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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN MARTINEZ,

Defendant and Appellant.

A145497

(City & County of San Francisco
Super. Ct. Nos. 214346, 221935)

In re MARTIN MARTINEZ,

on Habeas Corpus.

A147453

Defendant Martin Martinez was 19 years old when he stabbed to death another young man at a party. A jury rejected his claim of self-defense and convicted him of second degree murder with personal use of a knife. (Pen. Code, §§ 187, 189, 12022, subd. (b)(1).)¹ The jury also found defendant tried to silence one witness and obtain false testimony from another, and convicted him of solicitation to commit murder (§ 653f, subd. (b)), solicitation to commit perjury (§ 653f, subd. (a)), and attempting to dissuade a witness from testifying (§ 136.1, subd. (a)(2)). The court sentenced defendant to prison for 15 years to life for murder plus an additional nine years eight months.

On appeal defendant contends the trial court erred in allowing a gang expert to testify that, in gang parlance, the request to have a witness “smacked” meant killed; instructing the jury that one who starts a fight or engages in mutual combat has a limited

¹ All further section references are to the Penal Code except as noted.

right to self-defense; directing the jury to reach a verdict on murder before reaching a verdict on manslaughter; and responding to a jury question during deliberations by restating instructions. Defendant also argues trial counsel was ineffective in failing to object to the mutual combat instruction and reiterates that claim in a petition for a writ of habeas corpus, which we have consolidated with the appeal.

Finding no error, we shall affirm the judgment and deny the petition for a writ of habeas corpus.

Statement of Facts

Defendant and 17-year-old Angelo Zuniga had a fight at a party that ended when defendant pulled a knife from his pocket and repeatedly stabbed Zuniga to death. Defendant claimed self-defense.

The October 25, 2008 party was hosted by high school senior Doris Vargas in the garage of her family's San Francisco home. Vargas testified that about 30 to 50 young people attended, including Vargas's classmate and defendant's sister, Mariela Martinez. Mariela arrived at the party around 8:00 p.m. and defendant arrived later. Mariela was "frightened" when defendant arrived, according to Vargas. Vargas testified that defendant was angry with Mariela, who "was supposed to be home." A "little bit" later, Vargas saw Mariela dancing with Andy Mondragon. Mondragon later told the police that defendant walked up to him, "got into [his] face," said "what's up?" and made movements toward him like he was going to take a swing. Vargas "immediately stood between them and told them there shouldn't be any violence." Mondragon later went up to defendant to apologize for dancing with Mariela but defendant told him "don't speak no more. I'll cut your throat." Mondragon left the party.

The confrontation between defendant and Zuniga occurred sometime later. Defendant's sister Mariela was dancing with other girls when Zuniga tried to "freak dance" with her.² A friend of defendant and Mariela, Alexander Torres, testified that Zuniga "touch[ed] her hand to see if she wanted to dance with him" and tried to come up

² In freak dancing the dancers rub or bump their bodies against each other.

behind her to rub himself against her. Torres saw from Mariela's body language that she did not want to dance with Zuniga but did not think she needed his help to resist Zuniga's advances.

The prosecution witnesses provided few details about the ensuing fight between defendant and Zuniga. Abigail Ferreira saw defendant punch Zuniga but did not know if other punches were exchanged. Jesus Rodriguez said that he heard someone scream "fight," looked around, and saw "wild punches" being thrown between defendant and Zuniga. Rodriguez started walking toward the fight and was halfway across the garage when he saw Zuniga drop to the floor. Defendant immediately left the garage.

The first 911 call reporting a stabbing was made at 11:50 p.m. The police and paramedics arrived within minutes but were unable to revive Zuniga. He died of multiple stab wounds. A medical examiner testified there were seven knife wounds, including a stabbing wound to the chest; a cluster of four to the left lower back; and a slashing cut to the arm. Two of the wounds caused lethal injury, a chest wound that punctured the aorta and a back wound that punctured the spleen. The medical examiner found no wounds, bruises or scratches on Zuniga's hands. Zuniga was intoxicated at the time of his death, with a blood alcohol ratio of .12 to .13 percent.

