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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ATLAS, JR.,

Defendant and Appellant.

E060974

(Super.Ct.No. FSB1301322)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lorenzo R.

Balderrama, Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

On December 3, 2013, a fourth amended information charged defendant and appellant John Atlas, Jr. with two counts of dissuading a witness by force or threat in violation of Penal Code<sup>1</sup> section 136.1, subdivision (c)(1) (counts 1 and 2). The information also alleged as to both counts that defendant committed the crimes in association with or for the benefit of, a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(B). Furthermore, the information alleged that defendant had suffered a prior conviction for which he served a prison term within the meaning of section 667.5, subdivision (b). Following a jury trial, on December 10, 2013, the jury found defendant guilty, as charged, as to both counts 1 and 2, and found true the gang allegation. On February 27, 2014, defendant admitted that he suffered a prior conviction for which he served a prison term.

The trial court sentenced defendant to a determinate term of one year for his prior felony conviction and a consecutive life term with a minimum term of seven years pursuant to section 186.22, subdivision (b)(4)(C) as to count 1. The court imposed a concurrent life term with a minimum term of seven years as to count 2.

Defendant filed a timely notice of appeal.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. PROSECUTION EVIDENCE**

On April 2, 2013, Aviata Malufau, Jr. lived on West Spruce Street in Rialto with his wife, mother-in-law, and nine children. He owned a Chevrolet Tahoe. On that date, at about 5:40 a.m., he was letting his car warm up outside while he gathered his children to drop them off for bible study. When he went back outside, he saw the car being driven off. He could not see who was driving, but he did not give anyone permission to take or drive the car. His wife, Annie Malufau, called the police.

Later that morning, Mrs. Malufau received a call from her sister; her sister thought she saw Mrs. Malufau's car in a Stater Bros. Market parking lot. After confirming that the car was hers through the license plate number, Mrs. Malufau told her sister to call the police.

San Bernardino Police Officer Emil Kokesh monitored a radio call that a stolen car had been spotted at a Stater Bros. parking lot on 4th Street and responded to the call. When he got there, he saw the parked Tahoe. After confirming that the car had been stolen, the officer parked behind the Tahoe so it could not leave.

A person named Dunell Crawford got out of the driver's seat of the Tahoe, and began to walk away. Officer Kokesh told Crawford to stop and "took him down to the ground" when Crawford failed to do as asked. After arresting Crawford, Officer Kokesh found and took into custody a film container with two bindles of what appeared to be methamphetamine.

Defendant was standing at the front of the Tahoe when Officer Kokesh first approached, and stayed there while the officer restrained and arrested Crawford. After Crawford was detained, defendant approached and asked if he could get his jacket out of the car. Officer Kokesh saw a jacket in the back seat and found a prescription bottle with defendant's name on it in the pocket of the jacket. The officer told defendant to wait until the owner of the vehicle arrived; if the owner said the jacket did not belong to him, Officer Kokesh would release the jacket to defendant. Defendant stood off to the side and waited.

Mr. and Mrs. Malufau and one of their children went to the Stater Bros. parking lot to try to retrieve their Tahoe. The car and a number of police officers were there when they arrived. Mr. Malufau told Officer Kokesh that the jacket in the car did not belong to him. The officer gave the jacket to defendant and told him to leave.

At that point, defendant began walking back and forth and yelling, "Don't go to court," or "You better not go to court," "We know you live in Five Time," and that they were going to come after the Malufau family. Defendant also made "gunshot noises." "Five Time" is a gang on the west side of San Bernardino. Mr. Malufau became upset and "wanted to hurt [defendant]." The officers, however, stepped between them and kept them apart. The officers then handcuffed defendant, who continued yelling at the Malufaus. The officers searched defendant and found two cigarette lighters. When the lighters were placed on the roof of one of the police vehicles, defendant yelled, "That's to burn your f---in' house down."

Mr. and Mrs. Malufau felt frightened and intimidated. Officer Kokesh, at their request, accompanied them home. Neither wanted to come to court, but felt they had been compelled to do so. The Malufaus moved from the residence immediately after the incident because they were frightened for their family. Whoever took the car knew where they lived, so defendant's threats appeared genuine.

