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

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JEFFREY LUCKEY,  
  
Defendant and Appellant.

C066063  
  
(Super. Ct. No.  
10F00614)

A jury convicted defendant Jeffrey Luckey (aged 17 at the time) of robbery, but deadlocked on a charge of assault with a firearm and found not true an allegation that a principal in the robbery used a firearm. (Pen. Code, §§ 211, 245, subd. (a)(2), 12022, subd. (a)(1).) The assault count was later dismissed on the People's motion, and the trial court sentenced defendant to five years in prison. Defendant timely appealed.<sup>1</sup>

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<sup>1</sup> Before trial, defendant rejected a four-year offer, but former codefendant Julius Zachary entered into an agreement under which he pled no contest to robbery and personally using a firearm, for a stipulated 12-year prison term. Zachary did not appeal.

On appeal, defendant contends that: (1) no substantial evidence supports the robbery conviction, and (2) the trial court erred when it admitted evidence about defendant's membership in a robbery team. We disagree and shall affirm the judgment.

#### **FACTS**

The People's theory at trial was that defendant, his brother Tyrone Smith, and former codefendant Julius Zachary, were members of the "Jack Boys"<sup>2</sup> who "jacked" or "robbed" people, and that this group robbed victim J.S. in January 2010. The group had robbed J.S. several months before, and knew he was "physically and emotionally fragile." The defense argued this was a case of "guilt by association" and J.S. misidentified defendant, as shown by a number of his inconsistent statements, and his memory problems.

The evidence at trial focused on three points: (1) the charged January 2010 robbery of J.S., (2) an uncharged October 2009 robbery of J.S., and (3) evidence about J.S.'s ability to accurately perceive and recall what happened.

J.S. testified that he was on a light rail train on the afternoon of January 16, 2010. At the Marconi Avenue station, three young men got on and sat around him, with Julius Zachary next to him, and defendant "and some other guy" sitting across

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<sup>2</sup> Sometimes spelled "Jack Boyz" in the record.

from him. J.S. had known Julius and his brother Larry Zachary<sup>3</sup> because they used to be neighbors, and because J.S. and Larry had lived in the same foster home for a month. J.S. had seen defendant on the light rail before. In October 2009, at Arden Fair Mall, Larry, in the company of three other people, one of whom may have been defendant, had "snatched" J.S.'s iPod. When J.S. had words with Larry about his iPod, one of the people said, "if you fight him, you have to fight me."

During the January robbery, Julius referred to the iPod incident and told J.S. to watch his back. J.S. got off the train, hoping to find a security guard, but saw the guard leave. After a couple of minutes, Julius mentioned his brother, called J.S. a snitch, pushed a handgun into J.S.'s stomach and punched J.S., and defendant took his backpack.

After he made a 911 call, J.S. was taken to view some men who had been detained, but identified only two of them, Julius and defendant. J.S. testified that during the 911 call he was "mixed up" and in mentioning Larry to the dispatcher had been referring to the earlier iPod incident.

A retired police officer testified that on January 16, 2010, shortly after a dispatch about the robbery, he saw a man in a red jacket matching one of the robber's descriptions speaking to two men, and all three men stared at him, "giving me a dog look[.]" After he pulled around to watch them, two were

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<sup>3</sup> Because the Zachary brothers share the same surname, we shall refer to them by their respective first names.

"almost running" to a Chevron station, then to a Wendy's restaurant, and the one with the red jacket walked "real fast" away. The officer detained this man (Tyrone Smith), and the other two, defendant and Julius, were found hiding in the Wendy's bathroom.

J.S. identified Julius as the one with the gun, and identified defendant as the one who took his backpack. J.S. did not identify Tyrone Smith. When Smith was released, he walked by the patrol cars containing defendant and Julius, "and looked at them and threw some kind of hand gesture, like, his hands, and he crossed his hands, his fingers out."

