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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE JESUS PEREZ et al.,

Defendants and Appellants.

C067040

(Super. Ct. Nos.
SF113004A, SF113004B)

Defendants Jose Jesus Perez and Jose Gutierrez shot dead 15-year-old Vincente Salazar who was wearing a red shirt, which was the color of defendants' rival street gang. A jury found defendants guilty of first degree murder and found true enhancements the murder was committed for the benefit of a street gang and that a principal intentionally discharged a firearm. The jury further found Perez guilty of actively participating in a street gang.

On appeal from the resulting judgment, defendants raise six contentions relating to the evidence, the instructions, the prosecutor's handling of the case, and the sentence. Finding one error with respect to the fees in the case, we modify the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Sometime after 11:00 p.m. in August 2009, Salazar was walking three girls (Vanessa Ballesteros, Erika Beltran, and Ashley Willman) home from a party. As they walked near a bar, a car pulled up behind them and someone inside the car yelled out "'Southside, sur trece.'" Perez and Eduardo Montes (who was Gutierrez's uncle) got out of the passenger side of the car and walked up to Salazar. Gutierrez (who was the driver) and a teenage girl named Leticia P. remained in the car. Perez started hitting Salazar with his fists and choking him and then Montes started swinging at Salazar with a crowbar. Salazar eventually got the crowbar away from Montes, and Salazar hit the windshield of the car. Gutierrez got out a gun from his pocket. Perez and Montes told Gutierrez to open the trunk, and then Perez and Montes pulled out a gun from the trunk. Salazar started running away. Gutierrez fired his gun at Salazar multiple times. Perez fired his gun at Salazar as well. Salazar fell to the ground. Gutierrez tracked Salazar with his gun, lowering his hand and firing his last shot at Salazar while Salazar was falling down. Gutierrez, Perez, Montes, and Leticia P. then all drove away together.

Police heard gunshots, drove to the intersection where Salazar had been shot, and found an unresponsive Salazar lying on the ground. He was pronounced dead from a gunshot wound to his neck and head that entered from behind him. He also had blunt force trauma to his head, face, neck, trunk, upper extremities and lower extremities.

Police interviewed Leticia P. During the interview, Leticia P. asked the police detective, "'If I tell you my story, am I still going to go to jail?'" The detective responded, "'I'll tell you what, if you don't tell me anything, you're certainly going to go to jail.'" After Leticia P. talked to the detective, she did not go to jail.

Police also interviewed Gutierrez. During the interview, Gutierrez admitted to police he was in the car, but he denied being the shooter.

Police searched Gutierrez's house. Inside his bedroom they found boxes of bullets. On his cell phone was a picture of a gun on a blue bandana, which Leticia P. identified as being a photograph of the murder weapon.

Police also searched Perez's home. Inside his bedroom was a CD case with the writing "Sur 13," a disassembled .22-caliber rifle, a safe with a revolver inside, and bullets. Perez's cell phone had rap music referring to Sureños shooting and killing Norteños. Perez admitted he was a Sureño gang member. He had gang tattoos on his chest, arm, and wrist. The Sureños, whose color is blue, are the rivals of the Norteños, whose color is red.

While awaiting trial in this case, Perez and Gutierrez beat up another inmate.

DISCUSSION

I

*The Court Did Not Err In Admitting Gutierrez's
Statement To Police Because Gutierrez Had
Not Invoked His Right To Remain Silent*

Gutierrez contends the trial court erred in admitting his statement that he was present when Salazar was shot because officers failed to stop interrogating Gutierrez after he "unambiguously invoked his right to remain silent." His invocation was as follows: "You told me I have the right to remain silent, right?" He is wrong because this invocation was equivocal.

At the beginning of the interrogation, the detective told Gutierrez he "ha[d] the right to remain silent" and that he "ha[d] the right to talk to a lawyer and have him or her present while [he was] being questioned." Gutierrez answered "[y]eah" and "[y]es" when the detective asked if he understood those rights. The alleged invocation came in the latter half of the police interrogation. When Gutierrez said he was 18 years old, the detective responded that while the detective and one of the witnesses to the murder believed that the shooting was accidental, the victim's family was saying it was "cold-blooded murder," so Gutierrez had to "fill this in in between" and he has "gotta say something." Gutierrez then responded with what he claims was his unequivocal invocation: "You told me I have

the right to remain silent, right?" The detective responded, "You do. That's, that's your right. The only reason we brought you down here and the only reason we want to talk to you is to get your side of it. So it's up to you. If you want to explain to us what happened, we'll listen, and if you don't, we'll just go by what the other people say, and that's fine, too. So what do you wanna do?" Gutierrez replied he "didn't have nothing to do with it," he was "not the shooter," and he "was just in the car."

