Filed 5/23/12 P. v. Mancera CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MANCERA, Defendant and Appellant.	B233107 (Los Angeles County Super. Ct. No. MA046170)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed as modified.

Deborah L. Hawkins, 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, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * *

A jury convicted appellant Anthony Mancera of first degree murder in violation of Penal Code section 187 (count 1) and two counts of assault with a firearm in violation of section 245, subdivision (a)(2) (counts 2 & 3).[1] In connection with count 1, the jury also found true that appellant personally used a firearm and caused great bodily injury or death, a violation of section 12022.53, subdivision (d). In connection with counts 1 and 3, the jury found true that the crimes were committed for the benefit of a criminal street gang, in violation of section 186.22, subdivision (b).

At sentencing, the trial court chose count 3 as the base count and sentenced appellant to the midterm of three years, plus a consecutive five-year term for the gang enhancement. The court sentenced defendant to a consecutive one-year term (one-third of the midterm of three years) for count 2. Finally, the court sentenced defendant to a full-consecutive indeterminate term of 25 years to life for count 1, followed by a consecutive indeterminate term of 25 years to life for the personal use of a firearm enhancement, plus a consecutive determinate term of 10 years for the gang enhancement.

On appeal, appellant contends that (1) he did not receive a fair trial because the trial judge demonstrated judicial bias, (2) the evidence is insufficient to sustain the gang enhancement found true in connection with counts 1 and 3, (3) the evidence is insufficient to sustain the finding of premeditation and deliberation required for first degree murder, and (4) the trial court erred in imposing a consecutive 10-year term for the gang enhancement in connection with count 1. With respect to the first three contentions, we disagree and therefore affirm appellant's convictions and enhancement findings. With respect to the fourth contention, respondent concedes – and we agree – that the additional 10-year term was error and we therefore order it stricken.

FACTUAL BACKGROUND

1. Summary

On the evening of July 2, 2009, in Lake Los Angeles, appellant fired a single shot into the chest of Sergio Santiago and killed him (count 1). When Santiago's friend,

---

[1] All statutory references, unless otherwise noted, are to the Penal Code.

Richard C., approached Santiago immediately after the shooting, appellant pointed the gun at him (count 3). In a separate incident that occurred approximately 15 to 20 minutes prior to the shooting of Santiago, appellant pointed a handgun at Rick G. (count 2).

2. The Parties Involved

Appellant, who went by the moniker "Scrappy," and codefendant, Christopher Falcon, who went by the moniker "Capone," were members of the "Drifters" criminal street gang. The Drifters also went by "West Side Drifters" and "DFS."[2] Although Santiago sometimes tagged with a crew called "Straight Coming Up" or "SCU," he denied being one of its members. Santiago went by the moniker "Verse."

Jennifer S. had been dating Santiago for approximately one year at the time of his death. Prior to dating Santiago, Jennifer S. had dated appellant for about nine months. Appellant and Santiago did not get along because of their relationships with Jennifer S.

3. Incidents Prior to the July 2, 2009 Shooting

In October 2008, Jennifer S. witnessed a confrontation between appellant and Santiago at the Saddleback Market. Santiago, Jennifer S., and a few others were about to enter the market when appellant, Falcon, and three others – including another Drifters member named Carlos – approached them carrying bats and sticks with nails. Appellant's group called out, "West Side Drifters" and attempted to force Santiago into a fight. Santiago responded, "Come on, let's fight." Falcon called out "cuete" and lifted his shirt, revealing the butt of a handgun. At Jennifer S.'s urging, Santiago got back into the car with her. Appellant and his group ran off behind the building.

About four months before Santiago's death, appellant, Falcon, and a third individual stood in front of Jennifer S.'s house and called for Santiago to come outside. Both appellant and Falcon also shouted, "West Side Drifters" and called Santiago a "faggot." The next day, Jennifer S. observed new tagging at her neighbor's house across the street. The tagging read either "West Side Drifters" or "DFS" and "187."

---

[2] Trial in this case commenced as a joint trial of both appellant and Falcon. Falcon pleaded no contest to second degree murder after the first day of testimony and is not a party to this appeal.

About two or three months before he died, Santiago showed up at Jennifer S.'s house with fresh scrapes on his face and blood on his clothing. Santiago said that he had been in a fight with appellant and, during the fight, had broken appellant's nose. According to Santiago, two of appellant's friends were present when the fight occurred.

4. The July 2 Shooting

On the evening of July 2, 2009, Rick G. and a friend were in front of Rick G.'s house at the intersection of Coolwater Avenue and 172nd Street in Lake Los Angeles. Appellant, his girlfriend, and Carlos passed by Rick G.'s house. Carlos asked Rick G. if he wanted "to chill." When Rick G. approached Carlos, appellant punched Rick G. and the two began fighting. During the fight, appellant pulled a handgun from his waistband and asked, "Do you want to get loud?" Carlos told appellant to put the gun away, which he did. Rick G.'s grandmother came out and yelled for him. Rick G. responded by going back inside his house.

Later that same evening, Santiago, Richard C., and Gilbert S. drove to Rick G.'s house to play video games. When they arrived, appellant, Falcon, and Carlos were standing near Rick G.'s house. Santiago got out of the car and walked toward the group. An argument began and Richard C. grabbed a baseball bat "to help his friend." Santiago took off his shirt in preparation for the fight.

