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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVE VALDIVIA,

Defendant and Appellant.

2d Crim. No. B229337
(Super. Ct. No. VA101903)
(Los Angeles County)

Steve Valdivia appeals the judgment following his conviction for shooting at an occupied vehicle (Pen. Code, § 246)¹ and assault with a semiautomatic firearm (§ 245, subd. (a)(2)). The jury found to be true an allegation that he personally used a firearm in the commission of both offenses. (§ 12022.5, subd. (a).) Also, in a bifurcated trial, the jury found that the shooting at an occupied vehicle offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Valdivia was sentenced to 15 years to life pursuant to section 186.22, subdivision (b)(4) for that offense. A six-year sentence for the assault was imposed and ordered to run concurrently. The firearm enhancements were stayed pursuant to section 654. Valdivia contends the trial court erred in admitting gang evidence in the guilt phase of the trial, and that the prosecution's

¹ All statutory references are to the Penal Code unless otherwise stated.

gang expert gave improper opinion testimony in the trial of the gang enhancement. He also claims there was insufficient evidence to support the gang enhancement. We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 4:15 a.m. on August 1, 2007, Los Angeles Sheriff's Deputy Shawn Dumser heard gunshots while on patrol in Hawaiian Gardens, California. Deputy Dumser saw a green Honda Civic in the area and pursued and stopped the vehicle. Dumser was acquainted with the Honda driver, Edward Solorzano, and knew him to be a gang member.

Solorzano was frightened and yelled: "Dumser. They're shooting at me. Those fuckers in the white car are shooting at me." Just then, the white car came into view. Officer Dumser pursued the car which stopped in a parking lot. Three men were in the car. The men were later identified as Valdivia, Duby and Aquino. Dumser detained Aquino. Valdivia and Duby ran away.

Another deputy responding to the scene saw Valdivia and Duby running. The deputy captured Duby but Valdivia climbed a fence into a nursery. A third deputy, positioned near the nursery, arrested Valdivia. A .22-caliber magazine with three bullets was recovered in a search of the area around the nursery.

In a post-arrest interview with Deputy Dumser, Valdivia admitted that he was becoming a member of the Chivas gang that night. He also admitted that he had been armed with a gun and threw the gun as far as he could when he climbed over the fence into the nursery.

On August 7, 2007, Detective Brandt House interrogated Solorzano in jail. Solorzano told House that, while driving around on the night of the shooting, he noticed he was being followed by a white car. He accelerated and ran multiple red lights in an attempt to get away, and several shots were fired at his vehicle by someone in the white car. Solorzano admitted he was a member of the Hawaiian Gardens gang, and believed the men in the white car were from the rival Chivas or Artesia gang.

The trial court granted a defense motion to bifurcate trial of the gang enhancement from trial of the offenses. During trial of the offenses, Detective Brandt

House testified as a gang expert. He testified that Solorzano was a member of the Hawaiian Gardens gang, Aquino was a member of the Chivas gang, and Valdivia and Duby were "affiliates" of the Chivas gang. He testified that the shooting occurred in the territory of the Hawaiian Gardens gang. House also testified that the Chivas gang was the same gang as the Artesia gang. Also, at trial Solorzano recanted his statements to Detective House and preliminary hearing testimony consistent with those statements by claiming a total lack of memory of the incident.

After the verdict on the offenses, the gang enhancement trial was conducted. Detective House also testified as a gang expert in the enhancement trial. He testified that Hawaiian Gardens and Chivas/Artesia were criminal street gangs, and also gave testimony establishing two prior predicate offenses. He opined that the offenses were committed for the benefit of the Chivas/Artesia gang based on a hypothetical which tracked the evidence.

DISCUSSION

No Error in Admission of Gang Evidence

Valdivia contends the trial court erred by admitting gang evidence during trial of the charged offenses. He argues that the gang enhancement had been bifurcated, and gang evidence was irrelevant to his guilt of the offenses. We disagree.

Gang evidence is admissible if relevant to a material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) "[E]vidence 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." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) In particular, opinion testimony by a gang expert may be admitted to show the motive for a particular crime when the very reason for the crime is gang related. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; *People v. Ruiz* (1998)

62 Cal.App.4th 234, 239.) Admission of gang testimony is reviewed for abuse of discretion, and the trial court's ruling will be upheld absent a showing that the court acted in an arbitrary, capricious, or patently absurd manner. (*Avitia*, at p. 193; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.)

Here, the gang evidence admitted during the guilt phase of the trial consisted of testimony by Detective House of the Los Angeles Sheriff's Department regarding the relevant gang membership of Valdivia and others, the rivalry between the Hawaiian Gardens and Chivas/Artesia gangs, and the statements made by Solorzano to him before trial. House also testified to the nature of gangs, the importance of criminal acts to the reputation of gang members, the marking of gang territory, and the preference for committing crimes in groups. There was no objection to any of the testimony.

This evidence was relevant and highly probative regarding intent and the motive for the commission of the charged offenses. The testimony showed that the offenses were gang motivated and had no other reasonable explanation. None of the evidence was so inflammatory as to sway a reasonable jury.

