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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL DAVID LOPEZ,

Defendant and Appellant.

2d Crim. No. B229534
(Super. Ct. No. 1324733)
(Santa Barbara County)

Daniel David Lopez appeals from a judgment following conviction by jury of (1) attempted murder (count 1 – Pen. Code, §§ 664, 187, subd. (a)), with jury findings that the crime was committed willfully, deliberately, and with premeditation, with intentional, personal discharge of a deadly weapon (a short-barreled rifle), with personal infliction of great bodily injury, and for the benefit, at the direction of, or in association with a criminal street gang (§§ 12022.7, subd. (a); 12022.53, subd. (d); 186.22, subd. (b)(1)); (2) vandalism resulting in damage greater than \$400 (count 2 – § 594, subd. (b)(1)), with a finding that the crime was committed for the benefit, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); (3) brandishing a deadly weapon (a knife) (count 3 – § 417, subd. (a)(1)); and (4) violating a gang injunction by possessing a knife in a "gang safety zone" during the vandalism (count 4 – § 166, subd. (a)(4)). The trial court sentenced Lopez to a determinate term of 7 years, followed by an indeterminate term of 40 years to life, in state prison.

We conclude that the trial court did not err (1) when it denied Lopez' motion to bifurcate trial on the gang enhancements from trial on underlying charges, or (2) when it struck a defense expert's opinion that Lopez was "moving away" from the gang lifestyle at the time of the charged offenses. We affirm.

FACTUAL BACKGROUND

December 19, 2009

Vandalism, Brandishing a Knife, and Violating a Gang Injunction

Lopez is a member of the Westside VLP street gang in Lompoc. Southside Lompoc is a rival gang.

In March 2008, Lompoc police officers served Lopez with a gang injunction. The injunction prohibited gang members from carrying weapons in "gang safety zones," among other things.

On December 19, 2008, Erik Morales was washing his car outside his mother's house in a gang safety zone. Lopez drove by in a white Mazda, with a car full of people screaming, "Westside VLP," and flashing gang signs. They parked and walked toward Morales, carrying knives. Morales heard Lopez say to his companions that Morales, "is a Southsider." Morales is not a gang member but has friends who are associated with Southside Lompoc. Morales went inside his mother's house with his girlfriend. Morales recognized Lopez because he knew him from school and had previously fought him.

Lopez and his companions broke a window of the house, and then broke all the windows of Morales' car. Repairs cost \$1,800.

January 16, 2009

Attempted Murder

Almost a month later, on January 16, the family of Daniel Rodriguez held a memorial at their home for Daniel, a 14-year-old Southside Lompoc member. He was killed two days earlier by a member of Westside VLP. Members of Southside Lompoc attended the memorial and many guests were in the front yard.

During the memorial, a white car passed by. Daniel's sister recognized Lopez as the driver. He and his passengers called out, "Westside," flashed gang signs, and laughed. One of the guests threw a beer bottle at the car and broke its rear window. Someone called police. Guests started to move inside or into the backyard. A guest wrote down four digits of the license plate. The digits closely corresponded to the license plate of a white Mazda registered to Lopez' grandmother.

About 10 or 15 minutes after the white car passed by, it returned. A man got out and started firing a short-barreled rifle toward the guests. It sounded like a .22, according to Daniel's brother.

The man's face was covered. Witnesses could not identify him at trial. Daniel's father described the man to police as young, Hispanic, 5 feet 6 to 8 inches tall and weighing about 150 pounds. At trial he could not recall this.

The man fired two or more shots toward the guests but did not initially hit anyone. Daniel's brother testified that he confronted the man with a chair. The man aimed the rifle at Daniels brother and he heard it click, but the rifle did not fire. Daniel's father testified that the man also aimed at him, and he heard a click, but the rifle did not fire.

Armando Cortez, a member of the Southside Lompoc gang, jumped over a fence and grabbed the man who had the rifle. The man shot Cortez in the leg, ran to the white car, and drove away. A guest followed the white car in a truck for a short distance but lost sight of it when it drove through a mobile home park.

