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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL RICARDO DOMINGUEZ,

Defendant and Appellant.

C065762

(Super. Ct. No.
09F05226)

After hearing his brother had been "jumped," defendant, a Sureño gang member, joined his two older brothers and friends in a fight against three men wearing red. One was victim Samuel Sanchez. As the fight ended, Sanchez was mercilessly hit, kicked, stomped, and finally stabbed to death, while huddled on the ground in the fetal position.

Defendant was arrested two months later, after a traffic stop where a gun was found in the car. He was subsequently charged with Sanchez's murder, as well as enhancements for gang benefit and personal use of a knife.

The jury convicted defendant of first degree murder, but deadlocked on the enhancements. The same jury also convicted defendant of carrying a loaded firearm in a vehicle (Pen. Code, § 12031, subd. (a)) based on the traffic stop two months after the murder.

Sentenced to 25 years to life in prison, defendant appeals. He contends the trial court erred in failing to instruct sua sponte on defense of another as an affirmative defense to assault or battery. He further contends the trial court erred in admitting evidence of his arrest for possession of a loaded gun after he agreed to plead guilty to the charge. He asserts the evidence was unduly prejudicial.

As we will explain, we find no error and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Brian Logan, with his friends Nathaniel Renteria and victim Sanchez, went to a liquor store to rent a U-Haul truck. Logan was wearing a red and black shirt and red and black shoes. Sanchez wore a red jersey. While they were in the store, defendant's brother Leonardo Chavez drove up with his girlfriend, Shanti Maharajh. Chavez went inside the store and exchanged words with Renteria.¹ They all went outside and began fighting. Outnumbered three to one, Chavez told Maharajh to call his "homies."

¹ Renteria may have asked Chavez, "what's up, ene?" "Ene" is Spanish for "N" and when said to a Sureño gang member would be taken as a challenge.

Maharajh was moving that day; her house was very near to the liquor store. Chavez, his brothers Francisco Dominguez and defendant, and various other family and friends were helping. When Maharajh called the house for help, almost everyone immediately got in a Suburban and left to drive the very short distance to the store. Defendant was in the bathroom and did not go with them. The Suburban pulled up to the fight and several people got out and joined the fight. Defendant followed on foot.

A group of young men were at the nearby Superb Burger and saw the fight from across the street. According to one of the group, it looked like a gang fight between men wearing blue and three men wearing red. As the fight continued, Sanchez was singled out by the larger group in blue. By then, he was on the ground in the fetal position, where he was kicked, punched, and stomped. Then everyone backed away from Sanchez and someone approached and inflicted the last wounds, stabbing Sanchez in the back of his head, neck, and shoulders.

Sanchez was bloody. Logan and Renteria took him to the UC Davis Medical Center, where he died. The cause of death was a total of 11 stab wounds to his neck and torso. Some of the wounds were three-inches deep.

The main issue at trial was the identity of the stabber. One of the men at Superb Burger, Michael Purcell, saw someone walk up and join the fight. That person had yelled at Purcell,

who walked away.² Purcell later saw that same person stab Sanchez. He identified defendant as that person from a photographic lineup.³ A fireman at a nearby station identified defendant as someone he had seen running away after the fight. The description other witnesses gave of the stabber did not match defendant. The stabber was variously described as a "big dude" and a guy with long hair. Defendant was approximately 5'6" with a shaved head.

In his interview with the police, defendant at first denied participating in the fight. Eventually, he admitted he went to the fight. He claimed he saw someone hitting his brother Leo, so he ran over and "socked the fool a couple of times." Defendant added he was scared off by a man with a machete.⁴

A gang detective testified as an expert that defendant, as well as his two brothers, had been validated as Sureño gang members. Sureños associate with the color blue and are enemies of Norteños, who associate with the color red. It was the expert's opinion that the stabbing would benefit the Sureño gang.

² At the time of the fight and in court, Purcell wore red. He denied any gang affiliation.

³ Several other witnesses also identified defendant as being involved in the fight.

⁴ Both Renteria and Maharajh testified a man came over from the gas station with a machete.

