (Defendant did not request such an instruction.)

It is unnecessary to decide whether the court erred in admitting the MySpace pages. The error, if any, was harmless because the jury already heard defendant's admission to Detective O'Neill and the testimony of Angel, Eric and Michael that defendant was a member of the Brown Familia gang.

V. THE COURT DID NOT COMMIT MISCONDUCT BY COMMENTING THAT THE WITNESS ERIC WAS "AFRAID."

Eric was walking with Angel just before Angel was attacked. Eric identified defendant as the attacker from a six-pack photographic lineup and circled his picture. At trial, he confirmed that he made that identification but refused to make an identification in court. Although Eric admitted that the attacker was in the courtroom, he refused to identify him by pointing to him or describing the color of the shirt he was wearing. The prosecutor and the court engaged in a lengthy attempt to get Eric to identify the person he saw attack Angel.

At one point in that prolonged attempt, the court stated: "Eric, it's important that you answer the question. You're under oath. You're in a court of law. I understand that

you are afraid . . . ." Defense counsel broke in and objected to the court's statement that Eric was "afraid." After further attempts to have Eric identify the person he saw attack Angel, the court and the parties discussed the situation outside the presence of the jurors. In that discussion the court described Eric's mannerisms for the record: "His legs are shaking, his hands are shaking." The court stated: "[I]t's clear to me that this witness is afraid and anxious." In that same discussion the prosecutor commented: "He is shaking and he looks at the court, so he's clearly afraid." Defendant did not dispute those characterizations.

When testimony resumed, the court and the prosecutor renewed their attempt to get Eric to identify the attacker, and when those attempts failed, the prosecutor moved on to other subjects. The court did not withdraw its statement nor did it admonish the jury not to take anything it said as an indication of what it thought about the evidence, the witness, or what the verdict should be. (See CALCRIM No. 3530.)

On appeal defendant claims that the court showed partiality toward the prosecution by commenting that Eric was "afraid." He further claims the court committed reversible error in not giving CALCRIM No. 3530 on its own motion.

We do not agree that the jury would interpret the court's observation directed to Eric—"I understand that you are afraid"—as demonstrating bias toward the prosecution. A reasonable juror would interpret the remark for what it was—an attempt to soothe and reassure the witness so that he would respond to the questions being asked. While it may have been appropriate to instruct the jury with CALCRIM No. 3530,[6] the court's failure to do so was not prejudicial. The court did not say that Eric was afraid of defendant or his gang. He might have been afraid of testifying in court or of perjuring himself. Further, based on the in-chambers discussion with counsel, the evidence of the witness's

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[6] The first sentence of CALCRIM No. 3530 reads: "Do not take anything I said or did during the trial as an indication of what I think about the evidence, the witnesses, or what your verdict should be."

fear was so overwhelmingly apparent that not even defense counsel challenged it. Lastly, the comment was only on a collateral issue.

VI. DUE PROCESS DOES NOT GIVE THE DEFENDANT THE RIGHT TO BE PRESENT DURING A PROBE INTO POSSIBLE JUROR MISCONDUCT AND A HEARING ON GROUNDS FOR EXCUSING A JUROR FOR HARDSHIP.

During the course of the trial an alternate juror sent a note to the court stating that another alternate juror had made comments to him regarding the evidence of Brown Familia's predicate crimes. The two jurors were called into chambers separately and questioned about the comments by the court. Defense counsel and the prosecutor were present but defendant was not. After the two jurors were interviewed, the court re-admonished all the jurors not to discuss the case with anyone. Earlier the court and counsel for the parties heard a request by a juror that he be excused on the grounds continued service on the jury would work a hardship on him. Defendant was not present. The court granted the juror's request.

It is well-settled that due process does not give the defendant the right to be present "at every interaction between a judge and a juror." (*United States v. Gagnon* (1985) 470 U.S. 522, 526.) Rather, "a defendant has a federal constitutional right, emanating from the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment, to be present at any stage of the criminal proceedings 'that is critical to its outcome if his presence would contribute to the fairness of the procedure.' [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1356-1357.)

Discussions with or concerning a seated juror generally are not a critical stage of the proceedings. (*United States v. Gagnon*, *supra*, 470 U.S. at pp. 526-527.) In any case, defendant has not shown how his presence would have contributed to the fairness of the proceedings.

VII. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT.

A. Gang Evidence

The prosecutor asked Detective O'Neill: "And what types of crimes have you investigated involving Brown Familia?" Defense counsel objected on the ground the answer would be "irrelevant, unless he's a gang expert." The court asked the prosecutor: "I assume, counsel, this is laying the foundation?" The prosecutor responded: "Yes, your honor." The court then overruled defendant's objection and Detective O'Neill testified that he had investigated crimes in which Brown Familia members had committed murder, attempted murder, robbery, burglary and possession of drugs for sale.

Later in the trial some comments by the prosecutor in chambers led to this colloquy between the court and the prosecutor. "The court: So it is Detective Barretto who is your gang expert and not Detective O'Neill? [The prosecutor]: Correct."

After the prosecutor clarified that Detective Barretto would be her gang expert, defendant did not renew his objection to the question asked of Detective O'Neill concerning the types of crimes involving Brown Familia that he had investigated nor did he move to strike Detective O'Neill's answer. Nevertheless, defendant argues on appeal that the prosecutor "duped" the court into believing that Detective O'Neill was her gang expert and was able to introduce evidence of Brown Familia crimes based on "a purposeful misrepresentation to the court." We disagree.

