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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY ANGUIANO,

Defendant and Appellant.

B235024

(Los Angeles County
Super. Ct. No. BA342931)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed as modified.

J. Kahn, 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, Senior Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Anguiano appeals from the judgment entered after his conviction by a jury of one count of murder and one count of attempted murder arising from a 2001 incident and one count of murder and one count of shooting at an occupied motor vehicle arising from a 2007 incident with true findings on related firearm-use and criminal-street-gang allegations, as well as the special circumstance allegation Anguiano had committed multiple murders. On appeal, in addition to a sentencing error the People concede, Anguiano contends the trial court erred in denying his motion to sever trial on the 2001 counts from the 2007 counts. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The 2001 Shooting

On July 1, 2001 Joseph Cabrera and Cabrera's mother, Veronica Ramos, accompanied by Danny Vasquez and his girlfriend, attended a party in the Lincoln Heights area of Los Angeles. Cabrera and Vasquez were both members of the Clover Street gang, and the party was located within the Clover Street gang's territory. Around 3:00 a.m. the group left the party and walked to their car. Ramos got into the rear passenger seat of the car, while Cabrera and Vasquez stood on the sidewalk relieving themselves.

Ramos saw a Hispanic man run behind Cabrera and Vasquez and begin shooting. Ramos heard five to 10 shots. Cabrera was killed immediately; Vasquez was wounded. Los Angeles Police Officer Scott Smith responded to the scene and recovered several .380 live rounds and multiple nine-millimeter bullets, casings and fragments. Smith also identified Clover Street gang graffiti near the scene.

Cabrera died from multiple gunshot wounds, most of which entered his body from behind. Four bullets and several fragments were removed from Cabrera's body at an autopsy. All the nine-millimeter bullets retrieved at the scene and recovered from Cabrera's body had been fired from the same gun.

On August 5, 2001 Los Angeles Police Officer Christopher Patterson was on patrol when his attention was called to a Jeep parked on the side of the road. Anguiano approached the car and told Patterson the car belonged to him. Patterson found a nine-

millimeter Glock loaded with an 18-round magazine under the driver's seat of the Jeep. Anguiano admitted ownership of the gun and identified himself as a member of the Dogtown gang, a rival of the Clover Street gang.¹ Patterson confiscated the gun and booked it into evidence to be held for forensic analysis. Anguiano's gun was not tested until 2007. At that time, it was found to match the bullets, casings and fragments recovered from the Cabrera shooting.

Ramos, who saw the shooter only from the nose up as his face was partially covered, was unable to identify Anguiano in a photographic lineup shown to her shortly after the shooting. Shown a second photographic lineup on September 18, 2007—roughly six years after the crime—Ramos identified Anguiano as the shooter.

2. The 2007 Shooting

In the early morning of April 14, 2007 Presciliana Juarez and Shurnell West, a Clover Street gang member, left a restaurant located at 20th Street and North Broadway near downtown Los Angeles with another couple also associated with the Clover Street gang. Juarez drove; West was in the passenger seat. As they headed toward the intersection of North Broadway and Lincoln Park Avenue, Juarez's car was approached on the passenger side by a blue minivan. As the minivan drew close, a man wearing a black sweatshirt with flames on the sleeves began firing shots at Juarez's car from the open sliding door of the van. Juarez drove faster to escape, but the van followed. Juarez braked; and, as the minivan passed, she locked eyes with the driver, who was also wearing a black sweatshirt. Realizing West had been shot, Juarez drove directly to a nearby hospital. The minivan continued in front of Juarez's car until she entered the hospital drive. West died from a gunshot wound to the chest.

As Los Angeles Police Officer David Gomez drove toward the hospital in response to the shooting, he saw a light colored minivan parked near the corner of 2nd

¹ Los Angeles Police Officer Adrian Lopez, testifying at trial as a gang expert, explained the Dogtown gang claimed the area just north of downtown Los Angeles. The Clover gang claimed the area on the east side of the Los Angeles River, the dividing line between the two rival gangs.

Street and Zonal Avenue. When Gomez approached, a man got out of the minivan, crossed the street and fled; the minivan sped off. Gomez pursued the minivan until it came to a stop near an overpass. A Hispanic man wearing a dark colored jacket and carrying a bag got out of the minivan and ran toward a fence separating the road from the nearby railroad tracks. Gomez saw an object fall from the bag as the man ran. The man threw the bag over the fence, climbed after it and ran down the railroad tracks. After additional officers arrived at the location, Gomez proceeded to the hospital and brought Juarez back to the minivan. Juarez identified the minivan as the one involved in the shooting and also identified the black sweatshirt with flames on the sleeves found inside.