Over two months after the murder, the police stopped a car because it had a blue tree air freshener hanging from the rear view mirror.⁵ The police saw defendant, a passenger, reach under his seat. They then found a loaded .357 revolver there. At trial, the expert used this incident, as well as a similar incident in 2006 when defendant was in a car with a loaded gun, to validate defendant as a Sureño gang member. He testified guns are important to gangs and a gang member does not want to be caught "slippin'," that is, caught without his gun.

The defense offered an experimental psychology professor as an expert witness on memory and perception. He testified about general difficulties regarding accuracy of recall and memory.

During the discussion of instructions, the trial court indicated it would instruct on the natural and probable consequences doctrine, with battery or assault by force likely to cause great bodily injury as the target offenses. The defense made clear that it was not requesting an instruction on perfect or imperfect self-defense or defense of another for tactical reasons, as these defenses were at odds with the defense theory regarding defendant's lack of involvement in the murder. There was no discussion of possible defenses to the *target* offenses. The jury was instructed as to the murder on

⁵ "A person shall not drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied in or upon the vehicle that obstructs or reduces the driver's clear view through the windshield or side windows." (Veh. Code, § 26708, subd. (a)(2).)

theories of both deliberation and premeditation and aiding and abetting battery or assault with murder as the natural and probable consequence.

In closing argument, the People offered both theories to the jury. The defense argued the prosecution offered the aiding and abetting theory because it could not prove defendant was the actual killer. The defense argued that all defendant did was go to the fight, see someone punch his brother, punch the man who punched his brother, and leave. "He's not aiding and abetting anybody else, he is punching a guy." The defense focused on the varying descriptions of the stabber.

The jury convicted defendant of first degree murder. The jury deadlocked, however, on the gang enhancement (Pen. Code, § 186.22, subd. (b)) and the enhancement for personal use of a knife (Pen. Code, § 12022, subd. (b)(1)). The trial court declared a mistrial on the enhancements and dismissed them in the interest of justice on the People's motion. The jury also convicted defendant of carrying a loaded firearm in a vehicle. (Pen. Code, § 12031, subd. (a).)

DISCUSSION

I

Failure to Instruct on Defense of Another

A. Defendant's Claim

Defendant contends the trial court erred in failing to instruct sua sponte on defense of another as a defense to assault or battery. He argues that since the jury deadlocked on the gang and weapon use enhancements, some jurors must have

found that he was not the actual killer. Instead, the argument goes, some of the jurors' verdicts of guilt on the murder count were based on the theory of aiding and abetting and the natural and probable consequences doctrine. Under this theory, the target offense was assault or battery, to which defendant had a defense. As he told the police, he struck someone a few times to protect his brother.

The failure to instruct on defense of another, he contends, violated due process because it denied him a defense. He asserts the trial court should have instructed with CALCRIM No. 3470 (Right to Self-Defense or Defense of Another (Non-Homicide)).⁶ He contends the error was not invited by his refusal at trial of an instruction on defense of another as a defense to murder and that failure to give the instruction was prejudicial because it deprived him of due process and a fair trial. Finally, he contends trial counsel was ineffective for failing to request the instruction.

⁶ Defendant indicates such instruction would read in part: "Defense of another is a defense to assault by force likely to produce great bodily injury (Penal Code § 245(a)(1)) and battery (Penal Code § 242). The defendant is not guilty of those crimes if he used force against the other person in lawful defense of another. The defendant acted in lawful defense of another if: [¶] 1. The defendant reasonably believed his brother, Leonardo Chavez, was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger."

B. *The Law*

"[U]nder the general principles of aiding and abetting, 'an aider and abettor [must] act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.) Here, the jury was instructed accordingly: "Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

An aider and abettor is guilty not only of the specific crime he aids and abets, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted. [Citation.]" (*People v. Prettyman, supra*, 14 Cal.4th at p. 260.) "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably foreseeable*. [Citation.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.)

