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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CYNTHIA MICHELLE MARQUEZ et al.,

Defendants and Appellants.

D059082

(Super. Ct. No. SCD226584)

APPEALS from judgments of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

A jury convicted defendants Cynthia Marquez and Luciano Rivera of first degree robbery in concert (Pen. Code,¹ §§ 211/213, subd. (a)(1)(A), count 1) and first degree burglary (§ 459/460, count 2), and found true the special allegations that defendants were armed with a firearm in committing the robbery (§ 12022.53, subs. (b) & (e)(1)), they

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

committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)), and Rivera personally used a firearm in connection with count 2 (§ 12022.5, subd. (a)).

The jury also found Rivera guilty of four other offenses: assault by means likely to cause great bodily injury (§ 245, subd. (a), count 5) and battery causing serious bodily injury (§ 243, subd. (d), count 6) involving victim Antonio Perez; and assault (§ 240, count 7) and battery (§ 242, count 8) involving victim Mark Kaczmarczyk. The jury found true the special allegations appended to counts 5 and 6 that Rivera committed the offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b).) The jury also found true the special allegation appended to count 5 that Rivera personally inflicted great bodily injury on Perez within meaning of section 12022.7, subdivision (a), and found true the special allegation appended to count 6 that Rivera personally inflicted great bodily injury on Perez within meaning of section 1192.7, subdivision (c)(8). The jury also found true the special allegation appended to count 7 that Rivera committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)). In a bifurcated proceeding, Rivera admitted the allegations that he had a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior strike conviction (§ 667, subds. (b)-(i)).

I

FACTUAL BACKGROUND

A. The Home Invasion Robbery (Counts 1 and 2)

On April 5, 2008, numerous persons (including Mr. Brockman and Ms. Caballero) were at a residence in San Diego. The residence was a locus for numerous criminal

activities, including the sale of drugs. One of the persons present was "Pablo," the main seller of methamphetamine

In the early morning hours of April 5, 2008, Caballero unlocked and opened the front door to admit "Gilbert," who she believed was one of Pablo's regular customers. However, when she tried to close the door, it was pulled open and four men wearing hoodies entered the house. The invaders said something about "the law of the land that, you know, we have to pay up" The invaders "were there for Pablo."

Rivera was one of the invaders and was carrying a firearm. Marquez, carrying duffle bags, entered the house a few minutes later and directed the activities of the invaders. Marquez kept saying, "just be still. Just be quiet. They will tell you what to do." Marquez was "keeping guard," and at one point asked where Pablo was. The intruders eventually left "with the big duffel bags full of stuff."

A car registered to Rivera was left at the scene and impounded. A couple of days after the robbery, an informant (who authorities used for a consensual wiretap) talked on the telephone to Marquez and Rivera about the home invasion, and they told the informant they had been involved. Based on the wiretaps, police prepared photographic "six-packs," including a six-pack containing Rivera's picture and a six-pack containing Marquez's picture. Brockman identified Rivera and Marquez as two of the perpetrators and said Rivera was the person with the firearm. Caballeros also said the photographs of Rivera and Marquez looked like two of the participants in the robbery.

A gang expert testified about the Mexican Mafia. He testified "Bat" Marquez was a top Mexican Mafia member with his own organization and Marquez was his

"secretary." Persons who sell drugs in a Mexican Mafia area must pay "taxes," which are collected by soldiers or secretaries. If the dealers did not pay the taxes, the gang would extort money from them or conduct home invasions to take property, which they would then sell for a profit.

Another gang expert, who testified Rivera was a Mexican Mafia associate (or "soldier") and Marquez was a secretary for Bat Marquez, testified on how the home invasion robbery was committed for the benefit of and in association with the Mexican Mafia.

B. The Jail Assaults (Counts 5 Through 8)

On February 16, 2010, Mr. Perez was being held in jail on a charge of rape. Perez belonged to a Chula Vista area gang. Two fellow inmates, one of whom was Rivera, assaulted Perez so severely that he lost consciousness.

