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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.

LUIS FERNANDO ORTEGA,

Defendant and Appellant.

2d Crim. No. B232205
(Super. Ct. No. 2007045229)
(Ventura County)

Luis Fernando Ortega appeals the judgment following his conviction for first degree murder. (Pen. Code, §§ 187/189.)¹ The jury found a special circumstance allegation that the murder was committed while lying in wait to be true. (§ 190.2, subd. (a)(15).) The jury also found allegations to be true that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)), and that a principal personally discharged a firearm (§ 12022.53, subd. (e)(1)). Ortega was sentenced to life without the possibility of parole for the offense, plus 25 years to life for the firearm enhancement. Sentence for the gang enhancement was stayed.

¹ All statutory references are to the Penal Code unless otherwise stated.

Ortega contends the trial court erred by excluding evidence of third party culpability, and by admitting prejudicial gang evidence. He also claims ineffective assistance of counsel regarding polygraph test evidence. We affirm.

FACTS

Sofia N. and her family lived in a Newbury Park, California, condominium. Juan Nabte lived at the same residence as a boarder. Ortega lived within walking distance of the Nabte residence.

Nabte and Ortega were members of rival criminal street gangs. Nabte was a member of the Tocas gang and Ortega was a member of the Mara Salvatrucha (MS-13) gang. Fernando Chaclan, Luis Lima and Jenny Patino were also members of MS-13. Sofia was not a member of MS-13 but was present when Jenny Patino was "jumped into" the gang and was Ortega's former girlfriend. There had been conflict between Lima and Nabte before the murder.

During the evening of November 4, 2007, Sofia was with Ortega at Ortega's residence. Between 10:30 and 11:00 p.m., Ortega and Chaclan walked Sofia to her home. A group of people were celebrating Nabte's 21st birthday in the residence. Approximately five minutes after leaving Sofia at her home, Ortega telephoned her and asked her to go upstairs to her bedroom and stay away from the people who were drinking at the Nabte party. Sofia told Ortega that Nabte was standing outside the residence. In a second telephone call, Ortega confirmed that Sofia had gone upstairs. Shortly thereafter, Nabte was fatally shot by Ortega when Nabte was outside his residence smoking a cigarette.

Chaclan and Lima were with Ortega on the street at the time of the shooting and acted as "lookouts" for Ortega. Lima brought the .22-caliber rifle with which Nabte was shot. Jenny Patino saw Ortega, Chaclan and Lima running to the front of Nabte's residence. She also saw that Lima was carrying a rifle. After the shooting, Ortega, Lima and Chaclan ran away. Patino helped dispose of the rifle and attempted to create an alibi for Ortega.

Ortega, Lima, Chaclan, and Patino were arrested. Lima was charged with and convicted of first degree murder. As the result of plea agreements, Chaclan and Patino were convicted of being accessories after the fact. (§ 32.) They also admitted gang enhancement allegations. As part of their plea agreements, Chaclan and Patino agreed to testify against Ortega. At trial, Chaclan testified that he, Ortega and Lima discussed who would shoot Nabte and Ortega volunteered to do so. Patino testified that Ortega admitted to her that he shot Nabte for "MS," Ortega's gang.

DISCUSSION

No Error in Exclusion of Third Party Culpability Evidence

Ortega contends the trial court erred by excluding evidence of third party culpability. He argues that evidence showed another person threatened Nabte hours before the shooting and had a motive to commit the murder.

A criminal defendant has the right to present evidence that a third party is responsible for committing a charged offense if the evidence, like any other evidence, is relevant and its probative value is not substantially outweighed by the risk of undue prejudice. (*People v. Hall* (1986) 41 Cal.3d 826, 833-834; Evid. Code, §§ 350, 352.) Third party culpability evidence need not be "'substantial proof of a probability' that the third person committed the act," but only "capable of raising a reasonable doubt of defendant's guilt." (*Hall*, at p. 833; see also *People v. Lewis* (2001) 26 Cal.4th 334, 372.) The "rule does not require 'that any evidence, however remote, must be admitted to show a third party's possible culpability [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.*" (*Hall*, at p. 833, italics added, quoted in *People v. Kaurish* (1990) 52 Cal.3d 648, 685.) We review the trial court's decision to admit or exclude third party culpability evidence under the abuse of discretion standard. (*Hall*, at pp. 834-835; see also *People v. Avila* (2006) 38 Cal.4th 491, 577-578.)

