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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL RAY ACEVEDO,

Defendant and Appellant.

B263123

(Los Angeles County
Super. Ct. No. BA408864)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Reversed in part and otherwise affirmed.

Victor J. Morse, 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, Senior Assistant Attorney General, Michael R. Johnsen and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal from a first degree murder conviction, appellant Daniel Ray Acevedo challenges the trial court's denial of his motion to bifurcate the trial of his gang enhancement allegation from the trial for the underlying crime; the court's refusal to dismiss a prior juvenile adjudication; and its imposition of a (stayed) sentence for the gang enhancement. We conclude that the trial court acted within its discretion with respect to the first two grounds for his appeal, but erred with respect to the third.

Background

Mid-morning on January 22, 2013, working at a fast-food restaurant on Pico Boulevard near Hoover Street, in Los Angeles, Luis Ornelas and Felicitas Solano Cruz served three Hispanic men in a white Cadillac at the drive-through window. Ornelas identified the driver, who he had often served before, as appellant Acevedo, and he recognized the right front seat passenger as someone else he had seen many times as a customer. A surveillance video confirmed the car's travel through the drive-through line, which exited onto Pico Boulevard.

Ornelas testified that the driver had an "18th Street" tattoo, and both he and his front seat passenger seemed nervous. Cruz described the driver by size, complexion, hair, tattoos (some of which she described), and hat. The front seat passenger she described as between 17 and 20 years old, with a shaved head and tattoos on his cheeks and hands. Ornelas identified Acevedo from a photographic lineup, and at trial. When Cruz was shown a photographic lineup, she said nothing at first, and later said only that the photo of Rene Velasquez looked similar to the front seat passenger. At trial she said she was scared and nervous that because she testified something might happen to her.

About 10:30 a.m., Parra Almizar walked east on Pico Boulevard near Alvarado Street in Los Angeles after leaving a store in which he had purchased a notebook. A clerk at the store, Maria Serpas, saw a white four-door car driving slowly—"almost stopped"—next to Almizar, then "right away" she heard shots fired. After hearing the shots she left the store, and saw Almizar lying on the ground.

Eddy Torres, in an office near the Pico and Alvarado intersection, heard two pops, and saw Almicar running then falling to the ground. A Hispanic man then ran up to Almicar, jumped on his back with his knees, fired three shots from a revolver into Almicar's head, and ran west on Pico.

From a bus traveling east on Pico, Francisco Montes heard two or three loud noises. The bus driver said, "Oh no he killed that man." Through the bus window he saw a man point a silver revolver at Parra, who was lying on the sidewalk, fire three shots at Almicar, then walk westbound diagonally across Pico.

The police found Almicar dead, lying on the sidewalk at the corner of Pico and Alvarado. He had died from five fatal gunshot wounds, three to his face and two in his back, all apparently from a revolver. Almicar had no known gang affiliation.

A GPS tracking device on Acevedo's ankle showed that Acevedo was in close vicinity of the shooting at 10:30 that morning. About 14 minutes after the shooting Acevedo woke Henry Borja (who also wore a tracking device) at Borja's residence. The tracking devices confirmed that Borja was home at the time, and that Acevedo was there for about six minutes. Borja's girlfriend identified Borja and Acevedo as friends, and as 18th Street gang members, and testified that Borja and Acevedo engaged in a conversation she did not hear.

About an hour after the shooting, two officers stopped a white Cadillac in which Acevedo was the driver and Velasquez was the front seat passenger. They did not know about the shooting, and released the two after citing Acevedo for littering.

About 6:00 p.m. on the evening of the shooting, Acevedo was arrested during another traffic stop while driving the white Cadillac, this time without passengers. A blood stain on the inside of the right front door matched Parra's DNA. Borja was arrested a few hours later, following a pursuit on foot. A few weeks later Borja called and instructed his girlfriend to retrieve a bag from among gardening supplies near the front of his residence, and to deliver it to someone in Century City—which she did. The recipient turned out to be an undercover agent, who delivered the package—containing the revolver used to shoot Almicar—to the police.

