Filed 2/1/17 P. v. Ruiz CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. LUIS ALONSO RUIZ, Defendant and Appellant.	B267195 (Los Angeles County Super. Ct. No. BA432571)

APPEAL from a judgment of the Superior Court of Los Angeles, Michael Abzug, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Luis Alonso Ruiz appeals from his jury conviction of one count of assault with a deadly weapon with great bodily injury and criminal street gang enhancements.[1] The trial court sentenced Ruiz to an aggregate term of 17 years in state prison.

On appeal, Ruiz contends his conviction must be reversed because of prosecutorial misconduct and ineffective assistance of counsel. We affirm.

BACKGROUND

I. Prosecution Evidence

On the afternoon of January 1, 2015, Ruiz and co-defendant Hector Garcia stopped the victim, Yoni Sanchez, as he was walking in MacArthur Park. After an initial encounter in which Garcia asked Sanchez where he was from and what his neighborhood was, Ruiz and Garcia again approached Sanchez and Garcia told Sanchez, "you're in my neighborhood," and punched Sanchez. Ruiz and a third man joined the fight and this third person, who was never apprehended, drew a box cutter from his pocket and stabbed Sanchez in the chest. During the fight, Sanchez's mobile phone flew out of his hand and the suspects took the phone.

Sanchez did not want to report the incident because he did not want problems with the gangs and because the area where the incident occurred and where Sanchez lived was in Ruiz and Garcia's "gang's hood." He went to the hospital and received six stitches for the stab wound.

Los Angeles Police Department Officer Tomas Perez interviewed Sanchez at the hospital. In his interview on the day

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[1] The jury found Ruiz not guilty on a second degree robbery count.

of the incident, Sanchez gave a different account of the fight, telling Officer Perez that in the initial encounter Garcia identified his gang as Mara Park View, took Sanchez's mobile phone from him and told him to leave without it, and, when Sanchez tried to get his phone back, punched him. Sanchez told Officer Perez that Ruiz and the unidentified third suspect joined the fight, but that Ruiz was the one who stabbed him in the chest.

Officer Perez gave Sanchez a ride home after Sanchez testified at trial and Sanchez apologized for not testifying accurately. Sanchez explained that he had been threatened two months earlier by a member of the M-S gang and told, "Don't be a rat or else bad things are gonna happen to you."

Officer Perez testified that Mara Salvartucha was a criminal street gang that used the signs M-S and M-S 13. He described the gang's territory and activities, including the convictions of other gang members. Ruiz and Garcia were both admitted members of M-S 13. Based on a hypothetical with facts similar to this case, Officer Perez opined the attack and robbery were done for the benefit of and in association with the M-S 13 gang. He opined that by being blatantly violent in a public park during the day the gang members intimidated community members and victims not to cooperate with police for fear of retaliation.

II. Defense Evidence

The defense presented two witnesses who stated that Sanchez and two other men attacked Garcia, Ruiz intervened to defend Garcia, and Ruiz did not have a weapon. Both witnesses claimed to have no relationship with Garcia or Ruiz.

III. Rebuttal

Officer Perez testified that when Garcia was arrested on a prior occasion, Garcia identified the second defense witness as his cousin and, when contacted, the witness confirmed she was Garcia's cousin. Moreover, during the trial proceedings in this matter, Officer Perez overheard the second witness address Garcia's mother as aunt in Spanish.

IV. Conviction and Sentencing

The jury convicted Ruiz of one count of assault with a deadly weapon (§ 245, subd. (a)) but found him not guilty of second degree robbery (§ 211). As to the assault count, the jury found to be true the special allegations that Ruiz personally inflicted great bodily injury (§ 12022.7, subd. (a)), and that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subds. (b)(1)(B) & (b)(1)(C)).

Ruiz admitted to one prior serious or violent felony conviction (§ 667, subds. (a)(1) & (b)-(i); § 1170.12, subds (a) & (d)), and to six prior prison term convictions (§ 667.5, subd. (b)). The trial court struck the prior strike conviction and sentenced Ruiz to an aggregate term of 17 years based on: a low term of two years on the assault charge, plus 10 years for the gang enhancement, and plus five years for prior felony enhancement. The court stayed the great bodily injury and the prior prison term enhancements.[2]

Ruiz appealed.

