Filed 9/17/12 P. v. Torres CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GENARO C. TORRES, Defendant and Appellant.	B233421 (Los Angeles County Super. Ct. No. KA090474)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

John Doyle, 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, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Genaro Torres appeals from the judgment entered upon his jury conviction of attempted murder and assault and the jury's finding that these crimes were committed for the benefit of a street gang. Defendant contends the evidence does not support a finding that he committed attempted murder with deliberation and premeditation. He also argues that his trial counsel rendered ineffective assistance by not moving to bifurcate trial on the gang enhancement, and that the testimony of the prosecution's gang expert was insufficient to support the enhancement. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

At about 6:00 p.m. on March 15, 2010, the victims, Joel Guillen and Raul Gonzalez, along with their friend Thomas Xulu, drove to Morgan Park in the city of Baldwin Park. Gonzalez parked near the basketball courts. Defendant and others were playing basketball. Guillen went onto the court and got into an argument with defendant. Gonzalez heard defendant identify himself as "Froggy" during the argument.

Several minutes later, after Guillen had returned to the car, a red pick-up truck pulled up. Several men, including defendant, jumped out of it. Defendant hit Guillen in the head with what looked like a stick, a bat, or a hammer. Guillen fell down and went into convulsions. Someone struck Gonzalez in the head with a fist. Defendant shouted, "This is Froggy from Northside," then he broke a window in Gonzalez's car and left in the truck. Gonzalez drove Guillen home.

Guillen had to have a metal plate installed in his skull. He suffered from aphasia as a result of the attack and did not remember it. Gonzalez, Xulu, and another eyewitness, Raymond Gutierrez, identified defendant in a photographic lineup as the man who attacked Guillen.

The attack was reported at 6:48 p.m. From 6:36 p.m. to 6:40 p.m. calls were placed between a cell phone registered to defendant's uncle and one used by Jose de la Torre, a codefendant who is not a party to this appeal.

A reddish pick-up truck was registered to de la Torre's father. A hammer was recovered from defendant's house, along with a notebook with the initials of the Northside Bolen Parque gang and the name "Froggy" inscribed on the cover. Defendant is a known member of the gang, and his moniker is Froggy.

Defendant and de la Torre were charged with attempted first-degree murder (Pen. Code, §§ 664, 187, subd. (a))[1] as to Guillen (count 1) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) as to Gonzalez (count 2). Gang enhancements were alleged as to both counts (§ 186.22).

The jury convicted defendant as charged on count 1, and on count 2 found him guilty of the lesser included crime of assault (§ 240). The jury found the attempted murder was willful, deliberate, and premeditated, and the gang enhancement allegations were true. On count 1, defendant was sentenced to life in prison with the possibility of parole after 15 years. A concurrent three-year sentence was imposed on count 2.

This timely appeal followed.

DISCUSSION

I

Defendant contends his attempted murder conviction must be reversed because the evidence was insufficient to show that he possessed a specific intent to kill Guillen and that he acted with deliberation and premeditation.

"One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that issue, our sole function is to determine if *any* rational trier of fact

[1] All statutory references are to the Penal Code.

could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945–946.)

Defendant claims the fact Guillen was hit in the head with a bat or a hammer was insufficient to establish a specific intent to kill. Holding otherwise, he urges, would obviate the distinction between acting with conscious disregard for human life and acting with a specific intent to kill, and would turn every assault with a deadly weapon into an attempted murder. He essentially argues the evidence could have supported a contrary finding. But while reasonable minds may differ on whether defendant intended to kill Guillen, it was not irrational for the jury to infer an intent to kill from defendant's targeting the victim's head, a vulnerable area, with what looked like a hammer, inflicting a blow that sent the victim into convulsions and required the installation of a metal plate in his skull. Assaulting a victim "at a range and in a manner that could have inflicted a mortal wound" is sufficient to support an inference of intent to kill even if the killer abandoned the effort and the victim survived. (*People v. Lashley*, *supra*, 1 Cal.App.4th at p. 945.)

Defendant contends there is no evidence of premeditation and deliberation. These may be established by evidence about planning, motive, and the manner of killing. (*People v. Booker* (2011) 51 Cal.4th 141, 173.) While the three factors are not exclusive, the existence of evidence pertaining to all of them is sufficient to sustain a conviction. (*People v. Proctor* (1992) 4 Cal.4th 499, 529.) The record here contains such evidence.

The testimony that defendant and Guillen argued on the basketball court supports the inference that defendant acted out of anger, regardless of the subject of the argument. (See e.g. *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102 [anger relevant to motive].) Defendant's mention of his gang affiliation during the argument and the subsequent attack supports the inference that it also motivated his actions. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 [gang affiliation relevant to motive or intent].)

