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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ABRAHAM IBARRA,

Defendant and Appellant.

D059848

(Super. Ct. No. SCD211986)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian III, Judge. Affirmed.

In this robbery case, defendant Abraham Ibarra argues the trial court erred in admitting evidence of closely related crimes he committed, and for which he was convicted in a prior trial. Because the prior crimes were probative with respect to a gang enhancement alleged in the underlying information, the trial court did not abuse its discretion in admitting evidence of those crimes. Ibarra also argues the trial court abused its discretion in failing to bifurcate trial of the robbery count and the gang enhancement.

On this record, where the gang evidence was no more inflammatory than the evidence presented with respect to the substantive robbery allegation, bifurcation was not required. Accordingly, we affirm the judgment of conviction.

FACTUAL BACKGROUND

In our prior opinion in this case, we summarized the facts which gave rise to these proceedings: "Late on February 17, 2008, Ibarra and George Lopez (George) got out of a stopped car, ran up to James Novet as he walked home from work and told him to empty his pockets. Sometime during the incident, Marco Benitez got out of the same car and pointed a gun at Novet's chest while Ibarra patted down Novet's pockets. Novet handed over his wallet and cell phone. As the three walked away from Novet, Benitez shouted: 'You just got jacked by Ghost Town.'

"A few hours later, the group drove up to Julieta Santiago's car while she was looking for a parking space in her apartment parking lot. Santiago's boyfriend Mario Rodriguez was a passenger in her car at the time. Ibarra threw a bicycle in front of Santiago's car to prevent her from passing. Ibarra ran to the passenger side of the car, pressed a screwdriver to Rodriguez's neck, and took his wallet from his pocket. Meanwhile, Benitez approached Santiago with a gun. Santiago and Rodriguez got out of the car and Ibarra and Benitez got in the car and drove away. Juan Lopez (Juan), another member of Ibarra's group, stayed in the car during the carjacking and drove away in the car in which the group had arrived.

"The next morning, San Diego Sheriff's Deputies saw the stolen car being driven on the freeway. The deputies attempted to pull over the car, but the driver would not stop

and led the deputies on a high speed chase. The car eventually stopped and four individuals fled. The only individual apprehended was Juan. Law enforcement officers interviewed Juan, who gave false names for the other individuals involved in the crimes.

"On February 20, 2008, Ibarra and George came upon an idling truck. There was no driver inside, but there was a television in the bed of the truck. Ibarra jumped into the driver's seat of the truck and drove away with George in the passenger seat. Ibarra and George dropped off the television and drove to buy marijuana. A sheriff's deputy began following the truck after discovering it was stolen. The deputy activated his lights and sirens. Ibarra refused to pull over and led law enforcement on a high speed chase that ended when Ibarra crashed into a guard rail. Both Ibarra and George fled on foot. Sheriff's deputies arrested Ibarra later that day.

"Ibarra admitted to law enforcement officers he had stolen the truck and he was involved in the incident with Novet and the carjacking of Santiago and Rodriguez. Ibarra informed the officers the group decided to carjack Santiago's car because they had not 'come up so big' when they stole Novet's belongings. The detective asked Ibarra: '[I]f you didn't get caught today how long [do] you think it would be before you guys would jack some other fool for [his] car?' Ibarra responded: 'Probably tomorrow.'

"After Ibarra's arrest, Juan gave a second interview to law enforcement officers. In this interview, Juan said Ibarra "kicks it" with Varrío San Marcos (a San Marcos gang) [VSM], George was being tested by the gang to see if he would be allowed to join, and Benitez was a member of that gang. Juan said that on the night of the robbery of Novet

and carjacking of Santiago, the group went into the territory of the rival South Los gang in order to look for South Los gang members. [¶] . . . [¶]

"Novet testified that at the time of the robbery, he believed that the gun pulled on him was fake. Despite this belief, Novet handed over his belongings because 'an empty wallet and broken phone [weren't] worth being wrong.' Novet also testified that he was not afraid when he was approached by Ibarra and George, nor was he afraid when the gun was pointed at him. Novet testified that he was 'pretty sure' that he gave up his phone before the gun was drawn, and that he was not sure whether he handed over the wallet before or after the gun was drawn." (*People v. Ibarra* (Aug. 04, 2010, D055449) [nonpub. opn.]¹)

The jury in the first trial found Ibarra guilty of two counts of robbery (Pen. Code,¹ § 211), two counts of carjacking (§ 215, subd. (a)), two counts of unlawfully driving or taking a stolen vehicle (Veh. Code, § 10851, subd. (a)) and one count of evading a peace officer with reckless driving (Veh. Code, § 2800.2). With respect to both counts of robbery, both counts of carjacking and one count of unlawfully driving or taking a stolen vehicle, the jury found Ibarra acted for the benefit of, or in association with, a criminal street gang (§ 186.22, subds. (b)(1), (b)(4).) The trial court identified the robbery of Novet as the principal term and sentenced Ibarra to a total of 17 years to life plus 13 years.

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

In our prior opinion in this case, we reversed Ibarra's conviction for the robbery of Novet and the gang enhancement imposed with respect to that conviction. We found the trial court should have given a requested lesser included grand theft instruction because, in light of Novet's testimony that he was not afraid and did not believe the gun Benitez pointed at him was real, the jury might have believed that no robbery occurred. However, we affirmed Ibarra's other convictions and enhancements.