Richard C. swung the bat at Falcon but missed. Falcon told appellant to "pull out the cuete." Appellant pulled a handgun from his waistband and fired a single shot into Santiago's chest. The bullet struck Santiago in the heart and killed him.

As Santiago lay on the ground, Falcon approached and said, "That's how we do it." Appellant stated "Drifters."

After the shooting, Richard C. ran to Santiago to help him. Appellant pointed the gun at Richard C. Richard C. then ran away to find Santiago's family.

DISCUSSION

I. The Trial Court Did Not Demonstrate Judicial Bias

Initially, appellant contends that his convictions must be reversed because the trial judge was biased against him. He cites to a number of evidentiary rulings and comments by the trial judge which he claims demonstrate judicial bias.

A. Appellant Waived His Right to Raise the Issue of Judicial Bias

Appellant concedes that he did not raise the issue of judicial bias in the court below. He has therefore waived that issue on appeal. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110 (*Farley*); *People v. Samuels* (2005) 36 Cal.4th 96, 114.) Nevertheless, in an abundance of caution, we will also address his contentions on the merits. (*Farley*, *supra*, at p. 1110; *Samuels*, *supra*, at p. 114.)

B. Appellant's Claim of Judicial Bias Is Without Merit

1. Applicable Law and Standard of Review

Under both the California and United States Constitutions, a criminal defendant has a due process right to an impartial trial judge. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111 (*Guerra*); see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [U.S. Constitution].) The federal due process clause requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant and no interest in the outcome of the case. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905.)

Judicial impartiality, however, does not mean that a trial judge lacks the means to control the courtroom or lawyers who may be unruly. Section 1044 unequivocally states a trial judge's duty during the conduct of a criminal trial:

> "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of the evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

To that end, it is within a trial court's discretion to reprimand an attorney, even harshly if the circumstances require, if the attorney engages in inappropriate behavior, such as ignoring the court's instructions or asking inappropriate questions. (*Guerra*, *supra*, 37 Cal.4th at p. 1111; *People v. Snow* (2003) 30 Cal.4th 43, 78.) Mere expressions of

opinion by a trial court, based on actual observations of the witnesses and evidence presented, do not demonstrate bias. (*Guerra*, *supra*, at p. 1111.) Numerous rulings by a trial court against a party – even if erroneous – do not establish judicial bias, especially when such rulings are subject to review. (*Farley*, *supra*, 46 Cal.4th at p. 1110.)

On appeal, we determine only whether any judicial misconduct or bias was so prejudicial that it deprived the defendant of a fair, as opposed to a perfect, trial. (*Guerra*, *supra*, 37 Cal.4th at p. 1112.)

We address each of appellant's contentions of judicial bias at length and in turn. Whether considered collectively or individually, these allegations do not demonstrate judicial bias, let alone the absence of a fair trial.

2. Cross-examination of Jennifer S.

Without first eliciting a prior inconsistent statement, defense counsel inquired on cross-examination of Jennifer S. whether she remembered her answer, during the preliminary hearing, to the question of whether she disliked appellant at the time of the shooting. The prosecutor objected on the ground of "improper impeachment" and the trial court sustained the objection stating, "No foundation for it." Defense counsel then asked, "Did you testify that on the date --" at which point the trial court interrupted, "Counsel. Counsel." The following then occurred:

"[DEFENSE COUNSEL]: What? I'm making a foundation.

"THE COURT: No you're not. You have to ask her here before you introduce any prior testimony. At this point, there's nothing inconsistent.

"[DEFENSE COUNSEL]: Did you testify --

"THE COURT: No. Counsel, please approach."

The trial court then conducted an unreported sidebar, after which the following occurred:

"[DEFENSE COUNSEL]: Ms. Santiago [*sic*], as we sit here today, did you have animosity toward Mr. Mancera on July 3, 2009? [*sic*]

"[JENNIFER S.]: What does that mean?

"[DEFENSE COUNSEL]: Did you have a dislike for Mr. Mancera?

"[JENNIFER S.]: Yes.

"[DEFENSE COUNSEL]: Is that what you remembered [*sic*] testifying to on the date of the preliminary hearing?

"[PROSECUTOR]: Your Honor, I'm going to object. Improper impeachment.

"THE COURT: Counsel, give me a page cite to the reference.

"[DEFENSE COUNSEL]: Thirty-four and it's line four.

"THE COURT: Counsel, will you approach sidebar."

Thereafter, another unreported sidebar occurred, immediately followed by a reported hearing outside the presence of the jury. During the reported hearing, defense counsel stated that in order to show bias, he wanted to ask Jennifer S. if she (1) wanted appellant to go to prison and (2) had testified to that same fact at the preliminary hearing. The trial court sustained the prosecutor's relevance objection to that line of questioning, finding that the proffered testimony was "not evidence of bias or a motive to lie" under the circumstance of a witness whose boyfriend was the murder victim. The court also found that because the proffered testimony referenced punishment, it was therefore likely to "[play] on [the] passions, prejudice, and sympathy" of the jury.

Appellant contends that the trial court "ignored" defense counsel's argument and "transformed clear evidence of witness bias" into inappropriate references to punishment. This, appellant argues, shows bias. After considering all of the circumstances surrounding this incident, we disagree.