The murder of a rival gang member during a gang-related fight has been held to be a natural and probable consequence of the gang fight. (*People v. Medina* (2009) 46 Cal.4th 913, 921-922 and cases cited.)

"In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) "A trial court's duty to instruct, sua sponte, on particular defenses arises "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

C. *Application to this Case*

Defendant's statement to the police, particularly as argued to the jury, permitted the jury to find either of two levels of involvement by defendant. The first of these levels of involvement, or scenarios, was that defendant did not participate in the gang fight at all, but only hit someone to help his brother. The second scenario was that defendant hit someone to help his brother as part of his intentional participation in a gang fight. We consider whether it was error not to instruct on defense of another under either of these two scenarios.

Defendant's version of events, as argued by his counsel, does not support a finding that he aided or abetted the target offenses that resulted in murder. Defendant told the police that he simply hit someone a few times--"socking the fool a couple of times"--to protect his brother. Trial counsel argued

that defendant did only "one thing: He went there, he saw somebody punching one of the brothers, and he punched the guy, turned around and left." This argument was in line with the defense opening statement that defendant "wasn't going to a gang fight." Jurors who accepted this version of defendant's actions could not have found defendant guilty of murder on an aiding and abetting theory. To believe that defendant was not part of the fight, but acted only to rescue his brother who was under attack, required also finding that he did not share the intent of the others involved in the fight and was not aiding and abetting the fight, or consequently, the murder. As defense counsel argued, if defendant simply "punched somebody" and was "punching a guy" to help his brother, "[t]hat's not aiding and abetting." Counsel was correct.

Any error in failing to instruct on defense of another was necessarily harmless if the jury believed defendant's version of events. Even if the jury had found defendant guilty of battery, the jury could not find him guilty of murder on a natural and probable consequences theory of aiding and abetting because his version did not allow a finding that he aided and abetted the group; in his version, defendant was not part of, and did not intend to facilitate, the gang attack. Under the instructions given the jury, this limited role was *insufficient* to constitute aiding and abetting. We presume jurors understand and follow instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

The second scenario is provided by defendant's grudging admission that the fight appeared to be a "gang thing." This

admission permitted the jury to find he had greater involvement in the fight than merely "socking the fool" that was fighting with his brother. There was evidence that defendant, as well as his brothers, was a Sureño gang member. Based on this evidence, the jury, or some jurors, could have accepted defendant's story that he went to the aid of his brother, but *also* believed that he was aware of the general fight and, as a Sureño gang member, he intended to aid that fight. Indeed, this was the position argued by the People. The prosecutor argued defendant was "on the hook" for murder if he got involved and threw a punch, *if he intended to promote and encourage the fight*. If so, defendant would have been aiding and abetting the target offense and faced conviction for murder. Under this scenario, however, defense of another would not have been available to him as a defense.

From the evidence adduced at trial, it is clear that as the fight progressed, the group that arrived in the Suburban moved considerably beyond acting to save Chavez, defendant's brother. In particular, long after Chavez was removed from the danger zone, the group that savagely beat Sanchez intended to assault, batter, and severely injure him.

The use of defense of another, like self-defense, "is limited to the use of such force as is reasonable under the circumstances. [Citation.]" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) To assert defense of another, defendant could use only the force reasonably necessary to defend against the immediate danger to his brother. (CALCRIM No. 3470.) If jurors found defendant was *either* a member of the group beating

the helpless Sanchez or that he was punching someone else to aid the group beating Sanchez with the intent of facilitating that beating, such use of force was excessive because it went beyond what was necessary to help his brother. Because defendant used excessive force, defense of another would not be an available defense.

To summarize: If defendant punched someone only to aid his brother, defense of another was available as a defense to assault or battery. Defendant, however, was not separately charged with assault and battery; he was charged with murder with assault and battery as possible target offenses. If defendant acted only to aid his brother, he was not aiding and abetting the fight that lead to murder and had no liability for murder. As there was no evidence to support defense of another in the context of the charged crime of murder, an instruction on defense of another as a defense to assault or battery alone was unnecessary. (See *People v. Salas* (2006) 37 Cal.4th 967, 982 [in determining whether the evidence is sufficient to warrant a jury instruction, the trial court considers only whether there was evidence sufficient to raise a reasonable doubt as to defendant's guilt].)