After stabbing Zuniga, defendant went to a friend's house to meet his brother. One of the people present at the house testified that defendant had no cuts or bruises on him but did have redness and swelling around one eye. Defendant and a female friend went to the kitchen where the friend burned defendant's knife over the stove and washed it in the sink. Defendant was arrested after leaving the house, at 1:12 a.m., slightly more than one hour after the stabbing.

When interviewed by the police, defendant denied stabbing Zuniga and even denied being at the party. At booking, a nurse evaluated defendant's medical condition. The nurse saw no injuries. Defendant was asked if he "had any injuries or any type of recent trauma" and he said "no." Defendant's shirt was later found to have Zuniga's blood on the shoulder and sleeve, and defendant's own blood on the collar.

While incarcerated, defendant wrote letters to Oliver Barcenas, a member of the Norteño street gang with the moniker “Vicious.”³ The letters, which defendant admits writing, were seized from Barcenas’s residence during a search. The letters have handwriting on one side and “ghost writing” on the back — indented writing made by a pen without ink that scores the paper and appears invisible to the naked eye until shaded with a pencil.

Defendant’s March 2013 letter, in “ghost written” script, asked Barcenas to persuade Alexander Torres, one of the party-goers, to testify that Zuniga had a knife and to “smack” Andy Mondragon, who defendant threatened before stabbing Zuniga. Defendant wrote: “Oli: I got news from my lawyer. There’s a problem with Catracho [Torres] 0/30th Street. He’s supposed to testify on my behalf, but he’s starting to go astray. I need him to get on the stand and say that dude pulled out a knife on me and when the lights came on the knife disappeared, dude’s knife disappeared. I need him to beat this case. Holla at him for me ASAP. He needs to cooperate with my lawyer before trial. I need Andy smacked and Catracho 0/30th holla at my legal team. I can’t go home or beat this case if this ain’t taken care of. Bruh, can hook you up with Catracho. I know he’s got problems with the 30th Street niggas. Tell him we can fix his problems with them. Let him know I need his help. His AKA over the phone is ‘Vero.’ Bruh, I need all this ready and established ASAP before June. It’s ugly. My D.A. ain’t trying to work with me. Smack Andy and get at Catracho ASAP. Lil Bruh can help you get in contact with Catracho. I’m running out of time. The code for when you receive this is ‘I got the Twilight book you wanted.’ ”

Another ghost script letter in March 2013 asked Barcenas to “smack” Mondragon and gave Mondragon’s home address: “Oli, Bruh, make that happen ASAP. His address is 1374 Hampshire. I’m sure he still lives there. Have Bruh double check if dude live

³ There was evidence that defendant, the victim and other party-goers were also Norteños but none of this evidence was admitted at trial. The court admonished the jury that evidence about gangs related “solely as to Mr. Barcenas. And it’s only for you to put the letters . . . in context.”

there. I watch the news every day. When you smack him, tell me ‘you took the pics of that breeze.’ When you get this letter say ‘I got them new shoes that you wanted.’ So that’s the code when you receive this letter. You need to smack him before my trial. I’m not coming home if he get on the stand. Smack him ASAP, 1374 Hamp. Bring me home. I go to court Friday for a trial date. From now to my trial date he need to get smacked. Holla at me ASAP. Remember the address and destroy the letter.”

A police officer expert in gangs testified that, in Norteño slang, “to smack” a witness means to kill a witness. The testimony was as follows: “Q. . . . There are specific words used in this letter on the back. It says ‘I need Andy smacked.’ Do you have an opinion with respect to a Norteño like Mr. Barcenas, what that means? [¶] A. I believe it means to have Andy killed. [¶] Q. Why do you believe that? [¶] A. I looked at the contents of the letter and the way the word ‘smack’ was used, and that’s my belief what it meant. [¶] . . . [¶] Q. What was the basis of your opinion from your discussions with other Gang Task Force members? [¶] A. That it just reaffirmed my opinion that it meant to kill. [¶] I also spoke to a dropout Norteño gang member, and I posed the question to him. I asked him if as a Norteño gang member he were told to smack a witness in a case what would he interpret that to mean. And he said it would be to kill the witness. [¶] Q. What about the context of the letter itself. Was there anything about that that aids in your opinion that in this context the word means to kill? . . . [¶] A. The line that jumped out at me was ‘I watch the news every day. When you smack him tell me you took pictures of that breeze.’ . . . [Y]ou’re not going to see somebody who was smacked on the news if he was given a backhand or a slap. It’s not going to make the 6 o’clock news [on] the TV. The only thing it’s going to be is somebody that’s killed or greatly assaulted. [¶] Q. Now, when you say you talked to another Norteño about the term, in any of your investigation of the nature or meaning of the term, were you provided information that it meant something other than to kill? [¶] A. No.” On cross-examination, the officer conceded that “there are many definitions of ‘smack’ that don’t mean kill in the ordinary common usage of the word,” including to “beat up.” However, on redirect, the officer reasserted his opinion that the term “smack,” when read in the context of the letter, means to kill.