To safeguard the Fifth Amendment's privilege against self-incrimination, a person undergoing a custodial interrogation must be advised of the right to remain silent and the right to have counsel present during questioning. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444-445 [16 L.Ed.2d 694, 706-707].) "[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." (*Davis v. United States* (1994) 512 U.S. 452, 458 [129 L.Ed.2d 362, 370].) The request for counsel must be unambiguous and unequivocal, so that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Id.* at p. 459 [129 L.Ed.2d at p. 371].) "It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda* . . . either to ask

clarifying questions or to cease questioning altogether.”

(*People v. Stitely* (2005) 35 Cal.4th 514, 535.)

The statement here was insufficient to invoke Gutierrez’s *Miranda* rights. Statements similar to the one here have been found insufficient, including the following: “‘Maybe I should talk to a lawyer’” (*Davis v. United States, supra*, 512 U.S. at p. 462 [129 L.Ed.2d at p. 373]); “‘Did you say I could have a lawyer?’” (*People v. Crittenden* (1994) 9 Cal.4th 83, 123, 130-131); and “‘I think it’d probably be a good idea for me to get an attorney’” (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104). More recently, even the statement, “‘If you can bring me a lawyer, that way I[,] I with who ... that way I can tell you everything that I know and everything that I need to tell you and someone to represent me’” was held by our Supreme Court to be an ambiguous invocation of a defendant’s *Miranda* rights. (*People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 206-207.)

Here, it was during the midpoint of the interrogation when the detectives’ questions implicated Gutierrez and his friends in the shooting that Gutierrez’s free-flowing responses slowed down. It was then Gutierrez asked, “‘You told me I have the right to remain silent, right?’” His asking whether he had the right to remain silent was equivocal -- it either could be seen simply as the question it posed or as a stalling tactic. Either way, the detective confirmed Gutierrez had that right and then let Gutierrez decide whether he wanted to go on with the interview. Gutierrez then decided he wanted to do so. Just as in *Stitely*, where the detective confirmed with the defendant

that talking was optional and alluded to the prior *Miranda* warning (*People v. Stitely, supra*, 35 Cal.4th at p. 536), here the detective said the right to remain silent was Gutierrez's right, it was "up to [him]" if he wanted to talk and the detectives would listen, and if he did not "that's fine, too." Just as in *Stitely*, nothing in Gutierrez's equivocal statement prevented the detective from continuing the interview. There was no *Miranda* violation.

II

The Court Did Not Err In Admitting The Gang Evidence

Perez contends the trial court violated his federal due process right to a fair trial when it admitted "mounds of irrelevant and cumulative evidence about his gang ties." We disagree because the court did not abuse its discretion.

Perez moved to sever the gang charge and gang enhancement (and exclude gang evidence) from the murder charge on the basis the gang evidence would be unduly prejudicial. The court denied the motion, ruling that the gang evidence would be relevant to the murder charge on its own because it provided a motive for the killing.

The evidence the court allowed in included the following: Perez and Gutierrez beat up another inmate while awaiting trial in this case; Perez had gang tattoos on his chest, arm, and wrist; Gutierrez had pictures on his cell phone containing what was thought to be the murder weapon and indicia of gang membership such as a blue bandana and bullets spelling out gang abbreviations; Gutierrez had in his bedroom many boxes of

bullets; and Perez had on his cell phone rap music referring to Sureños shooting and killing Norteños. These are among the items of evidence Perez claims were irrelevant, cumulative, and unduly prejudicial.

The court did exclude as unduly prejudicial some of the gang evidence the People wanted to introduce, including the following: the reason for a traffic stop of Perez's car on June 12, 2009, was that Perez had been a suspect in numerous drive-by shootings; Perez had been convicted of possessing brass knuckles; and Perez had drug-related evidence in his bedroom.

Perez on appeal contends the evidence the court admitted was cumulative and that the excessive gang evidence was unduly prejudicial because it led the jury to believe Perez had a bad character. We disagree with Perez because the evidence was not irrelevant, cumulative, or unduly prejudicial and the jury was properly instructed on how to use this evidence.

The murder here was the beating and shooting of a 15-year-old because he was wearing a red shirt. Compared to this senseless act, the trial court reasonably could find the evidence of rap lyrics that mentioned killing Norteños, a fist fight in prison, boxes of bullets, and gang tattoos were not unduly prejudicial compared to their probative value. Their probative value was derived from the fact some of this evidence provided a motive for the killing (rival gang animosity as stated in the lyrics and demonstrated by the gang-related fight in prison and tattoos), showed that defendants had a means of perpetrating the killing (bullets) and some of this evidence

provided proof of the elements of the gang crime and gang enhancement (e.g., tattoos showed Perez's membership in the gang).

