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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. GREGORY DEE CLARK Defendant and Appellant.	B231034 (Los Angeles County Super. Ct. No. VA114972)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed as modified.

Benjamin Adam Owens, 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, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Gregory Dee Clark appeals from his convictions for inflicting corporal injury upon a cohabitant, assault with a deadly weapon, and making criminal threats. He contends admission of evidence of his gang membership was prejudicial error and he is entitled to three additional days of presentence custody. We conclude he is entitled to the three days but otherwise affirm.

BACKGROUND

Appellant, a gang member, has a history of violence and has served several terms in prison, including for spousal battery and three counts of gang-related voluntary manslaughter. Diane Reeves lived with appellant from 2005 to 2006. In 2007, he was incarcerated for possession of a deadly weapon. After appellant was released in 2009, he and Reeves again lived together.

On January 23, 2010, appellant struck Reeves in the ear with his fist, causing her to require hospital treatment and stitches. Reeves told police appellant had pushed her into a door, but refused to file a report because appellant had previously threatened to kill her and her family.

On February 18, 2010, appellant left a nearly three-minute message on the voicemail of Reeves's son, Gerryl Bennett, telling Bennett to tell Reeves not to raise her voice to him. He said, "she got one more time to holler at me, and you all mother fuckers are gonna be collecting some money . . . to bury her and to prosecute my ass if she hollers at me one more time." Bennett did not tell Reeves about the voicemail message but urged her to remain calm the next time she and appellant argued because he knew appellant was a gang member and previously had beaten his wife.

During an argument in March 2010, appellant brandished an aluminum bat and threatened to kill both Reeves and Bennett if Reeves did not stop yelling at him. He had previously threatened that if anything happened to him and he went to jail, his friends on the streets would "take care" of Reeves and her family. Bennett placed his hand over Reeves's mouth and asked her to be quiet. Reeves testified she was afraid of appellant and believed his threats because "he used to be

gang affiliated." Bennett testified he too was afraid of appellant because "he was a gang member." Reeves refused to report the incident to the authorities because appellant was affiliated with a gang and had a history of violence, and she believed he would follow through on his threats.

On April 16, 2010, appellant accused Reeves of being unfaithful to him. He pushed and shoved her, struck her with a dumbbell, threatened to kill her, and blocked the doorway so she could not exit the room. Reeves suffered a large bump on her forehead and bruising on her face, neck, and chest as a result of the attack.

On July 7, 2010, the Los Angeles County District Attorney's Office filed an information charging appellant with inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a); counts 1 & 4),[1] assault with a deadly weapon (§ 245, subd. (a)(1); count 2), and making criminal threats (§ 422; counts 3, 5, 6, & 7). Appellant pled not guilty and denied all the allegations.

At trial, Reeves and Bennett testified that appellant threatened them both and attacked Reeves on several occasions.

Appellant testified he never assaulted or injured Reeves or threatened her or Bennett. He was at a friend's house the night Reeves hurt her ear, and her injuries were caused by a fall. He had never done anything to hurt her. Appellant testified he did not mean his voicemail message to be taken as a serious threat, he was simply venting his anger.

The jury found appellant guilty on counts one, two, four, six, and seven, and guilty on count three (making criminal threats) of the lesser included offense of attempted criminal threats. The jury also found him guilty on count five (making criminal threats) of the lesser included offense of attempted criminal threats, but the court dismissed the count because it had failed to read the guilty

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[1] Unless otherwise stated, all statutory references are to the Penal Code.

verdict in the presence of the jury. Probation was denied and appellant was sentenced to 22 years in state prison.

DISCUSSION

A. Admission of Gang-Related Evidence

Appellant contends the trial court erred when it admitted Reeves's and Bennett's testimony that they were afraid to go to the police because appellant was a gang member. He argues the evidence was inadmissible under Evidence Code section 352 because its probative value was substantially outweighed by its unduly prejudicial impact. We disagree.