Mondragon, whom defendant sought to have “smacked,” testified that he was “reluctant” to be a witness at trial. In his testimony, he described his encounter with defendant as a “small confrontation” and said he could not remember anything about what happened or what was said. The prosecution relied upon Mondragon’s earlier police statement describing the confrontation and relating defendant’s threat to cut his throat.

Torres was also a subject of the letters. Defendant told Barcenas that Torres was “supposed to testify on my behalf” to say that Zuniga “pulled a knife” but Torres is “starting to go astray.” Torres testified for the prosecution at trial, saying that he did not see the fight but, to help defendant, had falsely told a defense investigator that Zuniga was armed with a knife during the fight. Torres called the investigator to recant the story and, at trial, reaffirmed that he never saw Zuniga with a knife.

Defendant testified in his own defense. He said he was drinking with friends on the night of the party when his mother called and asked him to check on his sister who was not answering her cell phone. Defendant went to the party and told his sister that their mother was trying to call her. Defendant said he was not angry with Mariela and told her she could stay at the party. Defendant also stayed at the party, socializing and drinking. He testified that the party-goers were freak-dancing, which is common at parties. Defendant said he had a “small confrontation” with Mondragon. Defendant could not remember why they argued. Friends stepped in between them and the confrontation was over — “it was just a few minutes, and that was that.” Mondragon approached defendant later and “said something. . . . I don’t remember what he said, but I cut him off and told him to get out of my face.” Defendant denied threatening Mondragon.

Sometime later, Mariela made “eye contact” with defendant as if “something was wrong.” Defendant walked over to her and she told him “I don’t want to dance with this guy,” referring to Zuniga, who was standing nearby. Defendant testified, “I got in his face” and told Zuniga “that’s my sister, she doesn’t want to dance with you.” Zuniga, according to defendant, replied “I don’t give a fuck” and punched him in the face. Defendant testified that Zuniga continued punching him. Defendant backed up, put up his hands to defend himself, and lowered his face to avoid the blows. Defendant testified:

“When I put my head down I saw him come up with something. [¶] . . . [¶] He had something in his hand. I’m not positive what it was, but I assumed it was a knife.” Defendant “freaked out.” “I went into my pocket, and I pulled out a knife.” Zuniga “kept hitting me. And I stabbed him, and he just wouldn’t stop. It was real quick and pushed him off.” Defendant said he stabbed Zuniga in the side on the first thrust and did not know where the other thrusts landed: “It happened really fast.” Defendant testified that Zuniga was facing him “the whole time.”

Defendant testified that he ran from the garage because he thought Zuniga “was going to chase [him].” Defendant’s nose was bleeding. He got a ride with a friend. Defendant went to see his brother and told him what happened. His brother took the knife and defendant did not see it again.

Defendant admitted repeatedly lying to the police. Defendant said he lied because he was “scared” and his brother said “keep your mouth shut.” Defendant admitted writing letters to Barcenas about Torres and Mondragon, and knowing that Barcenas is a Norteño gang member. Defendant testified that he wrote the letters because he wanted Torres to remain involved in the case. In asking Barcenas to “smack” Mondragon, he meant “[t]o rough him up, to hit him” in order “[t]o keep him from testifying.” Defendant denied the truth of Mondragon’s police statement but wanted to stop his testimony “[b]ecause he said some bad stuff that made me look bad.”

Discussion

1. Expert testimony.

Defendant contends that the gang expert’s testimony that the word “smack” means kill in gang parlance “crossed the line into the prohibited area of testimony as to [defendant’s] intent” and thereby “invade[d] the province of the jury to decide” defendant’s guilt or innocence on the charge of solicitation to commit murder. (§ 653f, subd. (b).)