Detective Brian Bell testified he knew defendant, who was friends with Julius, and defendant had said Tyrone Smith was defendant's brother. On October 29, 2009, Bell saw defendant's tattoos, including "Jack" on one forearm and "Boy" on the other, and the numbers "10" and "2" on the backs of his hands, which Bell interpreted to refer to the tenth and second letters of the alphabet, namely "J" and "B," referring to "Jack Boyz." Commonly, to "Jack" someone means to rob them. When Bell asked defendant how he had chosen the name "Jack Boyz," defendant said, "'That's what we do.'" When Bell confronted defendant with the definition of "jack" (rob), defendant told him "that's not what it meant, that it was his rap group." Bell testified there were five or six other members of the Jack Boyz, including Larry.

The parties stipulated that certain photographs admitted into evidence depicted Julius's hands and forearms, showing similar tattoos.

Another officer testified about the robbery that took place on October 25, 2009, at Arden Fair Mall, where J.S.'s iPod was taken. After J.S. described four persons, and said one was named "Larry," the officer detained defendant, Julius, and Tyrone Smith nearby. J.S. could not be sure about the first two, but identified Smith, and said that when he asked for his iPod back, Smith said, "if you're going to fight him, then you're going to have [to] fight me as well for the iPod."

J.S. was afraid to testify. On January 26, 2010, he received a threatening phone call from a woman demanding that J.S. "get my brother out of jail" and later that day received threatening calls from Julius, made (and recorded) at the Sacramento County Jail. In April 2010, J.S. heard his car alarm go off, and went outside to find Larry on the hood of his car, "trying to fight me." Days later, Larry attacked J.S. by a bus stop, stating "my brother is in jail" and then he swung at J.S. and they fought. In May 2010, at a Taco Bell, someone approached J.S., said something like "you got my boy arrested" and began to fight with J.S.

J.S. admitted to having depression and emotional problems, and also having memory problems, particularly if many things are happening at once.

Dr. Mitchell Eisen, a psychologist, testified about the imprecise way in which memory works, and how that can lead to

mistaken eyewitness identification, particularly in cases arising out of stressful situations.

## DISCUSSION

### I

#### *Sufficiency of the Evidence*

Defendant contends no substantial evidence supports the conviction, specifically, that no substantial evidence supports J.S.'s identification of defendant as one of the robbers. We disagree.

We review the entire record in the light most favorable to the verdict to determine whether a rational jury could have found true each of the elements of robbery. (See *People v. Raley* (1992) 2 Cal.4th 870, 886.)

Here, the record reveals the following: J.S. identified defendant both at the scene and in court as the person who took his backpack after another man pushed a gun into his stomach. J.S. testified he had seen defendant before, during the January and possibly the October robberies. Defendant had been detained after the October robbery, in company with Julius and Tyrone Smith. Defendant was found hiding with Julius in a bathroom after this incident, after being in Smith's company.

In contending no substantial evidence supports J.S.'s identification, defendant reargues the facts to highlight inconsistencies in J.S.'s testimony and J.S.'s memory problems. But all of these points were explored at trial. Further, defendant minimizes his association with Julius and Smith, and

offers no explanation why he was hiding in a bathroom after the robbery.

"[A]s our Supreme Court has made clear on repeated occasions, "[g]enerally, 'doubts about the credibility of [an] in-court witness should be left for the jury's resolution.'" [Citation] "Except in . . . rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution[.]'" (People v. Ennis (2010) 190 Cal.App.4th 721, 728 (Ennis).)

Defendant's briefing does not establish that J.S.'s identification of defendant was inherently improbable or unworthy of credence. (See *Ennis, supra*, 190 Cal.App.4th at pp. 728-729; *People v. Thompson* (2010) 49 Cal.4th 79, 124-125.) Accordingly, we reject what is essentially an invitation to this court to reweigh the evidence.

## II

### *Robbery Team Evidence*

Defendant contends the admission of robbery team evidence violated both state evidentiary standards and the federal Due Process Clause.<sup>4</sup> We are not persuaded.

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<sup>4</sup> No due process claim was made at trial, but the trial court had granted an unopposed blanket request by the defense to "federalize" objections. While this procedure has gained currency, it encourages laxity and does not relieve a defendant of the need to specify which federal ground for exclusion is asserted. (See Evid. Code, § 353, subd. (a) [objections must be timely and specific]; cf. *People v. Blacksher* (2011) 52 Cal.4th 769, 836, fn. 37 [but so long as claim on appeal does not invoke different legal standards than those applied by trial court, it will be considered].)