The district attorney retried the Novet robbery and enhancement. Prior to the second trial, the prosecutor moved in limine for an order permitting him to use the affirmed convictions to impeach Ibarra. Ibarra opposed the motion on the grounds such use of the affirmed convictions would place him in a worse position than he was at the time of the first trial and thus would improperly punish him for appealing his conviction. The trial court largely agreed with Ibarra's argument. The trial court barred the prosecutor from using the convictions to impeach Ibarra in the event Ibarra testified at the second trial. However, the trial court permitted the prosecutor's gang expert to refer to the conduct which gave rise to the affirmed convictions. Later, the trial court permitted the prosecutor to present a videotape of the statement Ibarra made in which he referred to the other crimes.

Properly instructed, the jury again convicted Ibarra of the robbery of Novet and again found that it was committed for the benefit of or in association with a criminal street gang. The trial court again sentenced Ibarra to 17 years to life plus 13 years.

DISCUSSION

I

On appeal, Ibarra argues the trial court abused its discretion in permitting the prosecution to present evidence of the events and conduct which gave rise to his separate affirmed convictions. Although he concedes the evidence was relevant to the alleged gang enhancement, he argues that because of other evidence of his gang involvement the trial court should not have permitted the prosecution to also admit evidence of his other crimes. Ibarra points to statements he and Lopez made to the effect they hang out with members of the VSM, to evidence that Benitez was a member of the gang, and Novet's testimony that Necio shouted "you've just been jacked by Ghost Town." He contends that in light of this evidence the trial court should not have permitted the prosecution to present evidence of his other gang related crimes. He argues that evidence of those crimes was merely cumulative with respect to his gang participation.

The court in *People v Tran* (2011) 51 Cal.4th 1040, 1048-1049 (*Tran*) largely rejected Ibarra's argument. In *Tran* the prosecution established a gang's predicate offenses, as required by section 186.22, subdivision (f), by presenting evidence of crimes the defendant himself committed on behalf of the gang. On appeal, the defendant argued that in light of evidence committed by other gang members, evidence of his past crimes was cumulative and therefore unduly prejudicial. In rejecting this contention, the court stated: "[D]efendant cites no authority for the argument that the prosecution must forgo the use of relevant, persuasive evidence to prove an element of a crime because the

element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute.

[Citations.] But the prosecution cannot be compelled to "present its case in the sanitized fashion suggested by the defense." [Citation.] When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion." (*Tran, supra*, 51 Cal.4th at p. 1049.)

Here, the evidence of the crimes Ibarra committed near the time of the robbery of Novet had obvious probative value with respect to the gang enhancement. Evidence of the other separate crimes plainly showed that the robbery of Novet was not a single event in which one of his confederates was only coincidentally a gang member; the other crimes evidence tended to show the Novet robbery was part of a pattern of activity designed to improve the reputation of the gang.

The potential prejudice of the evidence of other crimes was well within tolerable limits. An important factor in determining whether evidence of a defendant's other offenses is unduly prejudicial is whether it is more inflammatory than the charged crimes. (*Tran, supra*, 51 Cal.4th at p. 1047.) Here, the evidence of the prior crimes, which the trial court instructed the jury could only be considered with respect to the gang enhancement, was no more inflammatory than the robbery of Novet.

Because the evidence was probative and not unduly prejudicial, the trial court did not abuse its discretion in admitting it. (*Tran, supra*, 51 Cal.4th at p. 1050.) Because

admission of the other crimes evidence was proper, we reject Ibarra's related claim that in admitting the evidence the trial court deprived him of a fair trial.

II

Ibarra also argues the trial court should have granted his motion to bifurcate trial of the robbery charge and the gang enhancement. Again, we find no error.

Because of the efficiencies which are achieved by way of a joint trial of related matters, in order to prevail on a motion to bifurcate a gang enhancement, a defendant must " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051 (*Hernandez*)). "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Hernandez, supra*, 33 Cal.4th at pp. 1049–1050.)

"Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself . . . a court may still deny

bifurcation." (*Hernandez, supra*, 33 Cal.4th at p. 1050.) The court in *Hernandez* noted that a "trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Ibid.*)

In applying these principles, the court in *Hernandez* noted that much of the gang evidence presented in that case was relevant to the charged offense, specifically on the issues of motive and intent. (*Hernandez, supra*, 33 Cal.4th at p. 1051.) While the court in *Hernandez* acknowledged that some evidence of prior criminal acts by the defendants' fellow gang members and some of the expert testimony would not have been admissible at a trial that was limited to the charged offenses, the court found that the otherwise inadmissible evidence was nonetheless somewhat probative and not highly inflammatory as compared to the other gang evidence which would have been admissible even in a separate trial of the substantive offense. Thus, the court found that the defendants had not shown any substantial danger of prejudice. (*Ibid.*)

Here, evidence of Ibarra's crime spree with Benitez and the others was probative not only with respect to the gang enhancement, but it was also probative with respect to Ibarra's motive in participating in the robbery of Novet and in establishing that Ibarra was in fact a willing and active participant in the crime. Thus, much of the evidence related to the gang enhancement would have been admissible in a separate trial of the robbery. Moreover, as we indicated, the gang evidence was not any more inflammatory than Novet's testimony about the robbery. Under these circumstances, the trial court did not abuse its discretion in denying the motion to bifurcate.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McDONALD, J.