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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

YSMAEL GALINDO,

Defendant and Appellant.

D059934

(Super. Ct. No. SCS230517)

APPEAL from a judgment of the Superior Court of San Diego County, Stephanie Sontag, Judge. Affirmed.

Ysmael Galindo and Araceli Noriega were members of the Sidro gang. A jury found Galindo guilty of the second degree murder of Noriega and found true that he used a deadly and dangerous weapon to commit the offense. Galindo appeals, contending the trial court erred by (1) denying his motion to bifurcate a gang enhancement allegation from the trial on the substantive count, and (2) admitting gang expert testimony. We reject his arguments.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Murder*

In July 2009, Noriega met with a group of people outside an apartment building in San Ysidro. The group smoked and passed around a joint of marijuana. Galindo joined the group, causing Noriega to roll her eyes when she saw him. She disliked Galindo because she thought he had "snitched" on her ex-boyfriend when the two men were arrested together years earlier.

When someone in the group offered Galindo the joint that was being passed around, Noriega stated, "[H]e's not going to take a hit of my stuff." Galindo responded, "I didn't want to hit your shit anyway, bitch." Noriega then retorted by calling Galindo a "rat." After Galindo greeted others in the group, he turned back to Noriega and said, "[W]hat are you looking at, bitch?" Noriega responded, "I am looking at you." At that point, Galindo stabbed Noriega in the neck.

Noriega shook her head and walked away, clutching her neck with her hand. When she took her hand away, blood poured out. Melissa De La Torre, who saw the incident happen, called 911. An ambulance transported Noriega to the hospital where she was pronounced dead.

Around midnight, Galindo went to Marlou Harris's house. Galindo explained to Harris that he stabbed Noriega and did not know whether she was dead. Later that morning, Harris and her children left the house because she was scared that Galindo would come to get her. She did not want to be a "rat" and was afraid of retaliation from

Galindo's gang, but eventually called the police and reported what she knew. Harris was later relocated as part of the witness protection program.

De La Torre was also afraid of being labeled a "rat" and did not immediately tell the police what she had seen. She initially told the police that she was under the influence of methamphetamine at the time of the murder because she did not want to testify, but later claimed that statement was a lie. Ultimately, De La Torre gave a statement to the police and went into the witness protection program. Although there were other witnesses to the murder, they were hesitant to testify at trial and changed their accounts of the events because they feared the gang or did not want to be considered a "rat."

#### *Expert Testimony*

At trial, San Diego Police Department Detective Steven Riddle testified as a gang expert. Detective Riddle stated that retaliation is important in gangs because it creates the perception of power and often occurs in response to a perceived insult or disrespect. He further explained that a "rat" was an individual who was known to have cooperated with law enforcement. A gang member who is labeled a "rat" would be disrespected by other gang members and could weaken the reputation of the whole gang.

According to Detective Riddle, it is uncommon for members within the same gang to commit acts of violence upon each other. However, an insult from a fellow gang member made in front of other members could spark violent retaliation because the insulted member would want to maintain his reputation within the gang.

Detective Riddle also testified that the Sidro gang was a documented gang within the San Ysidro community. The primary activities of the gang included murders, assaults with a deadly weapon, robberies, witness intimidation, narcotics sales, and rape. Galindo was a documented member of that gang.

## DISCUSSION

### I. *Motion to Bifurcate Gang Enhancement*

#### A. Background

The prosecution alleged that Galindo committed the murder for the benefit of, at the direction of, and in association with a criminal street gang. Prior to trial, Galindo moved to dismiss the murder charge and gang enhancement. The trial court struggled with understanding how the crime, which involved members of the same gang, benefitted the gang. Nevertheless, the trial court denied the motion.

Galindo later moved in limine to bifurcate the gang enhancement allegation. The prosecution argued gang evidence was relevant to Galindo's motive, intent and identity and to explain the fear and bias of witnesses. The trial court declined to bifurcate the trial, noting that expert testimony regarding the meaning of a "rat" in gang culture was relevant to assist the jury in understanding discrepancies between witnesses' statements to police and trial testimony and to the issue of witness intimidation.

After the prosecution rested its case, the trial court dismissed the gang enhancement, finding there was insufficient evidence Galindo acted for the benefit of the gang in murdering another gang member.

## B. Analysis

Galindo contends the trial court prejudicially erred when it denied his motion to bifurcate the gang enhancement allegation from the substantive trial. We disagree.