A cell phone belonging to Michael Godinez was recovered next to the minivan. Inside the minivan police found an envelope addressed to Anguiano, several children's toys, a soda cup with a straw and lid, a chocolate chip bag, a compact disc and a helmet. Anguiano's DNA was detected on the cup, straw and lid, and his fingerprints were found on the chocolate chip bag, compact disc and helmet. Two days later police recovered a backpack on the other side of the overpass near the tracks. The backpack, which Anguiano's 14-year-old stepson identified as his, bore the name "Dogtown" and other gang-related markings. Inside, police found a nine-millimeter gun, ammunition and two magazines. Godinez's fingerprints were found on one of the ammunition boxes, and spent bullets recovered from Juarez's car matched the gun. A month later Juarez identified Anguiano as the driver of the minivan in a photographic lineup.

During a search of Anguiano's home, police found gang graffiti, photographs of Anguiano with others in Dogtown gang apparel, a firearm cleaning kit and a weapon magazine holder. Additional photographs showed Anguiano and other gang members, including Godinez, displaying gang signs while carrying the casket of another gang member. Godinez, as well as both of Anguiano's brothers, were also identified as members of the Dogtown gang.

3. *The Information*

Anguiano was charged in an information with the July 1, 2001 murder of Cabrera (Pen. Code, § 187, subd. (a)),² and the attempted murder of Vasquez (§§ 187, subd. (a), 664, subd. (a)), as well as the April 14, 2007 murder of West (§ 187, subd. (a)) and shooting at an occupied motor vehicle (§ 246). The information specially alleged as to all counts Anguiano had personally and intentionally discharged a firearm causing death or great bodily injury within the meaning of section 12022.53, subdivisions (b) through (d) and (e)(1), and the crimes had been committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(4)). In addition, the information alleged two special circumstances under section 190.2, subdivision (a): “(3) The defendant . . . has been convicted of more than one offense of murder in the first or second degree” (counts 1 and 3); and “(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death” (count 3). The People did not seek the death penalty.

4. *Anguiano’s Motion To Sever*

Anguiano filed a motion to sever trial on the 2001 crimes (counts 1 and 2) from trial on the 2007 crimes (counts 3 and 4), arguing the crimes were not connected, shared “no civilian witnesses” who would be inconvenienced by separate trials and the combination of the charges subjected him to an additional special circumstance for multiple murders under section 190.2, subdivision (a)(3). The trial court denied the motion, finding the crimes to be of the same class and the People did not appear to be “bootstrapping” a “weak” case to a “strong” case. Although there was no cross-admissible evidence other than the evidence of Anguiano’s gang affiliation, the gang motive was a significant link between the two shootings. The court concluded joinder would not be unduly inflammatory or prejudicial.

² Statutory references are to the Penal Code unless otherwise specified.

5. *Trial, Verdicts and Sentencing*

Anguiano did not present any evidence in his defense. The jury convicted him on all counts and found all special allegations to be true. He was sentenced to life in prison without the possibility of parole on the 2001 murder conviction (count 1), plus an additional term of 25 years to life for the firearm enhancement on that count. The court imposed the identical, consecutive sentence on the second murder conviction (count 3), that is, life without the possibility of parole plus 25 years to life. On the attempted murder conviction (count 2), Anguiano was sentenced to a consecutive term of life in prison plus 25 years to life for the firearm enhancement. The court also imposed an additional 15 years for the gang enhancement. Sentence on the section 246 conviction (count 4) was stayed under section 654.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Denying Anguiano's Motion To Sever*

a. *Governing law*

Section 954 permits two or more offenses of the same class or connected together in their commission to be consolidated for trial against a single defendant. “[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by law.” (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*).)³ When the statutory requirements for joinder have been met, the defendant can demonstrate error in the denial of a motion to sever only by a clear showing of potential prejudice. (*Ibid.*; *People v. Soper* (2009) 45 Cal.4th 759, 774 (*Soper*).) “A trial court’s denial of a motion for severance of charged offenses amounts

³ The efficiency and benefits of a joint trial were described in *People v. Bean* (1988) 46 Cal.3d 919, 939-940: “A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process.”

to a prejudicial abuse of discretion if the “trial court’s ruling “falls outside the bounds of reason.””””” (Alcala, at p. 1220; accord, Soper, at p. 774.)