Four days after the shooting, police officers found a white Mazda under a tarp in the backyard of Lopez' cousin, Corina Figueroa. It had a broken rear window and was registered to Lopez' grandmother.

Corina Figueroa was on felony probation and cooperated with detectives when they interviewed her. She also testified against Lopez at the preliminary hearing. Because of her testimony, she was threatened, her car and home were vandalized, and her mother's van was set on fire. At trial, Figueroa testified "I don't remember. I can't do

this. I'm sorry." The court admitted Figueroa's preliminary hearing testimony and a video of Figueroa's police interview into evidence.

Figueroa testified that Lopez came to her house on the evening of January 16, and was upset because "he had got his [car] windows busted out," when someone threw a "brick" at the car. He left after 5 or 10 minutes.

He came back about 15 or 20 minutes later and said he shot someone. She helped him put his car in her backyard. He said he had gone back to the house and "just started shooting." He said someone jumped over a fence in front of him and he shot the person and ran back to the car. He said he "would've shot more but the gun jammed."

Figueroa said Lopez had a .22 rifle with him that was about two feet long. He said he got it from "Bobby's" house. Figueroa could see a bullet jammed in it. Lopez asked her to hide the rifle but she refused.

Investigators never found the rifle. A police officer testified that "Bobby" Barrera is a Westside VLP gang member who has ".22s." The officer saw Bobby driving away from the Rodriguez home just after Cortez was shot.

Expert Testimony

Lompoc police detective Scott Casey opined that the December 19 and January 16 crimes were committed for the benefit of the Westside VLP gang. Casey testified that Lopez was an active member of Westside VLP at the time of the offenses. He described frequent, recent contacts he had with Lopez in the company of other gang members, including an arrest in the white Mazda. He described four violent predicate crimes committed by other members of the Westside VLP consisting of three assaults and a murder. In Casey's opinion, the December 19 crimes benefitted Westside VLP because members called out "Westside VLP," and flashed gang signs during the crimes, thereby spreading fear and intimidation. In Casey's opinion, the January 16 shooting also benefitted Westside VLP because it spread fear and intimidation and was committed in retaliation for the disrespectful act of throwing a bottle through the car window after the driver shouted "Westside VLP."

Lopez presented the testimony of a clinical psychologist, John Lewis, Ph.D. Dr. Lewis expressed two opinions: (1) Lopez joined the gang for a "sense of belonging," because he felt isolated as a child, and (2) Lopez had become "disillusioned" with the gang and was "moving away" from it at the time of the charged offenses. Dr. Lewis based his opinions on seven hours of interviews with Lopez, including discussions about the charged offenses, interviews with Lopez' mother and girlfriend, and police reports. He concluded that Lopez had become disillusioned with the gang because gang members had offended him when they flirted with his girlfriend, they did not give him the respect he had hoped for, and they did not protect him or visit him in the hospital about six months before the shooting when he was accidentally stabbed by another member of Westside VLP during a fight with Southside Lompoc members.

On cross-examination, the prosecutor asked Dr. Lewis what Lopez had told him about the charged offenses. Defense counsel objected based on the attorney-client privilege.

Outside the presence of the jury, Dr. Lewis told the court that his discussions with Lopez about the charged offenses were "relevant" to a question posed to him by defense counsel "about whether [Lopez] was . . . capable of acting outside of the interests of his gang," but, "ultimately" Dr. Lewis determined he could not "know with any certainty whether when these incidents occurred he was acting outside the interests of his gang," so he did not include an opinion on that issue in his report. He confirmed that he did discuss the charged offenses with Lopez.

The court gave defense counsel the option of disclosing the discussions or withdrawing the expert's opinion that Lopez had become disillusioned with the VLP gang and was moving away from it. Defense counsel opted to withdraw the opinion, and the trial court instructed the jury to disregard it. The court told the jury it could consider the remaining opinion that Lopez joined the gang for a feeling of belonging.

Lopez presented the testimony of his mother and girlfriend that within six months before the shooting, he said he wanted to leave Westside VLP to start a new life. They said he was hospitalized after he was stabbed and no one from Westside VLP

visited him in the hospital or offered the family assistance. He became more guarded and fearful, and he spent less time with his Westside VLP friends and more time at home with his girlfriend and child.