While the attack on Guillen occurred within minutes of the argument, time is not determinative since a calculated decision may be made quickly. (*People v. Booker*, *supra*, 51 Cal.4th at p. 172.) Defendant attacked Guillen upon pulling up in a pickup

truck, armed with an object that he used as a weapon. He was accompanied by others, one of whom assaulted Gonzalez. He then left in the same pickup truck. It can be inferred that, after the argument with Guillen, defendant left the basketball court, gathered backup, obtained a getaway vehicle and an object that could be used as a weapon, and surprised the unsuspecting victim. (See e.g. *People v. Elliot* (2005) 37 Cal.4th 453, 471 [defendant planned crime by arming himself with knife and waylaying victim]; *People v. Lunafelix*, *supra*, 168 Cal.App.3d at p. 102 [unprovoked attack "deliberately and reflectively conceived in advance"].) The fact that defendant aimed at Guillen's head right away also supports the inference that the attack was deliberate and premeditated. (See e.g. *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 ["'wounds [which] were not wild and unaimed'" can demonstrate premeditation and deliberation].)

Sufficient evidence supports the attempted murder conviction.

II

Defendant argues his trial counsel was ineffective because he did not move to bifurcate trial on the gang enhancement. Defendant bears the burden of demonstrating that his trial counsel's representation fell below prevailing professional standards, and there is a reasonable probability that the outcome of the trial would have been different absent the deficiency in counsel's performance. (*People v. King* (2010) 183 Cal.App.4th 1281, 1298.) There is a strong presumption that counsel's performance was within the range of reasonableness, and we defer to counsel's tactical decisions. (*Id*. at p. 1299.) Defendant cannot meet his burden in this case.

The trial court has a broad discretion to deny bifurcation on a gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050 (*Hernandez*).) The *Hernandez* court reasoned: "Evidence of the defendant's gang affiliation . . . 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. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Id.* at p. 1049.)

The trial court has discretion to deny bifurcation of a charged gang enhancement even when gang evidence would be inadmissible if no gang enhancement were charged. (*Id*. at p. 1050.)

Like the defendant in *Hernandez*, defendant here injected his gang membership into the crime by giving out his moniker and gang affiliation. The gang expert helped the jury understand the significance of this self-identification, which was relevant to both motive and identity. The expert explained that gang members commonly shout out their gang affiliation when they commit violent crimes. They do so to gain recognition for themselves and their gangs. He also explained that gang members are obligated to retaliate if they are disrespected; otherwise, they would be considered "weak link[s]" by their own gangs and would be subject to attack. Additionally, the gang expert's testimony that gangs promote fear in the community by retaliating against anyone who cooperates with law enforcement helped explain the eyewitnesses' reluctance to identify defendant during trial.

Defense counsel's strategy at trial was to challenge the identification of defendant as the attacker. Since much of the gang evidence was crucial to defendant's identification, it is unlikely that the trial court would have granted a motion to bifurcate the gang enhancement. Defense counsel's decision not to make such a motion was entirely reasonable.

The only evidence defendant identifies as prejudicial pertains to the definition of a "criminal street gang," which requires, among other things, that one of the gang's "primary activities" be the commission of certain enumerated crimes (the so-called "predicate offenses") and that its members be engaged in "a pattern of criminal gang activity" by committing two or more such crimes within the statutory period. (§ 186.22, subd. (e) & (f); *Hernandez*, *supra*, 33 Cal.4th. at p. 1048.) The gang expert listed attempted murder as one of Northside Bolen Parque's primary activities. To establish "a pattern of criminal gang activity," the prosecutor offered evidence of another gang member's conviction of attempted murder and assault on a police officer. The gang expert's testimony was limited to explaining that the gang member shot at police officers

who were trying to gain entry to his house on a search warrant. None of the officers was hit, but the gang member was wounded.

While evidence of a predicate offense committed by another gang member may not be admissible at a trial limited to defendant's guilt, "countervailing considerations . . . apply when the enhancement is charged permit[ting] a unitary trial." (*Hernandez, supra,* 33 Cal.4th. at p. 1051.) The facts of the predicate offense of attempted murder, where no officer was injured, were no more inflammatory than the fact that defendant hit Guillen on the head with a hammer, causing severe injury. Since this predicate offense was committed by another gang member, it was not a crime for which defendant escaped punishment. And, as in *Hernandez,* this predicate offense was offered to prove solely the gang enhancement, so there was no danger of confusing the jury with collateral matters. (See *id*. at pp. 1050, 1051.)

Defendant incorrectly maintains the gang expert's testimony regarding the predicate offense of attempted murder constituted impermissible opinion about defendant's specific intent to kill Guillen. A gang expert may give an opinion that a crime committed in the manner described in a hypothetical question would be gang related, but may not give an opinion on how the jury should decide the case as to the particular defendant. (*People v. Vang* (2011) 52 Cal.4th 1038, 1049.) The expert's testimony about the predicate offense was not an attempt to "evade" this limitation as it was offered only in relation to the gang enhancement and not in relation to defendant's guilt. Contrary to defendant's assertion that the jury was allowed to consider the gang evidence as character evidence, the jury was instructed to consider the predicate offenses offered by the prosecution only in relation to the gang enhancement and not as evidence of defendant's bad character.