Alternatively, if defendant joined the fight not only to rescue his brother, but also to promote and encourage the general gang attack, his use of force--in facilitating the brutal assault on Sanchez--went beyond the force necessary to help his brother. Defense of another was not available as a

defense to the target offenses that led to murder under the natural and probable consequences doctrine.

Thus, the trial court did not err in failing to instruct sua sponte on defense of another as a defense to the target offenses of assault or battery. Further, since there was no evidence to support the instruction in the context of murder, trial counsel was not ineffective in failing to request it.

II

Admission of Defendant's Firearm Arrest

A. Background

Defendant contends the trial court erred in denying his in limine motion to exclude evidence of his July 2009 arrest for possession of a loaded firearm. He contends this evidence had only slight relevance. Defendant was willing to plead guilty to the firearm charge, and the evidence of illegal gun possession had no relationship to the facts of the murder where no firearm was used. The evidence was cumulative if used to prove the gang enhancement because there was other evidence to establish defendant's association with the Sureño gang.⁷ Defendant

⁷ Defendant contends his trial counsel, in opening statement, admitted defendant belonged to the Sureño gang. We do not agree. In opening statement, counsel merely said defendant went to aid his brother and had no intention of participating in a gang fight. However, defendant's brother Francisco did testify that defendant was a member of the Sureño gang. There were also pictures of defendant throwing gang signs; defendant had gang tattoos; and defendant had been stopped twice in cars while with validated gang members.

contends the evidence was prejudicial because it painted him as a violent person.

Before trial defendant moved to exclude evidence of his firearm arrest, and indicated his intent to plead guilty to count two. Defendant argued the evidence was very prejudicial and not very probative as the People had ample evidence of defendant's affiliation with the Sureño gang. The People responded the gang expert would use evidence of count two, possession of a loaded firearm, to show gang affiliation and would testify guns or weapons are a big part of gang life. Further, the expert would testify that one who kills a rival gang member should expect retaliation.

The trial court denied the motion. It found the potential prejudice of the evidence did not substantially outweigh its probative value to support the gang enhancement. The trial court gave an instruction that the jury could not conclude from evidence of gang activity "that the defendant is a person of bad character or that he has a disposition to commit crime."

Defendant decided not to plead guilty to count two since the evidence would still come in.

B. Standard of Review

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice" (Evid. Code, § 352.) "We apply the

deferential abuse of discretion standard to a trial court's rulings under Evidence Code section 352. [Citations.]" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.) "Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

C. *Analysis*

We find no abuse of discretion in admitting evidence of defendant's arrest for illegal gun possession despite his offer to plead guilty to that offense. The evidence was probative on the issue of the gang enhancement and to show defendant's fear of retaliation. Nor did the trial court abuse its discretion in failing to exclude the evidence as cumulative. The evidence of defendant's gang affiliation was not overwhelming and the record does not show that the extent of other evidence supporting the gang enhancement was apparent at the time the court ruled.

The evidence was not unduly prejudicial under Evidence Code section 352. "'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" (*People v. Zapien* (1993)

4 Cal.4th 929, 958.) Evidence should be excluded as unduly prejudicial “when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.” [Citation.]” (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

Evidence of defendant’s possession of a loaded firearm did not invoke this type of prejudice. It was brief, only one short witness, and not inflammatory. At most, this evidence suggested defendant had a capacity for violence because he had a loaded gun. In contrast, the testimony at trial about defendant’s actions in attacking the helpless Sanchez painted a clear picture of a callous and vicious man. Further, the jury was instructed on the limited use of evidence relating to gang participation and was specifically told not to use such evidence to show bad character or a criminal disposition. We presume the jury followed the court’s instructions. (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502.) Finally, the verdicts show the evidence of defendant’s gun possession did not unduly influence the jury. The jury made limited use of this evidence, declining to unanimously convict defendant of the gang enhancement.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.