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[2] The court also imposed various fines and fees and granted presentence custody credits.

DISCUSSION

On appeal, Ruiz contends that, during closing arguments, the prosecutor improperly: (1) suggested that, as a gang member, Ruiz had the mindset of someone who robbed and murdered people, and (2) appealed to the jurors' passions and sympathies by asking them to imagine themselves living in a community terrorized by gangs and telling them that witnesses were "disappearing" in other gang cases. Ruiz also argues that his counsel was ineffective for failing to request a limiting instruction regarding the gang evidence.

I. Prosecutorial Misconduct Claim

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

We view challenged statements in the context of the argument as a whole (*People v. Dennis* (1998) 17 Cal.4th 468, 522), and "we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the

prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

Here, the prosecutor in his closing argument told the jury that he wanted to give those who were not familiar with gangs an insight into how they worked and the mindset of someone who lived in a gang environment. When the prosecutor described a gang war unrelated to the case, defense counsel objected and the trial court sustained the objection.

Telling the jury that he was only bringing it up to help them understand the fear in the community, the prosecutor then stated that some people would not travel to certain neighborhoods for fear of getting killed. Defense counsel again objected and the court sustained the objection.[3]

A. Comment About Prior Murders and Robberies By Gang Members

The prosecutor then explained that gang members get courage around their "homies," and a member's attitude is different when he is alone. Saying "this is how gang members operate," the prosecutor noted that Ruiz, Garcia and the third suspect were hanging out together in the park. The prosecutor told the jury that it needed to understand "this isn't their first rodeo" and "[t]hey don't just go to the park and just say, oh you know what? if someone comes up with a bright idea, I'll think about if I want to go along with it. That's not how they work. They've already robbed folks. They've already murdered folks."

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[3] Before ruling on the objection, the court held a sidebar during which it told the prosecutor he had "gone outside the bounds of what's permissible" and that he had plenty of evidence in the record to work with and should not be generalizing without evidence.

Appellant objected and the court ruled that the arguments were about how street gangs operate in general, "not specifically your clients," and was a fair argument.

On appeal, Ruiz contends the prosecutor in effect argued that Ruiz had the state of mind of a murderer or robber and "a propensity to commit crimes." But the trial court overruled the objection, stating the argument was about how gangs generally operate and not specifically about Ruiz and Garcia. Moreover, Officer Perez had previously testified that M-S 13 gang's primary activities included robbery and murder. In this context, the prosecutor's statement neither infected the trial with unfairness nor involved the use of deceitful or reprehensible methods.

B. Asking Jurors to Imagine Living in a Gang Neighborhood and Reference to Disappearing Witnesses

Defense counsel gave a closing argument referring to a quote from Mark Twain "that if you tell the truth, you don't have to remember anything" and then reviewed the multiple versions of the events given by Sanchez and called into question Sanchez's credibility. In his rebuttal argument, the prosecutor argued that Mark Twain never had to deal with living in a neighborhood with gangs, where "if you come to court and identify the suspects that attack you, your family may get killed." The prosecutor asked the jurors to imagine living somewhere where gang members "will steal something from you – for example, . . . your bike and then you're afraid to report it to the police" and "you will see that same gang member riding around the neighborhood with your bike," or where you could not wear a nice item of clothing because it might be taken away. The prosecutor argued this context was

important to explain why Sanchez would tell a different version of events to jurors than what he previously reported.

Later in his rebuttal, the prosecutor argued that Sanchez was threatened by gang members to get him to change his story, stating "This is how gangs work in Los Angeles. . . . This is how the cases go down. A lot of times we don't even get the witnesses to come to court."

Ruiz contends the prosecutor's arguments invited the jury to subjectively place itself in the shoes of citizens terrorized by gang activity, thereby appealing to their sympathies and passions. He contends the prosecutor further appealed to their emotions by "essentially inviting the jury to punish [appellant] for what other gang members have gotten away with" when he mentioned witnesses "disappearing" or being murdered. Moreover, Ruiz argues, these claims about how gangs in Los Angeles work and other gang cases effectively made the prosecutor an unsworn witness for the prosecution. The arguments are without merit.