On May 14, 2010, Mr. Kaczmarczyk was being held in a segregated lockup because he was charged with crimes against children. Around 9:00 a.m., Rivera had just finished receiving a haircut and Kaczmarczyk was the next person to be allowed to use the dayroom. When the deputy opened the door to allow Kaczmarczyk to enter, Rivera attacked Kaczmarczyk. A videotape of the assault was played for the jury.

A gang expert testified that the rules of the Mexican Mafia required any gang member to assault any person being held for a rape charge or for a crime perpetrated against a child. The expert testified the assaults on Perez and Kaczmarczyk were for the benefit of the Mexican Mafia.

C. The Gas Station Charges (Counts 3 and 4)

On June 21, 2008, two persons robbed a Union 76 gas station and took cash and a laptop computer. The victim stated a photograph of Rivera resembled one of the robbers. The Mexican Mafia informant obtained the stolen laptop from Rivera, who told the informant it was from an Exxon Station robbery. The gang expert testified the robbery was for the benefit of the Mexican Mafia. However, the jury acquitted Rivera of the gas station robbery charges.

II

ANALYSIS

A. The Severance Claim

Prior to trial, Marquez moved to sever trial of the home invasion charges from trial on charges against Rivera arising out of the gas station robbery and the jail assaults, contending there was a danger she would be found guilty by association, and there was a potential for confusion of the evidence because the stronger evidence of the jail assaults could prejudice her. The trial court denied the motion, noting the gang allegations would make much of the evidence potentially cross-admissible even in a severed trial, and concluding there was little prejudicial impact from having the jail and gas station charges against Rivera amalgamated with the home invasion counts.

Legal Framework

Section 1098 provides that:

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the

court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

A joint trial is preferred when available. (*People v. Cleveland* (2004) 32 Cal.4th 704, 725-726.) However, a court retains discretion to order separate trials and a ruling on a motion for separate trials is reviewed under the abuse of discretion standard. (*People v. Morganti* (1996) 43 Cal.App.4th 643, 671.) The trials of codefendants may be severed " 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.' " (*People v. Avila* (2006) 38 Cal.4th 491, 574-575, quoting *People v. Massie* (1967) 66 Cal.2d 899, 917.) When ruling on a motion to sever, the court should consider:

"(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case." (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.)

When a court denies a motion to sever trial of otherwise properly joined defendants, we will not reverse the judgment unless the consolidation deprived a defendant of a fair trial or due process. (*People v. Pinholster* (1992) 1 Cal.4th 865, 933, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 458-459.)

Analysis

Although Marquez correctly notes the facts of the home invasion and the facts of the gas station robbery and jail assaults were not cross-admissible on the elements of the substantive offenses, the gang allegations appended to all counts created sufficient cross-admissibility to weigh in favor of consolidated trials. First, all of the more generalized gang evidence, admissible as to the enhancements appended to the counts arising from the gas station robbery and jail assaults, was equally admissible as to the enhancements appended to the counts arising from the home invasion. Second, Rivera's specific conduct in the gas station robbery and jail assaults was potentially cross-admissible as against Marquez, subject to the court's discretion under Evidence Code section 352, because (1) it was relevant to showing Rivera was an active gang member, and (2) Marquez was charged with committing the home invasion crimes with (among other things) the "specific intent to . . . assist in any criminal conduct by gang members," making Rivera's gang affiliation relevant to the charges against Marquez.

Marquez argues Rivera's jail assaults involved charges likely to unusually inflame the jury against her because Rivera was shown to be violent, and she would be tainted by her association with a violent offender.² However, because the evidence of Rivera's

² Marquez also suggests the gas station robbery evidence was unduly inflammatory and her association with the perpetrator of those offenses unfairly tainted her in front of the jury. However, the jury *acquitted* Rivera of those offenses, and Marquez offers no explanation of why her association with a person acquitted of those offenses may have tainted her.

assaults could have been cross-admitted as discussed above, any purported taint would also have been present in severed trials.