Defense counsel's initial questions of Jennifer S. on this topic were clearly objectionable insofar as they sought to elicit from her preliminary hearing testimony that was not yet inconsistent with anything she testified to at trial. (See Evid. Code, §§ 770, 1235.) Moreover, by responding "What? I'm making a foundation," when the trial court interrupted what was clearly going to be another objectionable question, counsel began arguing with the trial court in front of the jury. It would have been appropriate, under Penal Code section 1044, for the trial judge immediately to admonish counsel regarding this; that she chose not to shows restraint.

It was not until, apparently, the unreported sidebar that defense counsel finally clarified what he intended to show through his cross-examination: bias on the part of Jennifer S., as demonstrated by her current desire that appellant go to prison and her earlier preliminary hearing testimony to the same effect.

Jennifer S.'s subjective desire that appellant be punished by a state prison term is arguably evidence of bias and thus may have had some relevance to her credibility as a witness. Nevertheless, it also raises the issue of punishment, at least incidentally, which is something a jury is not to consider. Under the circumstances, the trial court could have concluded that Jennifer S.'s romantic relationship with the victim at the time of his death was more than sufficient to establish bias and that any references to punishment were excludable as substantially more prejudicial than probative. (See Evid. Code, § 352.) In any event, the exclusion of that evidence for the reasons stated by the trial court, even if error, does not suggest judicial bias, especially under the circumstances as recounted above. (See *Farley, supra*, 46 Cal.4th at p. 1110 [erroneous rulings – even if numerous – do not by themselves demonstrate judicial bias].)

3. Redirect Examination of Juliana P.

Juliana P. was a percipient witness to the Santiago shooting and identified appellant as the person who shot Santiago. On redirect examination, the prosecutor asked Juliana P. if she feared for the safety of her family. Defense counsel objected based upon lack of foundation, which the trial court overruled. Juliana P. answered that she did fear for her family's safety, in part because of her testimony. The prosecutor then asked Juliana P. if she had been threatened or contacted about her testimony. Defense counsel again objected, arguing that the question was beyond the scope of cross-examination. Without expressly ruling on the objection, the trial court allowed the prosecutor to re-open. Juliana P., apparently distraught and very emotional, then testified that an inmate from the county jail had told her not to testify against appellant.

On recross-examination, Juliana P. clarified further what had occurred. An old friend of hers who was also incarcerated in the county jail ran into appellant. Appellant told him about his case and Juliana P.'s status as a witness. The inmate contacted his

mother, who telephoned both Juliana P. and her mother. The inmate's mother asked that Juliana P. not testify against appellant because "the poor kid is doing life." The inmate's mother did not threaten Juliana P. in any way.

Defense counsel requested a hearing outside the presence of the jury immediately after Juliana P.'s testimony. During the hearing, he argued that Juliana P.'s testimony regarding this incident was irrelevant because there was no threat or coercion involved. In its denial of the implicit defense request to strike, the trial court ruled:

> "Actually counsel, the question that was asked of the witness who was clearly upset and crying and very hesitant in her answer, the question was has she been pressured by anyone not to testify. Pressure can come in many different ways, not limited to threats. Clearly, she felt pressure when the -- it sounds like a cellmate of your client got ahold of his mother, gave her details about this case. That inmate's mother then called [Juliana P.'s] mother and called her, and by that interaction she felt pressure.
>
> "The case law is very clear that whether a witness is threatened or pressured in other ways by other people, those pressures are relevant because it goes to witness' state of mind when she's testifying. And it goes both ways.
>
> "If somebody changes their testimony because of those pressures or doesn't change their testimony despite those pressures, both of those incidents are relevant to the witness' credibility.
>
> "And so the motion to strike that testimony is respectfully denied."

In his brief, appellant contrasts this ruling with the court's earlier ruling precluding Jennifer S. from testifying that she wanted appellant to go to prison. According to appellant, "the court's approach was quite different" in these two situations and is evidence of its bias against him.

We agree with appellant that this testimony, on balance, probably should have been excluded by the trial court *upon a timely and proper objection*. We disagree, however, that defense counsel made a timely and proper objection. In any event, we disagree as well that it is a manifestation of judicial bias or that it is anything more than a common trial court error.

Threats or other pressures not to testify are often admissible to explain inconsistencies in testimony or a feigned lack of recollection. (See generally, *Guerra*,

supra, 37 Cal.4th at p. 1141; *People v. Burgener* (2003) 29 Cal.4th 833, 869.) In this case, however, Juliana P. testified about the shooting without impeachment by prior statements or testimony and did not appear to feign a lack of recollection of any significant facts. Thus, there were no credibility issues that needed to be explained by the existence of threats or other pressures not to testify.

Here, however, defense counsel did not initially raise the proper objection. When the prosecutor first asked Juliana P. about threats to her family, counsel objected based on lack of foundation. The proper objection was relevance. When the next question was asked about threats to her family, defense counsel again objected, this time contending that the question exceeded the scope of cross-examination. Again, the proper objection was relevance. After the witness' testimony was completed, counsel finally – and belatedly – argued relevance in his implicit motion to strike. Even then, though, his argued theory of irrelevance was flawed. The testimony was irrelevant not because the pressure upon Juliana P. involved a plea for sympathy rather than a threat of violence, but because Juliana P. had not been impeached in any significant way by prior statements or a feigned lack of recollection.