Officer Meza of the police department testified as an expert on the 18th Street gang, identifying Acevedo, Velasquez, and Borja as 18th Street gang members, both from previous encounters and from their identifying tattoos. He provided testimony about that gang's primary activities and pattern of violent criminal gang activities; its various cliques and tattoos showing affiliation; and specific convictions of various members for violent crimes including attempted murder. He also testified that the area in which Almicar was killed was an area claimed by the 18th Street gang, and that the events to which the various witnesses had testified would indicate the killing was committed for the benefit of and in association with the 18th Street gang, in order to intimidate the community and deter the reporting of crimes.

A jury found appellant Daniel Ray Acevedo guilty of first degree murder (Pen. Code, § 187, subd. (a)),¹ committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), in which a principal personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b), (c), (d) & (e)(1)). The trial court sentenced Acevedo to 25 years to life in prison for the murder, doubled to 50 years to life under the "Three Strikes" law, and to an additional 25 years to life under section 12022.53, subdivisions (d) and (e), for a total of 75 years to life in prison. For the finding under section 186.22, subdivision (b)(1)(C), the court imposed an additional 10 years, stayed pursuant to section 654.

Discussion

Acevedo appeals on three grounds: First, that the trial court abused its discretion in denying his motion to bifurcate the trial for the criminal street gang enhancement allegation (§ 186.22, subd. (b)(1)(C)) from the trial on the charge of murder. (§ 187, subd. (a).) Second, that the court abused its discretion by refusing to dismiss a prior juvenile adjudication, and for sentencing Acevedo as a second-striker under the Three Strikes law. (§§ 667, subds. (b)-(i); 1170.12, subd. (c)(1) & (2); 1385.) Third, that the

¹ Statutory references are to the Penal Code unless otherwise specified.

court erred by imposing a 10-year sentence for the gang enhancement under section 186.22, subdivision (b)(1)(C) (although it then stayed the sentence under section 654).

We conclude that the trial court acted within its discretion with respect to the first and second of these grounds, and on that basis we affirm his conviction for murder and his sentence as a second-striker. However, we also conclude—as respondent concedes—that the trial court erred by imposing the 10-year gang enhancement term. We therefore will remand the matter to the trial court for entry of an amended abstract of judgment, striking the stayed 10-year gang enhancement sentence imposed under section 186.22, subdivision (b)(1)(C), and imposing instead subdivision (b)(5)’s requirement that he must serve a minimum of 15 years before being paroled. In all other respects, we affirm the judgment.

I. The Refusal To Bifurcate The Gang Allegation Did Not Abuse The Court’s Discretion.

To establish the criminal street gang enhancement of section 186.22, subdivision (b)(1), “the prosecution must prove that the crime for which the defendant was convicted had been ‘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 any criminal conduct by gang members.’ [Citation.] In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period. (§ 186.22, subds. (e) & (f).)” (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

Acevedo makes no contention that the prosecution’s evidence was insufficient to prove any of the enumerated elements of the gang enhancement allegation. Officer Meza, the prosecution’s gang expert, testified at trial that members of the 18th Street

gang had engaged in a pattern of criminal gang activity, primarily including murders, attempted murders, robberies, and assaults with deadly weapons. He identified a named gang member who was convicted of assault with a firearm in 2011; and another named gang member who was convicted of attempted robbery in 2010. And Meza identified Acevedo, Velasquez, and Borja as 18th Street gang members, based on their gang tattoos (those identified by other witnesses, as well as others on other parts of their bodies), their admission to officers of their 18th Street gang membership, their association with other gang members, and their presence in an 18th Street gang stronghold.

The evidence concerning Acevedo's membership and involvement with the 18th Street gang came not just from the prosecution's expert on the 18th Street gang, but from other witnesses as well. Ornelas, the fast-food worker, testified that Acevedo had an "18th Street" tattoo, which he associated with the "18th Street" graffiti in the area. Cruz, the other fast-food worker, recalled the Cadillac driver's tattoos of letters or numbers, and a teardrop tattoo near his eye. The officers who cited Acevedo for littering soon after the shooting noted Velasquez's "18" tattoo on his cheek and the back of his head. Borja's girlfriend testified that both Borja and Acevedo were 18th Street gang members.