Alejandra Robles was in a romantic relationship with Nabte at the time of the murder. Ortega proffered evidence that a man named Ricardo Gutierrez previously had fathered two children with Robles. On the day of the murder, when Robles brought the children to visit Gutierrez, Gutierrez tried to reconcile with Robles. Robles stated that she had no interest in reconciliation. Gutierrez angrily told Robles that he could find out where Nabte lived and that she and her boyfriend would "die one day." The offer of proof also included an assertion that Gutierrez telephoned Robles later in the day and Nabte answered the telephone. Gutierrez threatened Nabte directly over the telephone, stating: "I can go one on one with you, but you're not gonna survive."

In its motion to exclude the evidence of Gutierrez's possible culpability in the murder, the prosecutor stated that Gutierrez told police he had nothing to do with the Nabte murder. He claimed he was with his new girlfriend at the time. The girlfriend corroborated his story. The prosecutor argued that there was no eyewitness or physical evidence placing Gutierrez at the crime scene, and the offer of proof included no reference to evidence that Gutierrez had access to a firearm or actually knew where Nabte lived.

The trial court excluded the evidence on the ground that there was no evidence linking Gutierrez to the actual perpetration of the murder and, based on a search warrant covering Gutierrez's residence, there was some evidence excluding Gutierrez as a suspect. We conclude that the trial court did not abuse its discretion in so ruling.

Ortega was unable to produce any evidence linking Gutierrez to the murder. His offer of proof included no evidence that Gutierrez was at or near the scene of the murder when the shooting occurred. Moreover, there was overwhelming evidence that Ortega shot Nabte and that Chaclan and Lima assisted Ortega at the time of the shooting and Patino provided assistance after the crime was committed. There is no suggestion that any other individuals were involved with the crime, or that Gutierrez had any contact with Ortega, Chaclan, Lima or Patino at any time before or after the murder.

Evidence that Gutierrez threatened Robles and Nabte would have shown anger over a perceived betrayal but not a plan or intent to commit murder. Such evidence would indicate a possible motive to kill but it does not constitute ". . . direct or circumstantial evidence linking [Gutierrez] to the actual perpetration of the crime." (*People v. Kaurish, supra*, 52 Cal.3d at p. 685; *People v. Hall, supra*, 41 Cal.3d at p. 833.) Ortega's theory that a threat based on jealousy escalated into murder is pure speculation.

Ortega separately argues that exclusion of third party culpability evidence violated his federal constitutional right to present a defense. We disagree. Application of the ordinary rules of evidence, including ruling under Evidence Code section 352, does not infringe on a defendant's constitutional right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103; *People v. Hall, supra*, 41 Cal.3d at p. 834.)

No Ineffective Assistance Regarding Reference to Polygraph Test

Fernando Chaclan and Jenny Patino entered into plea agreements giving them use immunity in return for a promise to testify truthfully. Chaclan's agreement included a provision that he would "participate and provide truthful information to law enforcement in any additional investigative interview or polygraph examination conducted with [him] as part of the case against Luis Ortega." Patino's agreement had a virtually identical provision. The plea agreements were admitted into evidence in their entirety without objection by defense counsel.

Ortega does not challenge their admission generally, but asserts that the plea agreements should have been redacted to eliminate the reference to polygraph examinations. He contends that defense counsel's failure to request such a redaction constitutes ineffective assistance of counsel. We disagree.

To prevail on an ineffective assistance of counsel claim, an appellant must demonstrate that trial counsel's representation fell below an objective standard of reasonableness and that the deficient representation prejudiced appellant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) On appeal, there is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance, and we

accord great deference to counsel's reasonable tactical choices including decisions regarding objections to evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 703; see also *People v. Weaver* (2001) 26 Cal.4th 876, 931.) When the reasons for counsel's decisions do not appear in the record, we will find ineffective assistance of counsel only if there could be no conceivable reason for counsel's acts or omissions. (*Weaver*, at p. 926.) Also, a defendant must prove prejudice as a ""demonstrable reality," not simply speculation." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) We conclude that there was no ineffective assistance of counsel in this case.

Evidence Code section 351.1 provides in pertinent part that, absent a stipulation, "the results of a polygraph examination, the opinion of a polygraph examiner, or *any reference to an offer to take*, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding" (Italics added.) Accordingly, an objection to the plea agreements that Chaclan and Patino had agreed to take polygraph examinations may have been meritorious. Because a request for redaction could be made outside the presence of the jury, we see no particular tactical reason for counsel's decision not to object. Counsel may have concluded that no benefit would accrue by making the objection because the reference to polygraph examinations was brief and there is nothing in the record that any polygraph examination was ever given or requested.