In any event, by the time defense counsel finally argued relevance, the circumstances of the contact had been thoroughly fleshed out in cross-examination to show that appellant had not instigated it and that the contact had been pleading, rather than threatening, in nature. The trial court could have concluded that the motion to strike was "too little, too late" and that the incident, as fully revealed during cross-examination, was not prejudicial to appellant. In any event, and under the circumstances described above, the trial court's ruling, even if error, does not demonstrate judicial bias. This is so even when contrasted with the court's ruling regarding cross-examination of Jennifer S. (See *Farley*, *supra*, 46 Cal.4th at p. 1110 [erroneous rulings – even if numerous – do not by themselves show judicial bias].)

4. The Request to Voir Dire Officer Del Rio

Two gang experts testified in this case. The first, Los Angeles Police Officer Juan Del Rio, testified primarily about the Drifters gang as it originated in the 1960's within

the City of Los Angeles as well as its migration to other parts of Los Angeles County. He also testified about the predicate acts required for the gang enhancement. Los Angeles County Deputy Sheriff Richard Cartmill, a detective assigned to the Lancaster station, testified about the Drifters and SCU as they operated in the area of Lake Los Angeles. Prior to allowing two gang experts to testify, the trial judge conducted an Evidence Code section 402 hearing (402 hearing) where she heard argument from both sides regarding the propriety of the two gang experts. The court decided, under the circumstances of this case, that the testimony of both experts was relevant. She added, however, that the subject matter of the various defense objections would be appropriate subjects for cross-examination and defense closing argument.

During direct examination before the jury, Officer Del Rio testified about his qualifications as a gang expert. When the prosecutor began asking substantive questions about the Drifters, defense counsel asked for permission to "take the officer [on] voir dire." The trial court denied the request. Later, the prosecutor asked Del Rio about the Drifters' migration from the City of Los Angeles to other parts of the county. Del Rio began his answer with a reference to conversations he had had with older gang members, which prompted the following:

> "[DEFENSE COUNSEL]: Objection. That calls for hearsay.
>
> "THE COURT: Overruled. He can give us his opinion, counsel, and it can be based on hearsay. [¶] Go ahead.
>
> "[DEFENSE COUNSEL]: It is not his opinion, Your Honor. That is him saying –
>
> "THE COURT: Sir, please don't argue with me. If you want to be heard sidebar, ask to be heard sidebar.
>
> "[DEFENSE COUNSEL]: I want to be heard sidebar.
>
> "(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR:)
>
> "THE COURT: All right, counsel. Before you speak, a couple of things: You have become increasingly loud and argumentative in your tone with this court. I kindly ask you to take a breath. I asked you repeatedly not to make speaking objections and also not to argue with the court. As I said from day one, I have a microphone at sidebar. I'm more than happy to

hear you here. [¶] Now, before you begin, let me be very clear about this. This is an expert witness. He's about to state his opinion. He must state what his opinion is based on. Now, there are two ways we can go about it. He can give us his opinion and then he can state the reasons for it; or he can give us the background for the opinion and then tell us where that led to. In [the prosecutor's] questioning, I noticed a pattern of he lists the basis before the opinion. Under the law, it can be done either way. Clearly, if he states the basis and doesn't give an opinion, it's subject to a motion to strike but I can't be required to dictate the order in which the prosecution asks the questions. In terms of the law, he can give his opinion and he has to give the basis and it can be [in] either order. [¶] I will hear from you.

"[DEFENSE COUNSEL]: This all could have been avoided. I am getting a little bit upset. You're right. It's not appropriate. If I were to be allowed to voir dire him -- in 20 years, I've never been denied an opportunity to voir dire an expert witness. Twenty years. And, I mean, I don't – if the court would give me a reason why maybe --

"THE COURT: Again, counsel, I'm not required to have anybody question in the order you would like. At the point when you ask [*sic*] to voir dire him, this court was satisfied that he stated enough basis to give an opinion. Certainly, you will be given the opportunity to cross-examine him at any point if you feel that you can go after his expertise. That's a question for the jury preliminarily. He has enough of a basis to give an opinion. That's all that needs to be done. If I were not satisfied about it, then I would have granted -- actually, I'm not even sure in this circumstance before the jury. [¶] I guess my feeling also is if you strongly believe that they do not have the basis for an expert opinion, you could have done a 402 [hearing] and explored it. At the point you asked to voir dire him, this court was already satisfied that he had met that preliminary standard. Again, you may be unhappy with my ruling, but your solution to that is not to argue with me at every turn. So --

"[DEFENSE COUNSEL]: This going [*sic*] to be either in a 402 [hearing]. I wasn't trying to prevent him from testifying. I was trying to say if he does testify, I should have the right to inquire as to -- and not just be satisfied that the court is satisfied.

"THE COURT: And, counsel, that's what cross-examination is about. He's testifying. You'll have the opportunity to cross.