As to whether it was cumulative, the trial court did not abuse its discretion in finding it was not. The gang evidence took up a very short amount of time compared to the rest of the evidence. The evidentiary phase of the trial spanned 2,473 pages of reporter's transcript. The gang evidence about which Perez complains spanned approximately seven pages. There was nothing that required the People to prove the gang crime, the gang enhancement, and the motive for the murder in the most innocuous or sanitized manner possible.

The cases Perez cites to support his argument that there was an abuse of discretion here rising to the level of a due process violation are readily distinguishable.

For example, in *People v. Albarran* (2007) 149 Cal.App.4th 214, "the motive for the underlying crimes . . . was not apparent from the circumstances of the crime." (*Id.* at p. 227.) And the only evidence to support the prosecution's claimed motive that the shooting was to gain respect was the defendant's gang affiliation. (*Ibid.*) The appellate court found the gang evidence (which included a specific threat to murder police officers) "extremely prejudicial" and therefore reversed the defendant's conviction. (*Id.* at pp. 217, 220, 232.) Here, by contrast, the motive for Salazar's murder was gang-related as the only reason Salazar was targeted was his red shirt and the

gang evidence was nowhere near as inflammatory as death threats against police officers.

As another example, in *People v. Williams* (2009) 170 Cal.App.4th 587, police found a gun, drug paraphernalia and ammunition in a bedroom and a second gun and drugs in the garage. There were six gang members present at the time, including the defendant. (*Id.* at pp. 596-597.) The defendant was convicted of gun and drug charges with gang enhancements and the crime of participation in a criminal street gang. (*Id.* at p. 595.) The appellate court found the trial court abused its discretion in admitting evidence of "at least eight crimes committed by [gang] members," as well as evidence of dozens of police/gang contacts. (*Id.* at pp. 600-602, 609.) The evidence was cumulative because it "concern[ed] issues not reasonably subject to dispute." (*Id.* at p. 611.) Here, in contrast, Perez in closing argument disputed that the evidence showed that crimes gang members committed were for the benefit of the gang and that the gang evidence proved anything other than gang membership. Moreover, as we have already explained, the evidence was also relevant to show motive and means to commit murder.

Finally, as to Perez's argument the jury may have considered the gang expert testimony as bad character evidence, the court's instruction adequately covered this point. The court instructed the jury, "[y]ou may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." The jury was further

instructed not to let "bias, sympathy, prejudice, or public opinion influence your decision." We presume that the jury understood and followed the instructions. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1326.)

III

The Court Properly Instructed The Jury

On Evaluating Witness Credibility

Gutierrez contends the trial court violated his due process right to present a defense when it refused to instruct the jury that in evaluating a witness's credibility (here, Leticia P.), it could consider whether a witness had been promised a benefit or leniency for her testimony. The instruction was the part of CALCRIM No. 226 stating that in evaluating a witness's testimony, the jury can consider, "was the witness promised immunity or leniency in exchange for his or her testimony." (CALCRIM No. 226.) Gutierrez is wrong because Leticia P. was not promised a benefit or leniency for her testimony.

The testimony that Gutierrez claims warranted the portion of the instruction was that Leticia P. asked Detective Rodriguez, "'If I tell you my story, am I still going to go to jail?'" The detective responded, "'I'll tell you what, if you don't tell me anything, you're certainly going to go to jail.'"

To justify the instruction, there has to be "promised immunity or leniency in exchange for his or her testimony." (CALCRIM No. 226.) Here, the only promise was that if Leticia P. did not tell the detective anything, she would go to jail. This did not mean that if she testified at trial, she would not

go the jail. Indeed, the topic of immunity or leniency for her trial testimony was never mentioned. There was simply no promised benefit offered in exchange for Leticia P.'s testimony at trial.

IV

The Prosecutor Did Not Commit Misconduct

Perez contends the prosecutor committed misconduct by misstating the facts, misstating the law, and appealing to the passions and prejudices of the jury, all in violation of his constitutional right to due process. We take each contention in turn below, rejecting them all.

A

The Prosecutor Properly Stated The Facts

Perez contends the prosecutor misstated the facts when she argued in closing that "[t]wo witnesses came in and testified that this gun at the bottom where I have the caption, that the gun that [Perez] pulled that night is the gun that they saw." The evidence supported this argument. Erika Beltran testified she saw two people (one of whom fit the description of Perez) pull out a gun from the trunk and shoot Salazar and identified People's exhibit 88 as similar to the gun she saw. Vanessa Ballesteros similarly testified she saw Perez pull out a gun from the truck, saw him shoot Salazar, and then saw Salazar fall. Ballesteros also identified People's exhibit 88 as similar to the gun she saw.