A. *Background*

The People moved in limine to admit defendant's statement regarding his membership in Jack Boys. When asked by Detective Bell how the group got that name, defendant purportedly said, "That's what we do." The People asserted "to jack" was a synonym for "to rob." The People also sought to introduce evidence of "Jack Boys" tattoos sported by defendant and Julius, "Jack Boys" wallpaper on one of defendant's mobile phones, and the use by Smith of a "Jack Boys" hand sign.

The defense argued the cell phone wallpaper and any evidence of gang membership was unduly prejudicial under Evidence Code section 352, and alleged defendant actually told the detective "'Jack Boyz' is a rap group." The defense also asserted the evidence was improper character evidence (Evid. Code, § 1101, subd. (a)).

The trial court initially permitted the People to introduce evidence of the tattoos and wallpaper, to show the relationship between defendant and Julius, but excluded any reference to Jack Boys being a criminal street gang. Later, Detective Bell testified at an Evidence Code section 402 hearing about defendant's tattoos, and that defendant told him the name "Jack Boyz" arose because, "'That's what we do[,]'" but then claimed it was a rap group. The trial court ruled that statement was "state of mind evidence of . . . the reason he is connected to this organization, and what his perception of what this organization does. And then not, perhaps, coincidentally, his

involvement allegedly of doing exactly the conduct that he tattooed on his body."

It does not appear that defense counsel requested any limiting instruction regarding the challenged evidence.

*B. Analysis*

Regarding the "Jack Boys" tattoos, the cell phone wallpaper, and Smith's hand gesture to defendant and Julius after Smith was released from custody, defendant asserts "it is unclear" whether this was bad act evidence, and argues it "was simply impermissible propensity evidence" used "to show that [defendant] was a habitual robber[.]" He argues "motive and intent were not relevant" and that there "were no similarities between the two robberies for the evidence to have been probative of 'identity.'" Defendant also points out he offered to stipulate that he and Julius had matching tattoos and were members of the same group, and argues the evidence was *cumulative*.

The People argue the evidence was *not* offered to show defendant's role in any prior robbery. Instead, they argue it was evidence of identification, showing defendant "was a close associate" of Julius, or was an admission, or was evidence of defendant's state of mind.

Because no instruction limited the use of this evidence, the *reasoning* of the trial court is unimportant, because we review its *ruling*. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; *People v. Herrera* (2000) 83 Cal.App.4th 46, 65.)

Neither the People nor the trial court was required to accept the proposed defense stipulation. It was an evidentiary stipulation that did not eliminate any elements of the offense of robbery from the jury's consideration. Intent and identity were put in issue by defendant's not guilty plea. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 23 ["defendant declined to stipulate that he intended to permanently deprive Ly of his property. Accordingly, defendant's intent when he murdered Ly was a material fact"].) Nor was the evidence cumulative on intent, identity, or motive because "there is no way to ever define just what quantum of evidence is necessary to convince a jury beyond a reasonable doubt of a defendant's guilt." (*People v. Accardy* (1960) 184 Cal.App.2d 1, 4; cf. *People v. Leon* (2008) 161 Cal.App.4th 149, 169 [Leon's juvenile robbery adjudication cumulative on the question of his membership in a gang].)

Defendant contends the robberies are too dissimilar to allow evidence of the earlier robbery to be introduced. However, he overlooks a key point: *The same victim was robbed in both cases.* Evidence the same person has been victimized by the defendant in the past may be admitted to show intent, identity, and motive, because J.S.'s identity is a distinctive common mark. (See *People v. Beamon* (1973) 8 Cal.3d 625, 632-633 [the fact that a robbery victim had been robbed by Beamon 18 months before was admissible to show intent, identity and motive] (*Beamon*); *People v. Zack* (1986) 184 Cal.App.3d 409, 413-415 [fact murder victim had been assaulted by Zack before was

admissible to show intent, identity, and motive]; cf. *People v. Felix* (1993) 14 Cal.App.4th 997, 1004-1007 [fact Felix committed a prior robbery, perhaps with the same cohort, should not have been admitted because the robberies were dissimilar, and therefore the evidence was improper propensity evidence].