“In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, ‘we consider the record before the trial court when it made its ruling.’” “First, we consider the cross-admissibility of the evidence in hypothetical separate trials. [Citation.] If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court’s refusal to sever properly joined charges. [Citation.] Moreover, even if the evidence underlying these charges would *not* be cross-admissible in hypothetical separate trials, that determination would not itself establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges.” (Soper, *supra*, 45 Cal.4th at pp. 774-775.)

If the “evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of defendant’s guilt of each set of offenses.’” [Citations.] In making *that* assessment, we consider three additional factors, any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court’s discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.” (Soper, *supra*, 45 Cal.4th at p. 775; see Alcala, *supra*, 43 Cal.4th at pp. 1220-1222.)

b. *Cross-admissibility*

As Anguiano concedes, the statutory requirements for joinder were met in this case because the 2001 and 2007 crimes both involved murders and thus were of the same

class. (See § 954; *Soper, supra*, 45 Cal.4th at p. 771.) Nonetheless, he argues, joinder was improper because none of the evidence would have been cross-admissible had the charges been separately filed.

In terms of a severance motion, cross-admissibility requires that “‘evidence pertinent to one case [would] have been admissible in the other under the rules of evidence which limit the use of character evidence or prior similar acts to prove conduct (Evid. Code, § 1101, subs. (a) and (b)).’” (*People v. Johnson* (1988) 47 Cal.3d 576, 589; accord, *Soper, supra*, 45 Cal.4th at pp. 776-777.) “[T]here exists a continuum concerning the degree of similarity required for cross-admissibility, depending upon the purpose for which introduction of the evidence is sought: ‘*The least degree of similarity . . . is required in order to prove intent.* [Citation.] . . . In order to be admissible [for that purpose], the uncharged misconduct must be sufficiently similar to support the inference that the defendant “‘probably harbor[ed] the same intent in each instance.’ [Citations.]” [Citation.]’ By contrast, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity.” (*Soper*, at p. 776, fn. omitted; see *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) Nonetheless, a defendant seeking severance must make “a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.” (*People v. Arias* (1996) 13 Cal.4th 92, 127.)⁴

⁴ “Decisions such as *Ewoldt* are relevant to the analysis governing admissibility, but both the burden of proof relating to admissibility and the assessment of prejudice are different in the context of properly joined *charged* offenses.” (*Alcala, supra*, 43 Cal.4th at p. 1222, fn. 11.) “Not only is the burden allocated differently in cases involving properly joined charges as compared with cases involving the introduction of uncharged misconduct [under Evidence Code section 1001, subdivision (b)], but the nature of the abuse of discretion standard—and the ensuing method utilized to analyze prejudice, undertaken to determine whether a trial court abused its discretion in a specific case—also are significantly different from what is employed in determining whether a trial court erred in allowing the introduction of evidence of uncharged misconduct.” (*Soper, supra*, 45 Cal.4th at p. 774.)

There is no doubt Anguiano’s 2001 admission to a police officer that he was a member of the Dogtown gang would have been admissible against him in a trial on the 2007 charges. Similarly, a gang expert could testify to the rivalry between the Dogtown and Clover gangs whether the trial involved both incidents or was limited to the 2001 or 2007 shootings. (See, e.g., *People v. Castenada* (2000) 23 Cal.4th 743, 753 [“evidence of the crimes defendant here committed, his many contacts on previous occasions with the Goldenwest criminal street gang, and his admissions by bragging to police officers of those occasions of gang association or membership” proved defendant’s active gang participation]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 [affirming use of expert testimony to establish gang enhancement: “It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes ‘respect’”]; *People v. Carr* (2010) 190 Cal.App.4th 475, 489 [defendant’s admission of gang membership and gang-expert testimony supported imposition of gang special circumstance].) The trial court recognized the evidence of Anguiano’s gang membership was cross-admissible with respect to Anguiano’s motive or intent for both shootings but noted it would hardly be probative to string together a number of gang-related crimes and charge them jointly simply because of the gang relationship. Regrettably, shootings of the type in this case are not “so unusual and distinctive as to be like a signature” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403), and cannot be relied upon to support an inference of identity. Thus, notwithstanding the persuasiveness of the gang motive in this case—the persistent gang rivalry that fostered two brutally anonymous murders—the trial court was properly cautious in assuming cross-admissibility of gang evidence to support intent was, standing alone, sufficient to justify denial of the motion to sever.