Seeking to bifurcate the gang enhancement allegation, Acevedo argued in the trial court that the "other crimes" evidence and evidence of criminal street gang culture would be irrelevant to the substantive charge of murder, and more prejudicial than probative. And in this appeal he points to the absence of evidence that the murder victim had any gang affiliation, that the murder was committed in retaliation for any offense against the 18th Street gang or any threat to its reputation, that the perpetrators had claimed responsibility for or bragged about the crime, or that either they or the gang actually gained status from the crime. Paraphrasing a key Supreme Court decision on the subject, he argues that the evidence to prove the gang enhancement allegation was "so extraordinarily prejudicial, and of so little relevance to [his] guilt [of the charged crime], that it threatens to sway the jury to convict regardless of [his] actual guilt." (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) That, Acevedo argues, deprived him of his constitutional right to due process of law.

We review the trial court's decision for abuse of discretion. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.)

Acevedo does not contend in this court that the gang enhancement evidence was wholly irrelevant to proof of his guilt on the murder charge, or that the evidence of his gang involvement would necessarily have been inadmissible in a bifurcated trial on that charge. Rather, he argues that the gang enhancement evidence “had only minimal relevance” and “minimal probative value” for the purpose of establishing the elements of motive, identity, and witness credibility on the murder charge; that the evidence “did very little” to establish a gang motive; and that the gang expert's opinion about the crime's potential value to the gang's reputation had “very little additional probative value” to prove the issues of motive, identity, and witness reluctance to testify. The “only possible relevance for appellant's gang membership,” he contends, would have been to show his connections to Velasquez, his passenger in the Cadillac and the alleged shooter, and with Borja, whose residence he visited shortly after the shooting and at which the revolver was found.

It is of course true that the portion of the gang enhancement allegation evidence involving crimes in which Acevedo was not involved—evidence of the 18th Street gang's pattern of criminal gang activity, essential to establish the gang enhancement allegation—would not have been admissible in a bifurcated trial of the murder charge alone. And while that evidence was not particularly graphic or inflammatory (and was in fact less inflammatory than the evidence of the charged crime in this case), it necessarily had at least some potential for prejudice. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 [“California courts have long recognized the potential prejudicial effect of gang evidence”].)

But the remainder of the gang enhancement evidence was far more than just “minimally” relevant to the murder charge. And the gang enhancement evidence did not range beyond that required for proof of the elements of the murder allegation, and the gang enhancement allegation. This case therefore is not “one of those rare and unusual occasions where the admission of evidence has violated due process and rendered the

defendant's trial fundamentally unfair.” (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 232.)

First, of course, the evidence of Acevedo's membership in the 18th Street gang, and the 18th Street gang's presence in the area of the shooting, was inexorably entwined with the witnesses' identification of Acevedo as the white Cadillac's driver, and identification of Velasquez as his front seat passenger. Acevedo's and his passenger's many tattoos identified them as gang members, tended to explain their presence together in the car and their frequent presence together in the area of the murder. It also tended to show Acevedo's foreknowledge and active participation in the shooting—driving slowly next to Almicar as he walked along the sidewalk, permitting his passenger to exit the car in order to shoot Almicar, and preparing for a quick getaway following the shooting. It tended to explain Acevedo's meeting with Borja, another member of the same gang, just minutes later at Borja's residence, where the murder weapon was later retrieved. And it tended to explain Cruz's reluctance to identify Acevedo, based on evidence of gang retaliation for witness cooperation with investigations of gang crimes. The evidence of Acevedo's gang involvement therefore was relevant not just to prove the elements required to establish the gang enhancement allegation, but was relevant also to the credibility of at least one witness, and to the issues of intent, motive, and identity with respect to the charged offense.