For example, the prior robbery gave J.S. another chance to see defendant, which logically tended to bolster his identification of defendant. (*Beamon, supra*, 8 Cal.3d at p. 632 [“The identification, essential to the People’s case, is materially buttressed by evidence that the victim was familiar with and able to recognize defendant because of observations made” during a prior robbery].)<sup>5</sup> The prior robbery also tended to show defendant took J.S.’s backpack with the intent to permanently deprive him of it or its contents, and negated a defense that it was taken in jest or some form of horseplay. Finally, on the train shortly before the January robbery, Julius referenced the October robbery. This was evidence of motive to attack the same victim, J.S., and also evidence showing J.S.’s reason to fear the “Jack Boys” in January. Finally, even apart from the “same victim” analysis discussed above, defendant’s membership in a robbery team was “relevant to establish the defendant’s motive[.]” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223 [gang evidence case].) “[B]ecause a

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<sup>5</sup> Although J.S. did not testify defendant was present in the prior incident, he testified defendant *might* have been present, and defendant was detained with Smith and Julius nearby. The jury could rationally find defendant was present and that J.S. *did* see him on that occasion.

motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.'" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; see *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 (*Olguin*); *People v. Martin* (1994) 23 Cal.App.4th 76, 81.) Membership in a group dedicated to robbery shows motive.<sup>6</sup>

Defendant contends his statement, "That's what we do[,]"" was not admissible, construing it as support for "the single inference that [defendant] was part of a tight-knit group that was solely and exclusively engaged in robberies." That overstates the meaning of the evidence. It was used to show that defendant boasted of being part of a robbery team, not to show that the team members did nothing else. The fact that defendant proclaimed himself to be a robber was strong evidence of his intent to permanently deprive J.S. of his property. The fact defendant apparently quickly realized the folly of his admission to Detective Bell, and changed his explanation to reference a rap group, did not negate his first statement, contrary to defendant's suggestion. The meaning of defendant's conflicting statements about the nature of the group was for the jury to determine, and the jury could rationally take the first statement at face value, and discount the second.<sup>7</sup>

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<sup>6</sup> The fact "Jack Boys" was not shown to be a *criminal street gang* (Pen. Code, § 186.22, subd. (f)) did not make the evidence of defendant's membership therein less relevant.

<sup>7</sup> We note that defendant did not move to exclude the statement on the grounds it was involuntary.

Nor was the evidence unduly prejudicial under Evidence Code section 352.

“‘Prejudice’ does not mean a result which is unfavorable, it means a result which is unfair.” (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1109; see *People v. Zapien* (1993) 4 Cal.4th 929, 958 [“‘the statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors’”]; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

“When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence’s probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers ‘substantially outweigh’ probative value, the objection must be overruled.” (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

“The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court’s decision exceeds the bounds of reason.” (*Olguin, supra*, 31 Cal.App.4th at p. 1369.)

The trial court precluded any reference to *gangs* as such, and no evidence of violent activities by the Jack Boys (other than the two robberies) was introduced. The Jack Boys were not portrayed like the Manson Family, Hell’s Angels, or the MS-13 gangs. (Cf. *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497.) The evidence of the two robberies was relatively innocuous, and if anything, the January robbery was the more serious one, because of evidence that a gun was used.

Accordingly, we find no state law error in the admission of any of the challenged evidence.

Nor are defendant's efforts to show a federal due process violation persuasive. "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; see *People v. Kelly* (2007) 42 Cal.4th 763, 787.) Even if evidence should have been excluded under state law, its admission "results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

We have found and described multiple permissible inferences to be drawn from the challenged evidence. The admission of the evidence did not render defendant's trial fundamentally unfair.

**DISPOSITION**

The judgment is affirmed.

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DUARTE, J.

We concur:

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RAYE, P. J.

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BUTZ, J.