“A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to

which his testimony relates.” (Evid. Code, § 720, subd. (a).) Expert opinion testimony is admissible if the subject matter of the testimony “is sufficiently beyond common experience that an opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) “Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.” (Evid. Code, § 805.)

Among limitations on the use of expert testimony is the principle that an expert witness may not express an opinion on the defendant’s guilt. (*People v. Vang* (2011) 52 Cal.4th 1038, 1047.) “ ‘The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] ‘ ‘Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.’ ’ ’ (*Id.* at p. 1048.) Expert testimony about a specific defendant’s subjective intent and knowledge is also generally inadmissible. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946 [limiting *People v. Killebrew* (2002) 103 Cal.App.4th 644]; cf. *Vang, supra*, at p. 1048, fn. 4 [“in some circumstances, expert testimony regarding the specific defendants might be proper”].) Inferring an individual’s knowledge and intent are usually subjects within common experience that does not require expert testimony. “Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.” (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.)

State and federal courts have long permitted a qualified expert to testify about criminal street gangs — including their history, organization, activities, beliefs, symbols, and terminology — because these subjects are beyond the common experience of many jurors. (*People v. Lindberg* (2008) 45 Cal.4th 1, 46-47; *People v. Gonzalez, supra*, 38 Cal.4th at p. 944.) Expert testimony interpreting gang terminology is “not uncommon.” (*People v. Champion* (1995) 9 Cal.4th 879, 924, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860.) In a case alleging conspiracy to murder based on defendants’ intercepted telephone calls, a gang expert was permitted to testify that the

phrase “to ‘lay him down’ means to murder someone [and that] ‘[t]hing-thing,’ ‘thang,’ ‘heat,’ ‘heaters,’ ‘hizzy’ and ‘zizang’ are terms for gun.” (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1165.)

The testimony that “smack” means kill is no different from the testimony in *Roberts* that “to ‘lay him down’ means to murder someone.” (*People v. Roberts, supra*, 184 Cal.App.4th at p. 1165.) In both instances, expert testimony was admitted to assist a trier of fact unfamiliar with gang terminology. Defendant contends the gang expert went beyond an interpretation of gang terminology and improperly expressed an opinion about defendant’s actual intent in asking Barcenas to “smack” a witness. The record does not support the contention. The expert did not testify that defendant’s subjective intent in sending the letter was to solicit murder, nor express the opinion that defendant was guilty of that crime. The expert opined that a Norteño receiving a letter asking him to “smack” a witness would understand the letter to mean “kill,” based on the expert’s experience and conversations with former gang members and police officers familiar with gangs. But the expert also conceded “there are many definitions of ‘smack’ that don’t mean kill in the ordinary common usage of the word,” including to “beat up.” The jurors were instructed that they were “not required to accept [expert opinions] as true or correct. . . . You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.” (CALCRIM No. 332.) It remained for the jury to assess the value of the expert’s opinion, consider the letter itself, and weigh all the evidence presented in deciding whether defendant intended Barcenas to kill Mondragon or “[t]o rough him up, to hit him,” as defendant testified.

2. Jury instruction on self-defense.

The jury was instructed on murder in the first and second degree, voluntary manslaughter, and justifiable homicide for a killing committed in self-defense. (CALCRIM Nos. 500, 505, 520-522, 570-571, 3471-3472.) One of the self-defense instructions stated limitations on the right to self-defense where one starts a fight or

engages in mutual combat.⁴ (CALCRIM No. 3471.) Defendant contends there was no evidence to support the instruction and, thus, the court erred in giving the instruction and defense counsel was ineffective in failing to object to it.

The evidence fully supported the instruction. Defendant testified that he “got in [Zuniga’s] face” for trying to dance with Mariela. Ferreira saw defendant punch Zuniga and Rodriguez saw “wild punches” being thrown between them. Earlier, defendant had confronted and threatened another boy for dancing with Mariela. The only evidence that Zuniga was the initial and lone aggressor was provided by defendant’s self-serving testimony, which was in conflict with physical evidence showing only slight injury to defendant and multiple stab wounds to Zuniga, several in the back. The evidence, as a whole, permits the inference that defendant was the initial aggressor or voluntarily engaged in a physical fight. The jury was properly instructed on the matter and given the opportunity to weigh whether defendant started the fight or consented to fight with Zuniga before the claimed occasion for self-defense arose.