Defendant has not shown that the prosecutor intentionally "duped" the court or made a "purposeful misrepresentation" regarding her gang expert. We know of no rule that the prosecution can only have one gang expert in a case. Detectives O'Neill and Barretto could both be the prosecution's gang experts or the prosecution could have decided to change experts from Detective O'Neill to Detective Barretto. More importantly, evidence of Brown Familia's "predicate crimes" was relevant to the issue of whether Brown Familia is a criminal street gang regardless of who presents that evidence. (See discussion, *ante*, at p. 7.) Thus there was no harm or error in admitting Detective O'Neill's testimony.

B. Probation Search

Examining Detective O'Neill about his interrogations of defendant, the prosecutor asked: "Detective O'Neill prior to May 11th of 2009 when you spoke to the defendant, had you personally met the defendant?" The detective responded: "I don't think so, no" and then added: "Excuse me. I take that back. I had been present during a probation search at his residence; however, he was at school that day." Following up on that answer, the prosecutor asked Detective O'Neill: "And at that time did you locate anything with regard—or did you see, observe anything at the defendant's residence with regard to Brown Familia?" Detective O'Neill replied: "Yes, ma'am." At that point defense counsel objected and a conference was held in chambers in which defense counsel stated that he had received no discovery about a probation search or anything that was recovered as a result of that search. Following the conference, the court instructed the jury to disregard the questions and answers quoted above.

Defendant argues the prosecutor implied the existence of evidence known to her but not the jury and stated facts not in evidence. We disagree.

The prosecutor asked Detective O'Neill a simple, straightforward question: had he ever met defendant before the day he arrested him. She could reasonably expect a simple straightforward answer: yes or no. She could not reasonably expect Detective O'Neill to give a totally nonresponsive, irrelevant answer about a probation search at defendant's home. While it's true the prosecutor could not resist following up on this new line of questioning suggested by Detective O'Neill, by asking what if anything was found during the search pertaining to Brown Familia, there was no prejudice to defendant because the court instructed the jury to disregard this entire line of questioning and there was already evidence that defendant had admitted being a Brown Familia member.

VIII. THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION TO SUPPORT THE ATTEMPTED MURDER CONVICTION

Defendant contends the evidence was insufficient to sustain the jury's finding of premeditation and deliberation. We conclude otherwise.

The parties concur that in reviewing a finding of premeditation and deliberation, an appellate court generally looks to three categories of evidence: planning, motive and method. (*People v. Prince* (2007) 40 Cal.4th 1179, 1253.)

A. Planning

The evidence showed that defendant got out of a car and approached Angel with a gang challenge—"where are you from" or "do you guys bang." When he recognized Angel, defendant pulled out a knife and chased and stabbed Angel four times as he ran for his life. The prosecution did not have to prove that defendant was looking for Angel in particular or that when he got out of the car he planned to try to kill the person he saw on the sidewalk. Premeditation and deliberation can occur in a brief interval. (*People v. Memro* (1995) 11 Cal.4th 786, 862-863.) They could occur in the moments between defendant recognizing Angel and his beginning to chase him with a deadly weapon. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 849 ["Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief"].)

B. Motive

Defendant was a member of the Brown Familia gang. Angel was a member or perceived to be a member of a rival gang, the Lancas. The gang rivalry itself would provide defendant with a motive to murder Angel. In addition, defendant had lost a fight at school to a Lancas member nicknamed "Monster," a friend of Angel. Killing Angel could have been motivated by defendant's desire for revenge against Monster and the Lancas. Detective Barretto testified that losing a fight in front of fellow and rival gang members would typically call for "payback."

C. Method

The manner in which defendant stabbed Angel—four wounds close together striking two vital organs—also showed premeditation and deliberation. In *People v. Prince, supra,* 40 Cal.4th at p. 1253, the court observed that multiple wounds clustered in areas containing vital organs suggested a preconceived design to kill.

IX. SUFFICIENT EVIDENCE SUPPORTS THE GANG ENHANCEMENT.

The gang enhancement must be reversed, defendant argues, because there was insufficient evidence that he belonged to the Brown Familia gang or that any of the other persons in the car involved in the attack on Angel were members of that gang. Again, we disagree.

There was substantial evidence, including defendant's admission to Detective O'Neill, that defendant belonged to the Brown Familia gang. In any event, the street gang enhancement applies to any person committing felony for the benefit of a gang even if the person is not a member of that gang. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.) Nor is there any case holding that a person only acts for the benefit of a gang if he acts in concert with at least one member of the gang. Thus, it is irrelevant whether the other persons in the car were Brown Familia members.

X. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING A CONTINUANCE FOR NEW COUNSEL TO PREPARE A MOTION FOR A NEW TRIAL.

Six months after his conviction, defendant sought to further postpone his sentencing so that a new attorney could prepare a motion for a new trial in six to eight weeks. The court found that defendant and his current counsel already had received a reasonable amount of time to prepare a new trial motion and denied the request for a further continuance. We see no abuse of discretion.

XI. THERE IS NO CUMULATIVE ERROR.

Based on our discussion of the issues above, we find no cumulative error requiring reversal of defendant's convictions.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.