Under Evidence Code Section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The trial court has broad discretion concerning the admission of gang evidence to prove the issues in a criminal case as long as the evidence is admitted to prove a fact other than the defendant's criminal propensity. (Evid. Code, § 1101, subd. (b); *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Champion* (1995) 9 Cal.4th 879, 922.) We review the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

To prove appellant guilty of making criminal threats, the prosecution was required to establish, among other things, that the threats caused Reeves and Bennett "reasonably to be in sustained fear" for their own safety or the safety of their family. (§ 422; *In re George T.* (2004) 33 Cal.4th 620, 630.)[2] As our

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[2] Under section 422, "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat . . . which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that

Supreme Court has stated, "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, *means of applying force or fear*, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, italics added.) For example, in *People v. Mendoza*, (2000) 24 Cal.4th 130, the defendant was charged with kidnapping and robbery. During the robbery, the defendant stated he was a "homeboy." (*Id.* at p. 163.) One of the victims testified she understood "homeboy" to be a reference to defendant's gang affiliation. (*Ibid.*) The court held this testimony was directly relevant to establish the element of fear and was probative because fear was an element of robbery. (*Id*. at p. 178.) Bennett testified he also feared appellant because of his gang affiliation. This evidence established one of the means by which appellant applied fear to his victims.

This testimony was also relevant to rehabilitate Reeves by explaining her reticence to call the police. Similar to the victim in *Mendoza*, Reeves and Bennett understood appellant to be part of a gang. Reeves testified she was afraid of appellant because he was affiliated with a gang. Because of this fear, she refused to call the police or tell anyone about his violent behavior.

Appellant argues the evidence was nevertheless inadmissible under Evidence Code section 352 because it would tend to inflame the jury, and other evidence, such as his prior prison term for beating his ex-wife, was all that was necessary to establish the victims' fear for purposes of Penal Code section 422. We disagree.

There was no indication in the record that the gang-related evidence would unduly influence the jury. The prosecutor elicited only neutral and brief responses

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person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

from the victims concerning appellant's gang affiliation, and the court instructed the jury to consider the testimony only for the limited purpose showing Reeves's and Bennett's state of mind when appellant threatened them. Appellant argues it is not realistic to believe the jury considered appellant's gang affiliation for the sole purpose of determining Reeves's and Bennett's fear. We disagree. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the courts instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Accordingly, we presume the jurors followed the trial court's limiting instructions.

The trial court was within its discretion to admit Reeves's and Bennett's testimony concerning appellant's gang membership.

Even if admission of the testimony was error, the error was harmless because there was no reasonable chance a more favorable result to appellant would have been reached had the evidence not been admitted.

To warrant reversal, there must be a reasonable probability "a result more favorable to the appealing party would have been reached in absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

As noted, appellant was convicted of assault with a deadly weapon, inflicting corporal injury upon Reeves, and making criminal threats. The non-gang evidence—Reeves's physical injuries, her and Bennett's testimony regarding the circumstances and content of appellant's threats, and the message appellant left on Bennett's voicemail—amply demonstrated appellant's guilt. Particularly, the voicemail message, in which appellant stated that if Reeves shouted at him one more time, she and Bennett ("you all mother fuckers") would be "collecting some money . . . to bury her and to prosecute" him, and his threat that if he went to jail his friends on the streets would "take care" of Reeves and her family," were, in the

language of section 422, "so unequivocal, unconditional, immediate, and specific" as to permit the jury to conclude he meant to convey "a gravity of purpose and an immediate prospect of execution of the threat" even absent the gang evidence. No reason exists to suppose that a jury that disbelieved appellant's version of events and found his threats to be credible did so simply because he was a gang member. Therefore, no reasonable probability exists that the jury would have returned a different verdict had they been ignorant of his gang membership.

B. Presentence Custody Credits

Appellant contends he is entitled to three additional days of presentence custody credit. The Attorney General concedes the point, and we agree.

Appellant was arrested on April 16, 2010 and sentenced on February 15, 2011. Including the day of arrest and the day of sentencing (*People v. Smith* (1989) 211 Cal.App.3d 523, 526), appellant was entitled to 306 days of actual custody credit, three more days than the trial court's award of 303 days. The abstract of the judgment must be amended to reflect a total of 351 days of presentence custody credit, comprising 306 days of actual custody and 45 days of conduct credit.

DISPOSITION

The judgment is modified to reflect a total of 351 days of presentence custody credit. In all other respects the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect the judgment as modified and forward a copy thereof to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

ROTHSCHILD, Acting, P. J. JOHNSON, J.