The remaining two factors also did not militate in favor of severance. This was not a case in which a relatively weak case (on the home invasion counts) was joined with a much stronger case (on the jail assaults): the former had multiple witnesses who identified Marquez and Rivera as active participants, and had an informant to whom Marquez admitted involvement; and the latter also had strong evidence of Rivera's participation. Furthermore, this was not a case in which one of the charges is a capital offense or in which joinder of the charges converts the matter into a capital case. We conclude it was not an abuse of discretion to deny Marquez's motion to sever the trials.

B. The Sentencing Claim

Rivera argues the trial court's sentence was erroneous because, for the prior serious felony conviction (§ 667, subd. (a)(1)), the court added a five-year determinate term to the indeterminate term (imposed for the conviction on count 1) and another five-year determinate term to the determinate term imposed for the remaining unstayed convictions and enhancements. Rivera argues this was error and that one of the five-year prior serious felony conviction enhancements should be vacated.

However, Rivera recognizes this court rejected the substantively indistinguishable argument in *People v. Misa* (2006) 140 Cal.App.4th 837 (*Misa*). In *Misa*, this court examined the appropriate sentencing for status enhancements when a defendant is sentenced to both an indeterminate and a determinate term after *People v. Tassell* (1984) 36 Cal.3d 77 (overruled on other grounds by *People v. Ewoldt* (1994) 7 Cal.4th 380, 386-

387) and *People v. Williams* (2004) 34 Cal.4th 397. In *Tassell*, the court held that a status enhancement related to the nature of the offender (such as a prior conviction enhancement), not the nature of the offense, should be added only once to increase the aggregate term for multiple *determinate* sentences. (*Tassell*, at pp. 89-92.) In *Williams*, at pages 401 to 402, the court held this limitation did *not* apply to multiple *indeterminate* sentences imposed under the three strikes law, and that a prior serious felony conviction enhancement should be added to *each* indeterminate sentence. The *Williams* court reasoned that *Tassell's* restriction was derived from the language of the determinative sentencing statute (§ 1170.1) and not from the language or legislative history of the prior conviction enhancement statute; section 1170.1 was only applicable to determinate sentences; the three strikes scheme requires that enhancements be added as separate determinate terms; and adding the enhancement for each new offense was consistent with the logic of the three strikes law that separately increases the sentence imposed for each new felony conviction. (*Williams*, at pp. 402-405.)

In *Misa, supra*, 140 Cal.App.4th at pages 844-847, we applied the *Williams* rationale to require imposition of a prior serious felony conviction enhancement on both an indeterminate term and a determinate term for a defendant subject to the three strikes law as a second striker. The indeterminate term in *Misa* was based on the statutory penalty for torture. (*Misa*, at p. 846.) We reasoned that the defendant's recidivist status as a second striker warranted extending the *Williams* holding to require imposition of the enhancement on both the indeterminate and determinate sentences. (*Misa*, at p. 847.)

Here, Rivera's indeterminate term was not derived from the three strikes law but instead was based on the gang enhancement statute, which requires a sentence of 15 years to life when a home invasion robbery is committed to benefit a gang. (§ 186.22, subd. (b)(4)(B).) However, like the three strikes law, the purpose of section 186.22 is to impose "harsher punishment for gang-related offenses." (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1444.) Because indeterminate sentences are not governed by the sentencing rules applicable to determinate sentences, and because Rivera's indeterminate sentence was derived from a punishment-augmenting statutory scheme, we conclude the *Williams* holding applies equally here, and *Misa* is substantively controlling. The trial court did not err in imposing the prior serious felony conviction enhancement on both the indeterminate and determinate terms to which Rivera was sentenced.

C. The Discovery Claim

Before trial commenced, the prosecution sought a ruling on whether certain materials were required to be disclosed to the defense under section 1054.1 and/or *Brady v. Maryland* (1963) 373 U.S. 83, and requested the court review the materials in camera to rule on the disclosure obligations. The court held the in camera hearing and ruled the materials were not discoverable and sealed the information. All parties have requested that we likewise independently examine the sealed materials to determine whether the trial court's ruling was erroneous. We have examined the sealed materials and conclude the trial court correctly ruled the prosecution was not required to disclose these materials under either section 1054.1 or *Brady v. Maryland, supra*.

DISPOSITION

The judgments are affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.