Acevedo argues that the jury's willingness to find him guilty only of a lesser crime than first-degree murder might have been negatively affected by the evidence of his gang associations and the 18th Street gang's dominance in the area of the shooting. But the argument (even if true) demonstrates that the gang evidence was relevant not just to the gang enhancement, but also to show his active participation in the charged crime. (See *People v. Hernandez, supra*, 33 Cal.4th at p. 1049 [“evidence of gang membership is often relevant to, and admissible regarding, the charged offense”].) The jury was entitled to conclude (as Acevedo argued it should) that Acevedo did not know in advance that his passenger would exit the car and shoot Almicar, and that he might have driven slowly next to Almicar only because he was instructed by Velasquez to do so. But in evaluating

the likelihood that Acevedo had actively participated in the planning and perpetration of the charged crime, the jury was entitled to consider the evidence of his familiarity with the area, the testimony that he and Velasquez were perceived by witnesses as being nervous immediately before the shooting, and his close association with other members of the 18th Street gang, including perpetrators of other violent crimes in the area. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516-1517 [evidence of gang activities is permissible where gang enhancement evidence is also relevant to intent and motive in trial of charged offense].) Acevedo all but concedes the relevance of the gang evidence on these issues, by arguing only that the evidence was “consistent with”—but not necessarily conclusive proof of—the defense theory that Acevedo acted only as an accessory after the crime.

The trial court was not oblivious to the danger of prejudice resulting from inflammatory evidence that would be offered to support the gang enhancement allegation, but would be irrelevant to proof of the substantive charge of murder. After considering the pretrial bifurcation motion, it found that without the evidence of the defendant’s gang relationship, “I think it would make it very confusing for the jury to understand what transpired if I bifurcated it,” and although the gang involvement evidence would necessarily be prejudicial to the defendant, “the court believes it can cure that with appropriate limiting instruction and . . . I’m happy to give a limiting instruction as it relates to the predicate acts.”

The court did limit the purpose for which the jury could consider the evidence of gang activity. In the terms of CALCRIM No. 1403, the court instructed the jury:

“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 and enhancements charged;

“OR

“The defendant had a motive to commit the crime charged.

“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 has a disposition to commit crime.”

Acevedo argues that this instruction “was incapable of precluding the jury from being improperly influenced by the introduction of the unduly prejudicial gang evidence during the murder trial”; but he does not explain why it was inadequate to accomplish its purpose, and he cites no deficiency or error in the instruction. We have no basis on which to conclude that the jury failed to follow the court’s directive with respect to this evidence. (*People v. Ervine* (2009) 47 Cal.4th 745, 776.)²

II. The Refusal To Strike Acevedo’s Prior Juvenile Court Adjudication For Second Degree Murder Did Not Abuse The Court’s Discretion.

In *People v. Romero*, our Supreme Court affirmed the authority of trial courts to strike prior felony conviction allegations under section 1385, in cases brought under the Three Strikes law. (*People v. Romero* (1996) 13 Cal.4th 497, 529-530.) In this case, Acevedo asked the court to strike his prior juvenile court adjudication for second degree murder. The court denied his *Romero* motion, imposing a second strike sentence under the Three Strikes law, doubling his first degree murder sentence of 25 years-to-life imprisonment to a sentence of imprisonment for 50 years-to-life, which, with the consecutive firearm-enhancement term, then totals 75 years-to-life imprisonment. Acevedo appeals, arguing that the denial of his *Romero* motion abused the court’s discretion.

² We also find no basis on which to conclude that a result more favorable to Acevedo on the murder charge would have been reasonably probable if trial of the gang enhancement allegation had been bifurcated. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Burch* (2007) 148 Cal.App.4th 862, 868-869 [errors in denying bifurcation are evaluated for reasonable probability of prejudice under *Watson* standard].)