DISCUSSION

Bifurcation

Lopez contends the court erred when it denied his motion to bifurcate counts 1 through 3 from the gang enhancement allegations because the evidence of uncharged gang conduct was unduly prejudicial. (Evid. Code, § 352.) Specifically, he contends that the evidence of four violent predicate acts committed by other gang members, his own lengthy criminal history and history of gang-related contacts with police, the gang fight in which he was stabbed, testimony that Daniel was killed with "a .22," and testimony that Bobby Barrerra possessed .22 caliber rifles, created substantial danger of undue prejudice. We disagree.

A trial court has discretion to bifurcate gang enhancement allegations if it determines that the probative value of the gang evidence is outweighed by a risk of undue prejudice. (Evid. Code, § 352, *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) We review its decision for abuse of discretion. (*Id.* at p. 1050.)

"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 fear or force, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) The evidence of uncharged gang conduct here was relevant to prove Lopez' identity, motive, knowledge, and intent. The evidence was inextricably intertwined with evidence of his guilt. (*Id.* at p. 1048.) The eyewitnesses all described gang signs and slogans being used during the charged offenses. Evidence of gang territories, membership, and practice was necessary to understand the relationships between the witnesses, the victims, and Lopez. It was also necessary to prove Lopez' identity and to explain his reasons for vandalizing Morales' car and returning to the memorial with a gun.

Lopez has not established that the evidence of uncharged gang conduct was "so extraordinarily prejudicial, and of so little relevance to guilt, that it threaten[ed] to sway the jury to convict regardless of [his] actual guilt." (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) The trial court did not abuse its discretion by denying the motion to bifurcate.

Expert Testimony

Lopez contends the trial court erred when it struck Dr. Lewis' opinion that he was moving away from the gang lifestyle. We disagree. The opinion was based on Lopez' unreliable, self-serving statements that were not subject to cross-examination and the court did not abuse its discretion by excluding it.

The scope of an expert's testimony is left to the trial court's discretion. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172.) An expert may generally rely on hearsay, but the trial court may exclude from the expert's testimony any hearsay matter whose unreliability outweighs its probative value. (*Ibid.*) An expert may be cross-examined on the basis of his opinions. (Evid. Code § 721, subd. (a).) "Once the defendant calls an expert to the stand, the expert loses his status as a consulting agent of the attorney, and neither the attorney-client privilege nor the work-product doctrine applies to matters relied on or considered in the formation of his opinion." (*People v. Milner* (1988) 45 Cal.3d 227, 241.)

Dr. Lewis relied on Lopez' self-serving statements that he began to feel differently about the gang after gang members disrespected him and failed to visit him in the hospital. Dr. Lewis acknowledged that he also talked with Lopez about the charged offenses, and that Lopez' statements on that subject were "relevant" to the question whether he was "capable of acting outside of the interests of his gang." But the defense did not allow the prosecution to explore those statements on cross-examination. Lopez' statements to Dr. Lewis were untested and the court could reasonably conclude that they were unreliable, in view of overwhelming eyewitness accounts that he screamed "Westside VLP" and used gang signs during the charged offenses.

The probative value of Lopez' self-proclaimed disillusionment with the gang was minimal. It was also cumulative to the testimony of Lopez' girlfriend and mother that he was moving away from the gang and spending more time with family. The court did not abuse its discretion when it excluded the opinion.

Lopez contends the trial court abused its discretion because it allowed Casey to opine for the prosecution that Lopez acted for the benefit of the street gang but did not allow Dr. Lewis to counter that opinion. The record does not support the contention. Dr. Lewis testified that he had no opinion whether Lopez committed the crimes for the benefit of a street gang. Lopez' counsel asked him to opine whether Lopez had acted "outside of the interests of his gang," but Dr. Smith could not reach that conclusion "with any certainty," so omitted the issue from his report.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Jed Beebe, Judge

Superior Court County of Santa Barbara

Matthew P. Guasco; Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.