c. Other factors weigh heavily in favor of joinder

Nonetheless, the factors to be weighed in consideration of a motion to sever—whether a charge is unusually likely to inflame the jury; whether a weak case has been paired with a strong case; and whether joinder will convert the matter into a capital case—all favor joinder in this case. Neither of the shootings was more inflammatory

than the other: To the contrary, were the type of shooting here less common, the similarities between the two crimes would warrant an inference of common identity and favor cross-admissibility. Likewise, the People's decision not to seek the death penalty extinguishes any prejudice associated with that consideration.

Anguiano argues, however, that stronger evidence supported the 2007 crimes and, thus, prejudiced his defense of the 2001 crimes, for which strong evidence of his participation was lacking. This contention is meritless. Even if there was no DNA or fingerprint evidence of the sort available for the 2007 shooting, Anguiano had admitted in 2001 to ownership of the murder weapon, and Ramos identified him—albeit six years later—as the gunman. The only reason he had not been prosecuted earlier for Cabrera's 2001 murder was the failure of the police to submit his nine-millimeter handgun for ballistics testing. Consequently, even if the evidence of his participation in the 2007 crimes was stronger, the evidence he was the shooter in the 2001 crimes was sufficiently strong that he did not suffer undue prejudice by joinder of the charges for trial.

2. *The Trial Court Did Not Violate Anguiano's Due Process Rights*

Even if a trial court's denial of severance was correct when made, a reviewing court must reverse the judgment if the defendant shows joinder actually resulted in gross unfairness amounting to a denial of due process. (*Soper, supra*, 45 Cal.4th at p. 783.) In considering this question, the reviewing court examines the impact at trial of the joinder by looking at the evidence actually introduced at trial—the independent evidence of the defendant's guilt, as well as any spillover effect of the evidence from the joined charges. (See *People v. Turner* (1984) 37 Cal.3d 302, 313, overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150; *People v. Geier* (2007) 41 Cal.4th 555, 575-576; *People v. Macklem* (2007) 149 Cal.App.4th 674, 698.) The defendant, of course, bears the burden of demonstrating prejudice: “[A] bald assertion of prejudice is not sufficient.” (*People v. Sandoval* (1992) 4 Cal.4th 155, 174.)

Anguiano contends joinder of the crimes created jury prejudice as the 2001 evidence was “relatively weaker” than the 2007 evidence. While not as strong as the evidence supporting the 2007 charges, the evidence presented need not be completely

identical in strength for a joinder to be appropriately free from prejudice. (See *People v. Breault* (1990) 223 Cal.App.3d 125, 133-134) [joinder was proper even though the evidence was not cross-admissible and evidence on one charge stronger than evidence in support of others]; *People v. Ruiz* (1988) 44 Cal.3d 589, 604-607 [joinder of two murder charges was proper even though evidence relating to first murder was “relatively weak” and was made “much stronger” by evidence in support of second murder].) It is unlikely the jury would have reached a different conclusion had the trial been severed, and Anguiano has failed to show denial of severance deprived him of a fair trial.

3. *The 15-year Term Imposed for the Gang Enhancement Must Be Stricken*

At sentencing, with respect to count 2 the trial court concluded it was required to “impose 15 years pursuant to [section] 186.22 . . . sub[division] (b)(5),” which establishes a minimum parole eligibility term of 15 years for conviction of gang-related crimes punishable by a life term. However, the clerk’s transcript and ensuing abstract of judgment both indicate the court had imposed an additional 15-year term as a gang enhancement under section 186.22, subdivision (b)(4). The trial court’s oral pronouncement of sentence was correct. When the underlying gang-related felony already carries a life sentence, “section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole.” (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004; accord, *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239; *People v. Harper* (2003) 109 Cal.App.4th 520, 527.)

Generally, when there is a discrepancy between the oral pronouncement of judgment and the minute order, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) Moreover, the People have conceded the additional 15-year prison term for the gang enhancement should be stricken. (See *People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence can be properly corrected on appeal].)

DISPOSITION

The judgment is modified by striking the 15-year term imposed as a gang enhancement on count 2 (the attempted murder of Danny Vasquez), leaving the sentence on that count as a consecutive term of life in prison, with a minimum parole eligibility of 15 calendar years, plus 25 years to life for the firearm enhancement. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.