The manner in which the trial court is required to exercise its discretion in ruling on a *Romero* motion is explained in *People v. Williams* (1998) 17 Cal.4th 148. In ruling whether to strike or vacate a prior serious or violent felony conviction allegation or finding under the Three Strikes law in furtherance of justice under section 1385, subdivision (a), the court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

Acevedo’s trial court motion conceded that in September 2002, when he was 17 years old, he had suffered a juvenile second degree murder adjudication in which he was identified as the perpetrator of a gang related shooting (§ 187, subd. (a)); that on February 8, 2010, he had been released on parole; that on June 24, 2010, he was discharged from parole; and that on November 1, 2011, he had suffered a misdemeanor conviction for evading a police officer. (Veh. Code, § 2800.1.) He argues on appeal that he should have been found by the trial court to be outside the spirit of the Three Strikes law, because his prior serious offense had been committed when he was just 17 years old, more than 10 years before his current offense; and even if his motion to strike the prior adjudication were granted, he would still be subject to a mandatory sentence of 50 years to life imprisonment—allowing him “the slim hope of some form of relationship with his recently born daughter, his only child, outside the confines of the prison system in the year 2063.”

We conclude that the trial court’s denial of the *Romero* motion did not abuse its discretion. The court explained its exercise of discretion as “appropriate under the law,” in light of the facts that the charge for which Acevedo had suffered his strike adjudication was the same as his conviction in this case; and although he had been a juvenile when he was incarcerated “you really didn’t stay free from custody for that long a period of time

after the commission of that offense.”³ The trial court expressly affirmed its recognition that it had discretion to grant the motion, though it also concluded that to do so in this case might have abused its discretion. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 433.) “Where the Legislature establishes a sentencing norm and requires the court explicitly to justify a departure therefrom, and the court sentences in conformity with the legislative standard, all that is required on the appellate record is a showing that the court was aware of its discretion to select an alternate disposition.” (*People v. Langevin* (1984) 155 Cal.App.3d 520, 524; *People v. Gillispie, supra*, 60 Cal.App.4th at p. 433.)

Applying this standard, Acevedo has failed to show any abuse of discretion.

III. The 10-Year Gang Enhancement Sentence Must Be Reversed.

Acevedo appeals from the trial court’s imposition of the 10-year sentence enhancement of subdivision (b)(1)(C) of section 186.22, relying on *People v. Lopez* (2005) 34 Cal.4th 1002 for the proposition that his life sentence for first degree murder is not subject to the 10-year enhancement under that provision.

Subdivision (b) of section 186.22 “establishes alternative methods for punishment for crimes committed for the benefit of a criminal street gang.” In subdivision (b)(1)(C), that section imposes a 10-year enhancement for a defendant’s commission of a violent felony. But the subdivision (b)(1)(C) alternative does not apply where the violent felony is “punishable by imprisonment in the state prison for life”—as is the felony for which Acevedo was convicted in this case. (§ 186.22, subd. (b)(5).) Instead, it is subdivision (b)(5) of section 186.22 that applies, imposing a minimum term of 15 years before the defendant may be considered for parole. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1005.)

³ Acevedo committed the crime for which he was convicted in this case on January 22, 2013—about 30 months after his discharge from parole for the murder adjudication, slightly more than two years after his most recent misdemeanor conviction, and apparently while he was still on parole for the offense under Welfare and Institutions Code section 1001.5 (knowingly possessing or bringing into a California Youth Authority camp a controlled substance, alcoholic beverage, firearm, etc.).

As Acevedo contends—and respondent agrees—the trial court erred in this case by imposing the 10-year enhancement under subdivision (b)(1)(C) of section 186.22, then staying the enhancement under section 654, rather than imposing a 15-year minimum parole eligibility term under subdivision (b)(5) of section 186.22. We therefore will remand the matter with directions for the trial court to issue an amended abstract of judgment striking the stayed 10-year gang enhancement, and imposing a 15-year minimum parole eligibility term under subdivision (b)(5) of section 186.22.

Disposition

The matter is remanded with directions to issue an amended abstract of judgment striking the stayed 10-year gang enhancement, and imposing a 15-year minimum parole eligibility term under subdivision (b)(5) of section 186.22. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.