Here, the prosecutor asked the jury to imagine living in a gang neighborhood to rebut defense counsel's argument based on the Mark Twain quote on truthfulness. By explaining why a victim might change his story after his initial statement to the police, the prosecutor was rebutting defense's argument that Sanchez was not credible. Thus, the situation here is distinguishable from cases where the prosecutor asks the jury to "imagine what the victim experienced" and does not have the "unusually potent prejudicial impact" attributed to such tactics. (See, e.g., *People v. Fields* (1983) 35 Cal.3d 329, 362.)

Likewise, the prosecutor did not act as an unsworn witness. Officer Perez had testified that murder and witness intimidation

were primary activities of the M-S 13 gang, and that Ruiz, as well as Garcia, was an admitted member. Sanchez stated that he was afraid and did not want to testify because he lived in the "gang's hood." Thus, the prosecutor's argument that in some cases witnesses would not come to court or that victims might be afraid to testify for fear of retaliation against themselves or their families constituted fair comment on the evidence, including reasonable inferences and deductions to be drawn therefrom. (See *People v. Wharton* (1991) 53 Cal.3d 522, 567.)

II. Ineffective Assistance of Counsel

Appellant contends his trial counsel provided ineffective assistance when he did not request a limiting instruction prohibiting the jury from using gang evidence to prove criminal propensity, citing CALCRIM No. 1403.[4]

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[4] CALCRIM No. 1403, entitled "Limited Purpose of Evidence of Gang Activity," states: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] [The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related (crime[s]/ [and] enhancement[s]/ [and] special circumstance allegations) charged(;/.)] [¶] [OR] [¶] [The defendant had a motive to commit the crime[s] charged(;/.)] [¶] [OR] [¶] [The defendant actually believed in the need to defend (himself/herself)(;/.)] [¶] [OR] [¶] [The defendant acted in the heat of passion(;/.)] [¶] [OR] [¶] [<insert other reason court admitted gang evidence>.] [¶] [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/she) has a disposition to commit crime."

"The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) A criminal defendant must show both deficient performance—"that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates," and prejudice—"that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 386; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

"'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] . . . . '"Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' [Citation.] If the record on appeal ""sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,'" and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.'" (*People v. Vines* (2011) 51 Cal.4th 830, 876.) Thus, "[i]n the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel . . . unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Here, we cannot conclude that there could be no conceivable reason for trial counsel's decisions not to request a limiting instruction. A reasonable attorney may tactically conclude a limiting instruction might be riskier than whatever "questionable benefits" such an instruction might provide. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053.) Here, Ruiz's trial counsel argued that Sanchez was not credible and that none of his versions of the events was supported by the independent witnesses. Thus, his counsel argued that the gang allegations did not matter, as the evidence did not prove beyond a reasonable doubt that Sanchez was the victim of a robbery or assault. In this context, counsel might reasonably have concluded that a limiting instruction highlighting the gang evidence, which included criminal acts by other M-S 13 members was tactically risky.

Ruiz argues that the prosecutor suggested in his closing argument that Ruiz had a propensity to commit crime and his trial counsel "highlighted the gang evidence in his closing argument in arguing it was being used to sway the jurors' emotions. [Citation.] Therefore, Ruiz asserts, there would be no reason for counsel to avoid the requesting instruction." A review of the cited portion of the reporter's transcript shows, however, that counsel mentioned briefly that the prosecutor's comments about "murders and whatnot" were not what the case was about, but were an attempt to appeal to the jury's emotions. Moreover, as the jury was given the majority of its instructions prior to closing arguments, we cannot conclude that there could be no conceivable reason for trial counsel not to request a limiting instruction on gang evidence to be given after closing arguments, when the gang evidence would have been further highlighted due

to the limiting instruction's isolation from other evidentiary instructions.[5]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.

[5] The trial court instructed the jury after closing argument regarding non-evidentiary issues, such as deliberation procedure.