Valdivia argues that the mere fact that the trial of the gang enhancement was bifurcated from the guilt trial is sufficient to establish error in the trial court's admission of any gang evidence. Judicial authority and the facts of the case are both to the contrary. In cases involving gang allegations, a trial court has discretion to bifurcate the trial of a gang enhancement. (*People v. Hernandez, supra*, 33 Cal.4th at pp. 1044, 1049.) Although gang evidence is inextricably intertwined with the offense, bifurcation may be appropriate in certain cases because evidence of predicate offenses offered to establish a pattern of criminal gang activity generally do not relate to the charged offense and may not even relate to the defendant. (*Id.* at pp. 1048-1049.) Here, the record shows that bifurcation was ordered at Valdivia's request to prevent the jury from hearing evidence of the predicate offenses during the guilt trial. Nothing suggests that the bifurcation was intended to prevent admission of other gang evidence.

Gang Enhancement Supported by Substantial Evidence

Valdivia contends there was insufficient evidence to support the gang enhancement because the prosecution only presented evidence of one predicate act by the Chivas gang. We disagree.

When determining whether the evidence was sufficient to sustain an enhancement, we review the entire record in the light most favorable to the judgment to determine ". . . whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457.) We draw all reasonable inferences in support of the judgment and reversal is not warranted unless there is no substantial evidence to support the conviction under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *Duran*, at p. 1457.) Here, substantial evidence supports the judgment.

A "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal" that has as one of its "primary activities" the commission of one or more statutorily enumerated criminal offenses and through its members engages in a "pattern of criminal gang activity." (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320.) To establish a pattern of criminal gang activity, the prosecution must prove the commission of two or more predicate offenses committed on separate occasions by two or more gang members. (§ 186.22, subd. (a), (e) & (i); *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1457.) The charged offense may serve as a predicate offense. (*Duran*, at p. 1457.)

Here, the prosecution offered evidence of one qualifying offense committed by an Artesia gang member, and another qualifying offense committed by a member of the Chivas gang. The prosecution's gang expert, however, testified that the Artesia and Chivas gangs were elements of the same criminal street gang. He testified that Chivas "was once a very large clique or subgroup of Artesia; it got so big it became its own

gang. However, Chivas and Artesia for all intents and purposes--should be considered the same gang, because they are completely loyal to one another."

Valdivia claims the testimony of Detective House did not establish Chivas and Artesia were the same gang. Valdivia argues that the evidence shows that Chivas and Artesia were separate and distinct gangs even though they shared a common origin and continuing loyalty and allegiance to each other. We note that Detective House often referred to the Chivas and Artesia gangs separately, but concluded that they were a single criminal street gang "for all intents and purposes." Although somewhat idiomatic, the phrase "for all intents and purposes" means for every functional, relevant or material purpose. Despite any semantic issue, the gang expert concluded that Chivas and Artesia were a single gang based on his unchallenged expertise. The predicate acts element of the gang enhancement is a factual question and the jury could reasonably interpret House's testimony as establishing that Chivas and Artesia was a single gang. In any event, there was one uncontested predicate act, and the current offense qualifies as a second predicate act. (*People v. Duran, supra*, 97 Cal.App.4th at p. 1457.)

No Error in Use of Actual Names in Hypothetical Question

Valdivia contends that the opinion by gang expert House that the offense was committed for the benefit of a gang was inadmissible because the prosecutor improperly used the names of Valdivia and his companions in the hypothetical question upon which House's opinion was based. He argues, in substance, that the testimony of the gang expert usurped the role of the jury in determining guilt because House's opinion was tantamount to a statement of his belief that Valdivia was guilty. We disagree.

It is settled that expert testimony is admissible to explain how and why a crime was committed to benefit a gang. (§ 186.22, subd. (b)(1); *People v. Gardeley* (1996) 14 Cal.4th 605, 619.) "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1551, fn. 4.)

Valdivia relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644 which has been limited and disapproved in part. (*People v. Vang* (2011) 52 Cal.4th 1038, 1049.) *Vang* states that there is a critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves. (*Ibid.*) There is no error with a hypothetical question based on the evidence because it does not request an opinion on whether the defendant committed the offense. (*Ibid.*)

Detective House opined that a shooting committed in the manner described in the hypothetical question was gang related and committed to benefit the gang. The hypothetical was properly rooted in the facts of the case. The use of actual names did not convert House's testimony into an opinion on how the jury should decide the case. A hypothetical question is proper when "directed to help[] the jury determine whether [the defendant], not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*People v. Vang, supra*, 52 Cal.4th at p. 1046.)

Also, the jury was instructed that it was not required to accept expert testimony as correct. "You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable." (CALJIC No. 2.80.) Also, "[i]n examining an expert witness, counsel may ask a hypothetical question. . . . [¶] In permitting this type of question, the court does not rule, and does not necessarily find that all of the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved." (CALJIC No. 2.82.) It is presumed that the jury understood

and followed these instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Robert J. Higa, Judge
Superior Court County of Los Angeles

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