Nelson Carrington, a San Bernardino police officer, testified as a gang expert. The Five Time Hometown Crips were a "notorious" criminal street gang consisting of about 80 members operating in San Bernardino. They were known as the Junior Playboy Supremes when they started, but evolved as members from Los Angeles began moving into the area. The gang's territory was bounded by Etiwanda on the north, Rialto Street on the south, Pepper Street on the west, and Terrace Street on the east. Members of the gang call the area "Five Times," or "the Five." The Malufaus' Spruce Street residence was in the Five Time territory. The gang had a number of signs and symbols, including a five-point star, the number 5, 5X, Meridian Boys, 2700 Block and Dino Boys. The gang's primary activities included narcotics sales, possession of firearms, vehicle thefts, witness intimidation, and making criminal threats. Members of the gang had committed the "predicate" offenses necessary to show a pattern of criminal gang activity.

While Officer Carrington did not know if defendant was a member of the Five Time gang, he opined that defendant was an associate of the gang or its members. His opinion was based on the fact that Dunell Crawford was a documented member of the gang, and defendant made threatening statements while Crawford was still present, which

would serve to raise defendant's standing with the gang. Also, defendant's use of the term "we" when speaking about knowing where the victims lived indicated that he was "with" the gang and acting for them. Answering a hypothetical question mirroring the facts of this case, the officer testified that a person who did what defendant did would have acted in association with, and for the benefit of, a criminal street gang. Using the gang's name and the gang's territory to threaten the Malufaus was a way of sending a specific message to them.

#### B. DEFENSE EVIDENCE

Defendant testified in his own defense. He was raised on Manteca Street in Rialto. He left the country for a time after high school, but came back in 2005. Before he left the country, he had never heard of the Five Time gang, but did hear about the gang after his return "by associating with people, talking to certain people."

When defendant was arrested in this case, he had the prescription medications Risperdal, Depakote and Benadryl in his possession. Risperdal was a psychiatric medication; he had been diagnosed with schizophrenia in 2009. Defendant took Risperdal at night to help him sleep. However, he did not take the medication the night before he was arrested because he was meeting a girl and did not want to go to sleep.

Defendant took a bus from Rialto to San Bernardino to meet the girl and did not sleep the night before his arrest. He first saw the Malufaus' vehicle where it was parked when he was arrested. Dunell was outside the car. Defendant knew Dunell and approached him to see if defendant could get a ride. Defendant thought Dunell was

selling drugs because the girl he was with “wanted some drugs,” specifically methamphetamine.

Defendant knew that Dunell was a member of the Five Time gang because he had mentioned it. Defendant did not think that the Malufaus’ car belonged to Dunell, but he did not know whether it was stolen. Dunell had the key, and “some drug dealers, they can give people drugs for them to loan them their car.”

When the police arrived, defendant was in a doughnut shop getting a doughnut and soda. He saw the police get Dunell out of the car at gunpoint and thought they were arresting him for drug sales. Defendant tried to get his coat out of the car.

Defendant did not know who the Malufaus were when they got to the parking lot, but remembered yelling at them. He acknowledged that he yelled, “Don’t go to court” more than once. He, however, did not remember saying, “We know you live in the Five,” or that the lighter was to burn their house down. Likewise, he did not remember making a noise like a gunshot. He did know that the Five Time gang had a territory and it was called “the Five.”

Defendant could not explain why he did what he did, “because what was said shouldn’t have been said.” Also, he did not want to put anyone in fear of going to court. Also, he did not want to help the gang.

## DISCUSSION

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. On December 23, 2014, defendant filed a “petition for writ of habeas corpus in conjunction with brief.” We hereby treat his petition and brief as a personal supplemental brief. In his brief, defendant essentially argues ineffective assistance (IAC) of both his trial and appellate counsel.

In order to establish a claim of IAC, defendant must demonstrate, “(1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.] A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome. [Citations.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.) Hence, an IAC claim has two components: deficient performance and prejudice. (*Strickland v. Washington, supra*, at pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Ledesma*

(1987) 43 Cal.3d 171, 217.) If defendant fails to establish either component, his claim fails.