"[DEFENSE COUNSEL]: The court cut my legs out to ask him questions that I'm satisfied doing that way. In other words, if the court's going to allow me to question him concerning his expertise --

> "THE COURT: Of course I am, counsel. And, again, this appears to me that you have in your mind the order that questions need to be asked, and it's just not so. I have not cut your legs out from under you in any of your cross-examinations. I have ruled appropriately on objections from both sides. I will continue to do so."

Appellant contends that the trial judge's conduct in connection with Officer Del Rio's testimony demonstrates judicial bias because she (1) refused to allow defense voir dire of Del Rio, (2) allowed Del Rio to testify to hearsay rather than an opinion based on hearsay, (3) did not let defense counsel state his argument before beginning a "long lecture" as if counsel did not know the law, and (4) referred to him as "counsel" rather than by name. Again, we disagree that any of these allegations reveal judicial bias.

The trial court's refusal to interrupt direct examination of Officer Del Rio with defense voir dire regarding his expert qualifications was a proper exercise of its discretion. The trial court had properly concluded, based upon the initial direct testimony, that Del Rio was sufficiently qualified to testify as an expert. (See Evid. Code § 720, subdivision (a); *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 274 [whether a witness is qualified to testify as an expert is committed to the sound discretion of the trial court whose decision will not be reversed absent a "manifest abuse" of discretion].) Moreover, the court had previously stated at the 402 hearing that this, as well as other areas, could be explored on cross-examination. Finally, the trial court reiterated, during the sidebar hearing, that defense counsel would be allowed to inquire into this area during cross-examination. Nothing about the court's ruling suggests bias, or even error.

Similarly, the trial court's rulings on defense counsel's hearsay objections were also correct. Del Rio was explaining the factual basis of his opinion by referencing conversations he had had with older gang members about the gang's migration to northern Los Angeles County. It is hornbook law that a qualified expert may rely on and, to the extent that he does, testify to, hearsay in support of his opinions. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618, 620.)

Next, the trial court's so-called "long lecture" of defense counsel was also appropriate. First, it took place at sidebar and thus had no impact on the members of the

jury, who were the actual fact finders in this case. More importantly, it was an appropriate exercise of the trial court's inherent authority to control its courtroom under section 1044. Prior to this sidebar, defense counsel had openly argued with the court in front of the jury on at least two occasions. Defense counsel had also been admonished at least twice about speaking objections before the jury. The trial court indicated that immediately prior to the sidebar, defense counsel had raised his voice to the court and he essentially admitted that fact during the sidebar. Under these circumstances, there was nothing inappropriate about the admonition – or lecture if that is what appellant wishes to call it – which the court delivered prior to hearing the basis of defense counsel's objection.

Insofar as the trial court referred to the prosecutor by name and defense counsel as "counsel," we find absolutely no manifestation of judicial bias. As pointed out by the People in their respondent's brief, at other times during the trial, the court addressed defense counsel by name and also addressed the prosecutor as "counsel."

5. The Prosecutor's Objection

During her testimony, Jennifer S. testified that Santiago was not a member of SCU and that SCU only had about five members. Defense counsel, in an apparent attempt to impeach Jennifer S., asked the following questions of Detective Cartmill on cross-examination:

> "[DEFENSE COUNSEL]: Are you aware of whether the victim in this case was a member of this of Straight Coming Up?
>
> "[DET. CARTMILL]: That is what I – that's the information that I have, yes.
>
> "[DEFENSE COUNSEL]: Is it likely that his girlfriend of approximately 11 months would know this?
>
> "[DET. CARTMILL]: Yes.
>
> "[DEFENSE COUNSEL: Is it likely that his girlfriend of this amount of time would be under the impression that this particular gang had four or five members?
>
> "[PROSECUTOR]: Your Honor, that calls for speculation.
>
> "THE COURT: Sustained.

"[DEFENSE COUNSEL]: Would it be a fair statement to say that somebody who thought that this gang had four or five members didn't know that much about it?

"[PROSECUTOR]: Objection. Calls for speculation.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: Hypothetically, if somebody were to represent themselves as -- represent themselves as knowing about this gang Straight Coming Up and then ask how many members it had --

"[PROSECUTOR]: Your Honor, I'm going to hypothetically object.

"THE COURT: I will hypothetically sustain. Thank you.

"[DEFENSE COUNSEL]: Is it a misstatement to say that this gang has four or five members?

"[DET. CARTMILL]: I would say the information I have, there's approximately 20."

Appellant argues that the foregoing exchange, insofar as the trial court failed to admonish the prosecutor regarding his "hypothetical" objection, shows a lack of respect towards defense counsel and deference towards the prosecutor, further evidence of judicial bias. This argument is without merit. We agree with the People: this isolated incident was nothing more than a mild example of levity and had not been preceded by multiple speaking objections or other inappropriate behavior on the part of the prosecutor. The trial court's behavior is not evidence of bias.

6. Cross-examination of Detective Cartmill

Jennifer S. testified that appellant admitted to her he was a Drifters gang member. On cross-examination of Detective Cartmill, defense counsel attempted to explore what basis Cartmill had for his conclusion that appellant was a gang member other than this testimony from Jennifer S. The following occurred:

"[DEFENSE COUNSEL]: Do you know Mr. Mancera?

"[DET. CARTMILL]: Never met him before.