Evidence of a "defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*)). However, a "criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*)). It is also well established that gang evidence is admissible when the very reason for the crime is gang related. (*People v. Champion* (1995) 9 Cal.4th 879, 922, overruled on another point in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.) Thus, gang evidence is admissible in the prosecutor's case-in-chief, regardless of whether there is a criminal street gang enhancement allegation, where it is relevant to establish motive, intent or some fact other than the defendant's criminal propensity, provided that the probative value of the evidence is not substantially outweighed by its prejudicial effect. (*Williams, supra*, at p. 193; see generally Evid. Code § 352.) Accordingly, "[t]o 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*, at pp. 1049–1050.) A trial court has broad discretion in deciding whether to bifurcate issues in a criminal trial and the defendant has the burden

of showing that there is a substantial danger of undue prejudice from the evidence. (*Id.* at pp. 1048, 1050–1051.)

Here, the trial court reasonably concluded bifurcation was unnecessary because gang evidence was admissible in the trial of the substantive offense to prove Galindo's motive and intent and to explain discrepancies in witness statements and testimony. The prosecution's theory of the case was that Galindo killed Noriega because she called him a "rat" in front of others. Evidence of the meaning of a "rat" in gang culture and the impact of insults on a gang member in the presence of others had a "tendency in reason" (Evid. Code, § 210) to prove Galindo's motive for killing a fellow gang member. This evidence was also relevant to proving Galindo's intent. Further, the evidence regarding the term "rat" was relevant to assist the jury in understanding discrepancies in witness statements to the police and their trial testimony. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 413–414.)

Galindo did not establish that any of the gang evidence was so "extraordinarily prejudicial" that it threatened to sway the jury to convict regardless of actual guilt (*Hernandez, supra*, 33 Cal.4th at p. 1049), and we discern no abuse of discretion in the trial court's decision.

## II. *Admissibility of Gang Expert's Testimony*

In a related argument, Galindo contends the trial court prejudicially erred by admitting gang expert testimony because the evidence was not relevant to any material issue in the prosecution's case, amounted to improper character evidence, and was cumulative. The People contend Galindo forfeited his arguments by failing to object on

the asserted grounds at trial. Based on our review of the record, Galindo forfeited his evidentiary claims. (Evid. Code, § 353, subd. (a) [a judgment shall not be reversed based on erroneous admission of evidence unless the record shows the party seeking reversal objected to the evidence on the specific ground raised].) In any event, we reject Galindo's arguments on the merits.

As we previously explained, gang evidence is not admissible to establish a defendant's propensity to commit the charged offense (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 240), but may be admitted where it is relevant to noncharacter issues, such as motive or intent. (Evid. Code, § 1101, subd. (a); see *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 (*Funes*)). Because gang membership, activities, dynamics and motivations are beyond the common experience and knowledge of jurors, gang evidence is a proper subject for expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) For example, an expert may properly testify regarding motivation for a particular crime, retaliation, and intimidation. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657, disapproved on another ground in *People v. Vang* (2011) 52 Cal.4th 1038, 1047–1048 & fn. 3.) Even if relevant, however, the evidence is subject to exclusion under Evidence Code section 352 if its probative value is substantially outweighed by its prejudicial effect. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904–905.) We review the trial court's decision whether to admit such evidence for abuse of discretion. (*Funes, supra*, at p. 1519.)

Here, the gang expert's testimony was relevant to the issues of Galindo's motive and intent, the impact of insults on a gang member, and to explain discrepancies in

witness testimony (*ante*, part I). These were matters beyond the common experience and knowledge of jurors and thus proper subjects of expert testimony. Additionally, the gang expert's testimony was not merely cumulative of other evidence. While it is true that Galindo's gang membership was established through other evidence, the gang expert's testimony assisted the jury concerning matters in dispute, including Galindo's motive and intent.

Galindo has failed to show that the probative value of the evidence was "substantially outweighed" by the probability its admission would cause "undue prejudice." (Evid. Code, § 352.) The type of prejudice with which Evidence Code section 352 is concerned with is that which tends to evoke an emotional bias against a party or to cause a jury to prejudge a party based on factors other than the evidence presented at trial. (*People v. Scott* (2011) 52 Cal.4th 452, 490–491; *People v. Tran* (2011) 51 Cal.4th 1040, 1048.) In this case, the gang expert's testimony was no more prejudicial than other evidence introduced at trial, including Galindo's testimony that he was a member of the Sidro gang and was previously incarcerated for robbery. Additionally, the challenged evidence was much less inflammatory than witness testimony concerning the facts surrounding the murder and did not rise to a level of evoking an emotional bias against Galindo.

In sum, the trial court did not abuse its discretion in admitting the gang expert's testimony because that testimony was relevant to material issues in the case and its probative value was not outweighed by the probability of undue prejudice. Further,

having found that the evidence was properly admissible, we conclude the admission of the evidence did not violate Galindo's rights to due process and a fair trial.

DISPOSITION

The judgment is affirmed.

McINTYRE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.