3. Instruction on deliberations and completion of verdict forms.

Defendant contends the court erred when instructing the jury on the process of homicide deliberations and the manner of competing verdict forms. Specifically, defendant argues “the trial court interfered with the jury’s deliberations and unfairly coerced the return of a murder verdict by directing jurors not to vote on the lesser charge of manslaughter before delivering a verdict of not guilty on the greater charge of murder.”

⁴ The jury was instructed: “A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.” (CALCRIM No. 3471.)

The trial judge gave a standard jury instruction on homicide deliberations and completion of verdict forms that stated, in relevant part: “You will be given verdict forms for guilty and not guilty of first degree murder, second degree murder and voluntary manslaughter. [¶] You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder only if all of you have found [defendant] not guilty of first degree murder, and I can accept a verdict of guilty or not guilty of voluntary manslaughter only if all of you have found [defendant] not guilty of both first and second degree murder.” (CALCRIM No. 640.) The verdict forms contained similar admonitions. While the voluntary manslaughter verdict form is not included in the record on appeal, the parties are agreed that it provided: “Do not take final vote on this verdict unless you have found the defendant not guilty of [murder] in the 1st and 2nd degree.”

The instruction and verdict form were proper. A “jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but that it must acquit the defendant of the greater offense before returning a verdict on the lesser offense. [Citation.] In this manner, when the jury renders its verdict on the lesser included offense, it will also have expressly determined that the accused is not guilty of the greater offense. [¶] The acquittal-first rule, requiring the jury to expressly acquit the defendant before rendering a verdict on the lesser offense, serves the interests of both defendants and prosecutors” and an instruction incorporating this principle should be given “at the outset of jury deliberations,” as it was here. (*People v. Fields* (1996) 13 Cal.4th 289, 309, italics omitted.)

Defendant argues that the verdict form misstated the law. Defendant equates the verdict form’s directive that the jurors must find defendant not guilty of murder before taking the “final vote” on a verdict of manslaughter as a directive that the jurors could not deliberate on manslaughter unless and until they acquitted defendant of murder. Defendant’s construction is untenable. The verdict form simply admonished the jury not to take a *final* vote on voluntary manslaughter without first acquitting defendant of murder. The admonishment did not tell the jury it could not *consider* the lesser included

offense and any potential confusion was eliminated by the instruction informing the jurors “You may consider these different kinds of homicide in whatever order you wish.” (CALCRIM No. 640.)

4. Response to jury question during deliberations.

Defendant argues that a jury question during deliberations reveal the jury’s confusion about the verdict form and that the judge’s response, referring the jury to the instructions, was inadequate. During deliberations, the jury asked: “1. If we find the defendant guilty of 1st or 2nd degree murder, it is our understanding that we need to evaluate whether the decision should be reduced to voluntary manslaughter. Can you please confirm? [¶] 2. If we find the defendant not guilty of 1st or 2nd degree murder, should we then evaluate whether the act is voluntary manslaughter? We are confused because the instructions say: [¶] ‘A killing that would otherwise be murder is reduced to voluntary manslaughter if’ [¶] However, the verdict forms say: [¶] ‘Do not take final vote on this verdict unless you have found the defendant not guilty of 187 Penal Code 1st and 2nd degree murder.’ ”

The court referred the jury back to the instructions on voluntary manslaughter (CALCRIM No. 570) and the completion of verdict forms (CALCRIM No. 640). Defendant urges that the court should have provided additional guidance and that its failure to do so violated section 1138, which provides that when the jury “desire to be informed on any point of law arising in the case, . . . the information required must be given”

“The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information. [Citation.] Indeed, comments diverging from the standard are often risky.” (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

The court properly responded to the jury’s question by reiterating instructions specific to their concerns about the interplay of murder and manslaughter principles. Read together, those instructions told the jury to “consider these different kinds of homicide in whatever order you wish” (CALCRIM No. 640); “a killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion” (CALCRIM No. 570); and to complete particular verdict forms if the jurors “agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but also agree that the defendant is guilty of voluntary manslaughter” (CALCRIM No. 640). The jury was fully advised to consider both murder and manslaughter before rendering their final verdict.

Disposition

The judgment is affirmed and the petition for writ of habeas corpus is summarily denied.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.