We first address defendant's IAC claim regarding his trial counsel. To support his claim that his trial counsel rendered IAC, defendant argues that his trial counsel should have called his psychiatrist as a witness. Defendant argues that his psychiatrist could have testified about his mental illness, why he was prescribed Risperdal, and what side effects the drug could have.

In this case, we have reviewed the record and find that defense counsel actively and consciously represented defendant throughout the trial court proceedings. Counsel examined and cross-examined the witnesses, and made succinct and persuasive arguments to the trial court. When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Notwithstanding, we need not determine if defense counsel's actions fell below an objective standard of reasonableness because defendant cannot demonstrate that counsel's alleged deficient representation prejudiced him, i.e., there is a reasonable probability that, but for counsel's purported failings, defendant would have received a more favorable result. (*People v. Dennis, supra*, 17 Cal.4th at pp. 540-541; *Strickland v. Washington, supra*, 466 U.S. at p. 687.) Defendant, in support of his argument that he was prejudiced, simply states that he was prejudiced because the jury could not weigh evidence of defendant's psychiatric diagnosis and medications he was taking since his

trial counsel failed to call his psychiatrist to testify. First, we note that defendant did testify as to his mental status and the jury was fully aware of his claims of schizophrenia and medications he took. However, even if defendant's own testimony could have been bolstered by the testimony of his psychiatrist, the result would have been the same. As discussed in detail above, the evidence against defendant was overwhelming. Here, defendant admitted that he yelled at the victims, "Don't go to court[,] " a few times. Moreover, although defendant did not remember, Officer Kokesh testified that, in addition to yelling for the victims not to go to court, defendant stated that he knew where the victims "live in Five Time," made gunshot noises, and stated he would burn the victims' house down with the lighters the officers found. It should be noted that these remarks and gestures were made *after* defendant got his jacket and was free to leave. The jury obviously believed the testimony of the officer in finding defendant guilty.

In addition, defendant argues that his trial counsel rendered IAC because he failed to investigate that defendant was out of the country playing football. Again, even if counsel should have investigated this fact, no prejudice resulted from counsel's failure to do so. Here, defendant argues that because he was out of the country, he could not have been an associate of the Five Time gang. This information was relayed to the jury. Defendant testified that he was out of the country after high school until 2005. Defendant also stated that he had been in South Carolina and had only been back in California for two weeks prior to the incident. In fact, during closing argument, trial counsel reminded the jury, as follows: "One thing you know that's not disputed is that [defendant], though he grew up in San Bernardino County, he moved away, and he came back to California

just two weeks before this event occurred.” Hence, the jury was fully aware of defendant’s absence from San Bernardino. Therefore, any additional evidence regarding defendant’s absence would not have made a difference in the outcome of his case. Again, as noted above the evidence against defendant was strong. Although defendant was free to leave the scene after he retrieved his jacket, he stayed around and made threats to the victims and indicated that “the Five” will come after your family – all in front of a known Five Time gang member, Dunell Crawford. Although defendant denied being associated with the gang, the jury believed the overwhelming evidence to the contrary.

In sum, the jury, as the trier of fact, believed the evidence presented by the prosecutor and did not believe defendant’s testimony and assertions. We find that any alleged IAC by his counsel would not have changed the outcome of his case. Defendant has failed to demonstrate that his counsel’s alleged deficient representation prejudiced him, i.e., there is a reasonable probability that, but for counsel’s purported failings, defendant would have received a more favorable result. (*People v. Dennis, supra*, 17 Cal.4th at pp. 540-541; *Strickland v. Washington, supra*, 466 U.S. at p. 687.)

As for appellate counsel, defendant essentially argues that counsel provided IAC for filing a *Wende* brief instead of arguing IAC of trial counsel. Defendant's argument is without merit because under the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we must independently review the record for potential error. Simply filing a *Wende* brief does not deem a counsel’s performance as ineffective.

We have examined the entire record and are satisfied that no arguable issues exist, and that defendant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*People v. Kelly, supra*, 40 Cal.4th 106.)

**DISPOSITION**

The judgment is affirmed.

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MILLER  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.