B

*Perez Forfeited His Argument On Whether The Prosecutor
Misstated The Law, And Trial Counsel Was
Not Ineffective For Failing To Object*

Perez contends the prosecutor misstated the law when she argued in closing, "If you believe that the only original intention of these defendants . . . was to assault for purposes of producing great bodily injury on Vicente on that day, then you then find that these defendants are guilty of murdering him on that day under the law. [¶] If they aided and abetted the 245, they are guilty of the murder." Perez argues this was a misstatement of the law because under the natural and probable consequences theory, the defendants have to have jointly committed assault and the murder has to be a natural and probable consequence of that assault.¹

Perez's argument is forfeited because he did not object. Generally, to preserve a claim of prosecutorial misconduct, a defendant must object unless an objection or request for admonition would have been futile or an admonition would not have cured the harm. (*People v. Young* (2005) 34 Cal.4th 1149, 1188; *People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Here, Perez's failure to object to the argument deprived the trial

¹ The case was prosecuted on the alternative theories that defendants were guilty as direct perpetrators or aiders and abettors, or guilty under the natural and probable consequences doctrine, the target offense being assault by means likely to produce great bodily injury.

court of the opportunity to cure any prejudice that may have resulted from the prosecutor's statement. This was not a case in which objecting and requesting an admonition would have been futile.

Perez's defense counsel was also not ineffective for failing to object, as Perez now claims on appeal, because his decision to not object could have been based on a reasonable tactical decision. (See *People v. Vines* (2011) 51 Cal.4th 830, 876 ["`[r]eviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel'"].) The court correctly instructed the jury that under the natural and probable consequences doctrine, the jury had to find that a reasonable person in defendant's position would have known that commission of the murder was a natural and probable consequence of the commission of the assault with a deadly weapon or force likely to produce great bodily injury. (CALCRIM No. 403.) The court also correctly instructed that "[y]ou must follow the law as I explain it to you If you believe that the attorneys' comments on the law conflict with my . . . instructions, you must follow my instructions." Perez's defense counsel may have reasonably determined it was detrimental to call the jury's attention to the prosecutor's statement of the law when the court instructions were correct and the jury was instructed to follow them.

C

The Prosecutor Did Not Appeal

To The Passions And Prejudices Of The Jury

Perez contends the prosecutor improperly argued that Perez was guilty because he was a person of bad character, namely, a gang member who was violent 24 hours a day. There was no such improper argument.

Perez contends his counsel was not required to object because the argument was so pervasive. It was not. The prosecutor did stress Perez was an active Sureño who was a "gangster[] twenty-four hours a day." His music was violent and those lyrics reflected his values. His purpose in committing the murder was written all over the tattoos on his body. This argument was appropriate. Perez's gang membership and gang lifestyle provided the motive and intent for committing the murder here. It also helped establish the elements of the gang crime and the gang enhancement. This was not irrelevant character evidence that the prosecutor improperly used to tie Perez to crimes to which his gang membership had no relation.

V

There Was No Cumulative Error

Perez contends his trial was fundamentally unfair because of cumulative errors, which violated his federal due process right to a fair trial. The only error we have found is the People's misstatement of law in closing regarding the natural and probable consequence doctrine, but that error was not misconduct and it was harmless in light of the court's correct

instructions that the jury was told to follow. This one error that was not prejudicial did not make Perez's trial unfair.

VI

The Court Erred In Not Imposing A \$1,000 Administrative Fee

Perez and Gutierrez contend we must strike a \$1,000 fee that appears in their abstracts of judgment that was for the administrative cost of collecting the restitution fine because the court never orally imposed the fee.

While the court erred in failing to orally impose the fee, we nevertheless will not order the abstracts amended because the fee was mandatory and the court's failure to impose it was an unauthorized sentence that can be corrected at any time. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.)

The San Joaquin County Board of Supervisors has adopted an order establishing a mandatory 10 percent surcharge to cover the administrative cost of collecting a restitution fine imposed pursuant to Penal Code section 1202.4, subdivision (1). The order reads as follows: "This Board of Supervisors does hereby order and establish a fee effective September 18, 1995, to cover the administrative cost of collecting court ordered restitution fines equal to ten percent (10%) of the total amount ordered to be paid as authorized by Section 1202.4(1) of the Penal Code. This fee shall be paid to the county department administering the collection of court ordered restitution fines for deposit

into the general fund of the county treasury for the use and benefit of the county."²

The board of supervisors was permitted to enact the fee pursuant to Penal Code section 1202.4, subdivision (1) which reads as follows: "At its discretion, the board of supervisors of any county may impose a fee to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid, to be added to the restitution fine and included in the order of the court, the proceeds of which shall be deposited in the general fund of the county."

Because the county chose to establish the fee and made it mandatory, the court was required to impose it. We therefore modify the judgment to include the fee, but we need not order any modification to the abstracts because the fee is already recorded there.

² We grant the People's request for judicial notice of the board of supervisors' order.

DISPOSITION

The judgment is modified to include a \$1,000 fee for both defendants to cover the administrative cost of collecting the restitution fine. As modified the judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.