"[DEFENSE COUNSEL]: Is it a fair statement to say that you're of the opinion that your basis of the opinion that Mr. Mancera is in a gang is solely based on the report that had a statement by Mr. Mancera's ex-

girlfriend who became the girlfriend of the deceased or the victim saying, 'Yeah. He admitted to being a gang member'?

"[DET. CARTMILL]: No. That's not the only reason I believe he's a gang member.

"[DEFENSE COUNSEL]: It's the only reason I heard on the stand. If there's, more please tell me.

"[DET. CARTMILL]: Okay. On 04-09-2010, I contacted a couple members of the gang Straight Coming Up on the streets in Lake L.A. with regards to another investigation. One of those guys had a tattoo on his stomach that said, 'R-I-P Verse.' And it just wasn't clicking in my head at that time who Verse was. I asked him who Verse was and reminded me it was the victim in this case. And I asked him, 'So what? You know, so who killed him?' And he said that it was the Drifters that killed him. That is what a member of Straight Coming Up told me at that point after several months after the murder, that as far as he was concerned, as far as his gang was concerned, it was the Drifters who killed their friend.

"[DEFENSE COUNSEL]: How does that help you determine whether Mr. Mancera is one of the Drifters?

"[DET. CARTMILL]: Well, that -- it's kind of a totality of the circumstances type of thing. Who would know better that somebody's from a gang than their girlfriend and then the victim gang saying that their homeboy, their fellow gang member was killed by their rival gang? So it's kind of a combination of the two.

"[DEFENSE COUNSEL]: Okay. But in and of itself, does the fact that a Straight Coming Up member says the Drifters killed Verse, meaning the victim in this particular case, does that in any way help you -- without the girlfriend's statement, does that particular piece of information help you determine whether this gentleman, who you've never met, is a member of the Drifters?

"[DET. CARTMILL]: Yes.

"[DEFENSE COUNSEL]: How does that statement that Drifters killed Verse help you determine that Mr. Mancera is a member of the Drifters?

"[DET. CARTMILL]: Because they -- the victim gang knew who the gang was who killed their own gang member.

"[DEFENSE COUNSEL]: Okay. I'm going try --

"[DET. CARTMILL]: That's their statement, that as far as they are concerned, as far as they knew, the person who killed their fellow gang member was from the gang Drifters.

"[DEFENSE COUNSEL]: I follow you up to there.

"THE COURT: Counsel, actually, before you ask that, I'm going ask you to approach please sidebar. Thank you.

"(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR:)

"THE COURT: I'm going to try to save you from yourself because you have this detective who's experienced to testify and is trying to step around. You're about to make him say, basically, the Drifters -- say Drifters killed him. Your client is the shooter. That's the connect. [¶] Now, I don't think that he can form the opinion that your guy's the shooter. But that's the little piece that you don't seem to be getting and he's skating around it. And if you keep going here, eventually what you're going to get from him is 'Look. We knew your guy is the shooter. They're saying the shooter is Drifters.' If you want to continue, go at your own risk. I want to take the opportunity to save you from yourself.

"[DEFENSE COUNSEL]: All I'm trying to do is limit what he's saying which is –

"THE COURT: You're not limiting. You're about to make him step in something that he has tried valiantly to avoid. But if you want to continue there, go at your own peril because I didn't think you saw what was happening. But I --

"[DEFENSE COUNSEL]: Maybe I didn't. Why wouldn't he want to step if that -- if he wants to --

"THE COURT: Because, again, he's a experienced detective who's trying not to cause a mistrial or state something he thinks he does not have the authority to say. Yet upon repeated badgering by you -- trust me because I've been here before -- it's going to come out. And at that point, I'm not entertaining a motion for mistrial on an invited error on your part because you didn't see it coming. Once I threw up the sign, you chose to ignore it. It's up to you how you want to proceed."

Appellant argues that this exchange demonstrates judicial bias because the trial court inappropriately questioned defense counsel's trial tactics and tried to instruct him on how to conduct his case. Again, we disagree with this contention.

First, this exchange took place outside the presence of the jury and thus had no impact on the finders of fact. More importantly, it seems clear that the trial court was in good faith attempting to warn defense counsel of a response he had not anticipated and which could have been damaging had it been made. A fair reading of defense counsel's line of questioning and Detective Cartmill's responses thereto indicates that the questions called for and the detective was perilously close to giving the very answer warned of by the trial court: "(1) It is the business of gangs to know who is shooting at them; (2) SCU says it was a Drifter who killed Santiago and they should know; (3) *I'm the gang detective assigned to this case and I know your client was the shooter*; and (4) therefore I know your client is a Drifter." That defense counsel had not anticipated such a response to his questioning is evident from two things: (1) his response, "Maybe I didn't" to the court's statement "I didn't think you saw what was happening" and (2) the fact that he completely changed his line of questioning after the sidebar.

We see nothing inappropriate with the trial court's behavior; indeed, what we see is a court paying attention to the ebb and flow of the evidence and attempting to prevent testimony that might affect the fairness of appellant's trial.

In sum, whether considered individually or collectively, the incidents recounted above do not manifest judicial bias nor did they in any way impact the fairness of appellant's trial.