As we have explained, there was sufficient evidence supporting an attempted murder conviction in this case. The record does not bear out defendant's suggestion that he was convicted of attempted murder because the jury heard brief expert testimony that another Northside Bolen Parque gang member, in an unrelated case, was also convicted of attempted murder.

Defendant has failed to show that his counsel provided ineffective assistance by not moving to bifurcate trial on the gang enhancement.

III

Defendant contends the gang expert's testimony regarding Northside Bolen Parque's primary activities was insufficient to support that element of the gang enhancement. We review the sufficiency of the evidence to support an enhancement under the same standard we apply to a conviction, presuming "every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

A gang enhancement requires among other things proof that the crime was committed "for the benefit of, at the direction of, or in association with any criminal street gang . . . ." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined in relevant part as a group "having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), . . . and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Expert testimony based on an adequate factual foundation constitutes sufficient proof. (*Ibid.*)

When asked about Northside Bolen Parque's primary activities, the gang expert responded: "They vary. One of our more frequent forms is graffiti, vandalism,[2] followed by robbery, burglary, grand theft auto, possession of weapons, drug, narcotic sales, attempted murder, murder, assault with a deadly weapon." Defendant argues that this testimony shows that the gang's activities vary in frequency and does not establish that

[2] Of the offenses listed by the expert, the status of graffiti and vandalism as predicate offenses is unclear since only felony vandalism, which includes graffiti where the property damage is over $400, is a predicate offense. (See §§ 186.22, subd. (e) & 594, subd. (b)(1)); *In re Alexander L.* (2007) 149 Cal.App.4th 605, 612, fn. 2 (*Alexander L.*).)

the gang repeatedly and consistently engages in activities enumerated in section 186.22, subdivision (e). In response to the question about the gang's primary activities, the expert listed a number of qualifying predicate offenses. He did not say, and we do not read his response to suggest, that these offenses were infrequent.

Defendant also argues that the expert's testimony lacked foundation. The expert testified that he was a police officer with the City of Baldwin Park, where he was assigned to the gang unit. He had come in contact with gang members during various investigations and was a member of several associations dealing with gang issues in the San Gabriel Valley. He was familiar with Northside Bolen Parque through more than 200 field contacts, conversations with gang members, conversations with other officers, police department resources, and the gang's "fierce reputation" in the community. This provided sufficient foundation for his testimony. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 620 [gang expert's opinion based on conversations with gang members, investigations of crimes committed by gang members, and information from other officers and law enforcement agencies satisfied primary activities requirement].)

Defendant relies on *Alexander L.*, *supra,* 149 Cal.App.4th 605, a misdemeanor vandalism delinquency proceeding, where the court found the gang expert's testimony insufficient to establish that the alleged gang's primary activities were those enumerated in section 186.22, subdivision (e). (*Id*. at pp. 611–614.) Specifically, the court noted that when asked about the gang's primary activities, the expert stated that he "kn[e]w" that the gang had been involved in certain enumerated crimes, but he did not testify that these crimes constituted the gang's primary activities. (*Id*. at pp. 611–612.) No foundation for his knowledge was established, nor was there any other evidence ensuring the reliability of his conclusory testimony. (*Id*. at p. 612.)

The *Alexander L.* court considered the expert's testimony to be closer to the insufficient evidence in *In re Nathaniel C.* (1991) 228 Cal.App.3d 990 (*Nathaniel C.*) and *In re Leland D.* (1990) 223 Cal.App.3d 251 (*Leland D.*) than to the evidence in *People v. Gardeley*, *supra*, 14 Cal.4th 605. (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 614.) The gang expert in *Nathaniel C.* purported to testify about criminal gang activity in his area,

but the gang at issue in the case operated in a different area, and the expert could not offer first-hand testimony regarding its activities. (*Id.* at pp. 1004–1005.) Here, in contrast, the gang expert was a member of the gang unit of the City of Baldwin Park and had first-hand familiarity with the Northside Bolen Parque gang, which operates in that city. The prosecution introduced documentary evidence of convictions on predicate offenses within the statutory period. This case is thus distinguishable from *Leland D.*, where the expert testified about predicate offenses, based on non-specific hearsay and without a clear timeframe. (*Id*. at pp. 259–260.) Additionally, unlike *Alexander L.*, this case itself involves a predicate offense under section 186.22, subdivision (e), lending credence to the gang expert's testimony. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330.)

The gang evidence was sufficient to support the enhancement.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.