Such a conclusion may have been reasonable, but we consider the importance of a objection as pertaining to the issue of prejudice from counsel's failure to object. We conclude that Ortega fails to establish prejudice as the required second prong of an ineffective assistance of counsel claim. Cases that have held admission of polygraph evidence to be error concerned more significant evidence. In *People v. McKinnon* (2011) 52 Cal.4th 610, our Supreme Court held that it was error to admit evidence that a witness had taken and failed a polygraph test, but that the error was harmless under the circumstances. (At p. 664.) In *People v. Basuta* (2001) 94 Cal.App.4th 370, 388-389, a case relied on by Ortega, a witness offered to and took a polygraph examination. The trial court excluded evidence of the results, but allowed a

police detective to testify that the witness had offered to take the examination. (*Id.* at p. 389.) The appellate court concluded that admitting the detective's testimony was error and prejudicial because there was a "serious danger . . . that one or more jurors concluded that [the witness] passed the polygraph examination and that she was, therefore, worthy of belief." (*Id.* at p. 390.)

Ortega also cites *U.S. v. Brown* (C.A.Or. 1983) 720 F.2d 1059, where, similar to the instant case, the court concluded that the trial court erred in not redacting a polygraph examination clause from the plea agreement. The court, however, emphasized that the prejudice to the defendant resulted from the prosecution's prejudicial use of the unredacted plea agreements, not its mere admission into evidence. (*Id.* at p. 1072.) The court stated that the prosecution, through argument, tied "the substantive value of . . . the witnesses' promises always to be truthful with the mechanical effectiveness of the polygraph. The Government argued at length, vigorously and effectively, that the jury could believe the testimony given by the three main witnesses because the binding force of the plea-bargain guaranteed their veracity. It was not simply that those persons could be counted on, as manifest by their character, to keep their bargain, but that the contract contained a mechanism to keep them honest. In that linkage lay the operative core of the plea agreements and their forensic value." (*Ibid.*)

Here, there were no polygraph examinations given, and no argument by the prosecution regarding the polygraph provision in the plea agreements or even any mention of a polygraph examination. There was no evidence or argument that the polygraph reference influenced or gave any heightened credibility to the witness testimony.

No Error in Admission of Description of Photograph

Ortega contends the trial court erred in allowing the prosecution's gang expert to testify that he had seen a photograph of Ortega in which he was holding a sawed-off shotgun and flashing an MS-13 gang sign. He argues that the testimony was cumulative and that its probative value was substantially outweighed by the potential for prejudice. (Evid. Code, § 352.) He also argues that the evidence was prohibited

propensity evidence. (Evid. Code, § 1101.) We disagree. The evidence was admissible to support the opinion of the prosecution gang expert that Ortega was a gang member and that the charged offense was gang related.

To establish the gang enhancements alleged in this case, the prosecution had to prove the charged offense was committed "for the benefit of, at the direction of, or in association with [a] criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Evidence that the defendant was a member of a gang, including photographs indicating his or her gang affiliation, is admissible to show that the underlying offense is gang related. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1433–1434, 1437 [photograph of defendant making gang signs and other content from MySpace page properly admitted to explain gang motive for crime]; *People v. Garcia* (2008) 168 Cal.App.4th 261, 276-278 [photographs of defendants making gang signs and holding shotgun properly admitted to prove intent].)

Here, the gang sign shown in the photograph tended to establish that Ortega was a member of the MS-13 gang. The shotgun shown in the photograph tended to establish the violent nature of criminal street gangs and that the murder was gang related. In addition, it must be emphasized that the photograph itself was not admitted into evidence. Surely, any inflammatory impact the photograph would have had was reduced in the gang expert's descriptive testimony. In any event, the evidence admitted "did not rise to the level of evoking an emotional bias against the defendant as an individual *apart from what the facts proved*." (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 35, italics added.)

Ortega relies heavily on *People v. Barnwell* (2007) 41 Cal.4th 1038, a murder case, in which a victim was shot with a handgun. In *Barnwell*, the trial court admitted testimony from a police officer showing that a year before the murder defendant possessed another handgun similar to the murder weapon. (*Id.* at p. 1055.) Our Supreme Court concluded that the only relevance of possession of a weapon unrelated to the underlying charges is to show a propensity or disposition toward violence. (*Id.* at pp.

1056-1057.) *Barnwell* is inapposite. There were no gang allegations or gang evidence in the case, and the only purpose for the disputed evidence was to show a propensity to carry a gun. Here, the shotgun evidence was admitted as proof that the shooting was committed for the benefit of a criminal street gang.

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Rebecca S. Riley, Judge
Superior Court County of Ventura

Richard E. Holly, under appointment by the Court of Appeal, for Defendant and Appellant.

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