II. The Evidence Is Sufficient to Support the Gang Enhancement

Appellant next argues that the evidence presented is insufficient to support the gang enhancement found true in connection with the murder of Santiago and the assault on Richard C. Specifically, appellant contends that the evidence does not support a finding that the July 2 incident was for the benefit of the Drifters rather than as a result of personal animosity arising from Santiago's romantic relationship with Jennifer S. We find the evidence more than sufficient and will describe the relevant facts in some detail below.

A. Testimony of Officer Del Rio

Officer Del Rio testified that the Drifters began as a car club in the early 1960's within the City of Los Angeles. Ultimately, they developed into a criminal street gang whose primary activities include narcotics offenses, weapons violations, vandalism, auto theft, carjacking, and murder. Although originating within the City of Los Angeles, in more recent times the gang established cliques in the Palmdale area.

The Drifters, like all Hispanic gangs, value respect above all else. An act of disrespect towards a member requires retaliation, including assault and even murder. An ex-girlfriend of a member who dates a member or associate of another gang creates disrespect. A gang member who loses a fistfight to a rival gang member or associate is humiliated in the eyes of his fellow members and is also thereby disrespected.

Tagging a wall with the gang name and "187" near a location associated with a rival means, "This is my gang and we're going to kill you."

The prosecutor presented Officer Del Rio with a hypothetical based upon the facts leading up to the shooting of Santiago and the assault of Richard C. Del Rio opined that the shooting was for the benefit of the gang because it was retaliation for the various incidents of disrespect that preceded it. The assault also was for the benefit of the gang because by showing a willingness to shoot at bystanders, the gang created fear in the community.

B. The Testimony of Detective Cartmill

Detective Cartmill testified he has had contact with members of both Drifters and SCU. Members of the Drifters migrated from the City of Los Angeles to the east Palmdale and Lake Los Angeles areas of the Antelope Valley. SCU started as a Lake Los Angeles tagging crew but had developed into a gang associated with the Palmas 13 street gang.

Respect is "just about the most important thing for a gang member to have" and respect "is just another word for fear." It is important that a gang member is respected or feared by members of his own gang, by members of rival gangs, and by the public generally. Fear and respect give the gang member power: other members within his

gang will obey him, rival gang members will be less likely to challenge him, and ordinary citizens will be less likely to intervene and try to stop his criminal activity.

Appellant, in Detective Cartmill's opinion, was a Drifters gang member, based upon his admission of such to Jennifer S. Falcon was a Drifters gang member, based upon his admission during the booking process in connection with his arrest for Santiago's murder.

As of July 2009, there was a rivalry between SCU and the Drifters in the Lake Los Angeles area. There were reports of fights between SCU and Drifters members at Little Rock High School. The Drifters and SCU/Palmas 13 were "crossing out" each other's graffiti. Photos taken within two weeks after the Santiago murder showed such destruction of each other's graffiti. At least one photo showed Drifters graffiti crossed out in blue, with "187" sprayed in blue next to it. As explained by Detective Cartmill, blue was the color adopted by SCU. Considered with the reference to section 187, this meant that SCU was at war with the Drifters and intended to kill them.

The prosecutor provided Detective Cartmill with a hypothetical based upon the various facts of the Santiago shooting and the Richard C. assault. Cartmill opined that the shooting was for the benefit of the Drifters. Young women involved with a gang or gang member are considered "property" of the gang and it is considered disrespectful to a gang member and his gang if a former girlfriend begins seeing a member of a rival gang. It benefits the shooter's gang if the rival is killed because the killing generates fear in the rival gang and the public in general. It benefits the individual shooter because it raises his status as a killer within his own gang. Similarly, the Richard C. assault benefitted the gang because allowing Richard C. to live meant he would tell others about what happened and thereby increase the level of fear and respect accorded the Drifters.

C. Applicable Law and Analysis

An appellate court reviewing a challenge based on sufficiency of the evidence at trial must review the entire record in the light most favorable to the People and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Put another

way, the appellate court reviews the entire record in the light most favorable to the verdict and determines whether there is substantial evidence – evidence that is reasonable, credible, and of solid value – such that a reasonable juror could find the defendant guilty beyond a reasonable doubt. (*Ibid*.; see also *People v. Osband* (1996) 13 Cal.4th 622, 690.) When making such an evaluation, the appellate court does not reevaluate witness credibility or resolve conflicts in the evidence. Such matters are exclusively the province of the trier of fact below. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The same standard of review applies when evaluating the sufficiency of the evidence in support of an enhancement found true. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

With respect to the enhancement at issue here, section 186.22, subdivision (b)(1) requires that the crime be committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members." The enhancement applies only to felonies that are "gang related." (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

As recounted above, the evidence, considered under the applicable standard of review, is more than sufficient to show that the killing of Santiago was for the benefit of or in association with a criminal street gang with the specific intent to promote or further criminal conduct by gang members. First, the crime was clearly committed in association with other Drifters members: appellant was present at the scene with two other Drifters members, one of whom, Falcon, aided and abetted the shooting. Immediately after the shooting, appellant claimed "Drifters" in front of the others present while Falcon stated, "That's how *we* do it." (Italics added.)

There was testimony from which a trier of fact could conclude that Santiago, at a minimum, associated with SCU: Jennifer S.'s testimony that he tagged alongside SCU members and Detective Cartmill's observation, after Santiago's death, of a "Verse" memorial tattoo on an SCU member. Thus, whatever animosity existed between appellant and Santiago because of their competing relationships with Jennifer S., animosity also existed because appellant and Santiago were affiliated with rival gangs.

More importantly, as testified to by both Cartmill and Officer Del Rio, any personal animus between the two inevitably also involved the two gangs because of the need for respect within the gang culture and the perceived disrespect of a young woman leaving one gang member for a rival.

Additionally, Santiago had apparently humiliated appellant in a fistfight witnessed by appellant's friends. Again, as suggested by the testimony of the two gang experts, such humiliation required retaliation not simply on a personal level, but because appellant's gang and his status within the gang demanded it in order to regain respect.

Finally, the other incidents of violence or the threat of violence leading up to the July 2 shooting, involved appellant not as an individual, but as a Drifters gang member. Appellant was not alone at the Saddleback Market; he was accompanied by other Drifters and claimed Drifters during the incident. Similarly, during the incident at Jennifer S.'s house, appellant was joined by other Drifters, "Drifters" was claimed during the incident, and the group left behind Drifters graffiti.

All of these facts fully support the experts' opinions that appellant's killing of Santiago was committed in association with or benefitted a criminal street gang with the intent to promote or further its criminal activity: the killing was payback for the humiliation Santiago caused appellant specifically, and appellant's gang generally, by dating appellant's ex-girlfriend, and it engendered fear and respect for appellant and his gang in those present and those who might hear of it later. This is so whether or not the dispute began with a fight over Jennifer S.

The assault on Richard C. was incidental to the killing of Santiago. To the extent the evidence supported the enhancement in connection with the murder, it necessarily also supported the enhancement in connection with the assault, largely for the same reasons stated by Officer Del Rio and Detective Cartmill in their respective opinions.

Appellant makes various arguments in opposition to the jury's finding. We need not recount them here for purposes of this decision. In light of the significant evidence described above, appellant's contentions are nothing more than an attempt to get this court to reweigh the evidence already evaluated by the jury.

III. The Evidence Is Sufficient to Support Premeditation and Deliberation

Appellant next contends that the evidence is insufficient to support the finding of premeditation and deliberation required for first degree murder. Again, we reject this argument.

Murder that is willful, deliberate, and premeditated is of the first degree. (§ 189.) "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, quoting CALJIC No. 8.20 (5th ed. 1988).) The process of deliberation and premeditation does not require any extended period of time: "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Mayfield*, *supra*, at p. 767, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900; accord, *People v. Perez* (1992) 2 Cal.4th 1117, 1127.)

People v. Anderson (1968) 70 Cal.2d 15, 26-27, sets forth three types of evidence ordinarily used to establish premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. Although the *Anderson* factors provide, essentially, a "'synthesis of prior case law,'" they "'are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case.' [Citation.]" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 768.)

The evidence in this case provides facts probative of all three categories. In terms of planning, appellant brought a loaded handgun with him to the location that evening. Although there is no evidence that appellant knew Santiago would be present, the jury could have concluded that someone who carries a concealed loaded handgun in public, especially a gang member, has already contemplated and planned for the possibility of using it, if need be, to kill someone. Moreover, in light of the prior incidents of violence between appellant and Santiago, which will be discussed below, the jury could also infer that appellant intended to kill Santiago the first opportunity he had and that he was arming himself, at least in part, for that purpose.

There is substantial evidence of motive. Appellant disliked Santiago because of his relationship with Jennifer S. This personal motive created additional pressure to kill Santiago because of the disrespect it created (1) for appellant, in terms of his status within the gang and (2) for his gang, in terms of its status vis-á-vis other gangs. This motive to kill is amply demonstrated by the prior acts of violence and threats of violence, two of which involved either an express threat to kill (the "187" graffiti near Jennifer S.'s house) or an implicit threat to kill (Falcon's display of a handgun at the Saddleback Market).

Finally, the manner of killing also supports the finding of premeditation and deliberation. Appellant fired a single shot, at close range, into Santiago's chest. Moreover, in the context of the incident itself, appellant chose not to shoot Richard C., the participant armed with a baseball bat, but at Santiago, the bare-chested, clearly unarmed, man with whom he had an ongoing and often violent dispute. Under those circumstances, the jury could conclude that appellant used the circumstances of the altercation as an excuse to execute his pre-existing desire to kill Santiago.

Again, appellant points to other facts and argues that at best the evidence shows an unconsidered and impulsive decision to kill. And, again, this is nothing more than an attempt to get this court to reweigh the evidence already evaluated and considered by the jury. That we will not do. As recounted above, there is ample evidence to support the jury's verdict of first degree murder.

IV. The 10-year Gang Enhancement Must Be Stricken

Appellant contends the trial court erred when it imposed a 10-year consecutive term for the gang enhancement found true on count 1. The People concede and we agree that because the murder conviction resulted in an indeterminate term of 25 years to life, the 10-year enhancement is inapplicable. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.) Accordingly, we order it stricken.

DISPOSITION

The 10-year consecutive term imposed by the trial court for the gang enhancement found true in connection with count 1 is stricken. In all other respects, the judgment is

affirmed. The trial court is directed to forward a new abstract of judgment to the Department of Corrections and Rehabilitation.

SORTINO, J. *

WE CONCUR:

FLIER, Acting P. J.

GRIMES, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.