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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TRI TRONG HUYNH,

Defendant and Appellant.

G044790

(Super. Ct. No. 09CF1812)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Chief Assistant Attorney General, James D. Dutton, Assistant Attorney General, Sabrina Y. Lane-Erwin, Deputy Attorney General, for Plaintiff and Respondent.

Tri Trong Huynh appeals from a judgment after a jury convicted him of first degree murder committed for a criminal street gang purpose and street terrorism and found true street terrorism and firearm enhancements. Huynh argues the prosecutor committed misconduct and the trial court erred in denying his new trial motion because his trial attorney provided ineffective assistance of counsel. Neither of his contentions have merit and we affirm the judgment.

FACTS

In the early evening of Thanksgiving 2001, a group of relatives were at the Asian Garden Mall in Westminster. The group included brothers Kevin Eng, Kerry Te, Chamrotna Eng, and cousins Sam Por, Steven Por, and Heng Por, Heng's wife, Cam Por, and Cam's brother.¹ When Kevin, Sam, and Steven went outside to smoke, four Vietnamese/Asian men walked towards them. One of the men asked, "What are you looking at?" Kevin, Sam, and Steven did not respond. As the men walked away, they said, "Asian Crip."

A little later, as the Eng group walked to their cars, the four men followed them. One of the men asked where the Eng group was from, and Cam answered, "We're just here shopping. We're not from nowhere." One of the men ran and kicked Sam and a whistle sounded. A large group of men appeared from the shadows and attacked the Eng group, who were all unarmed. Some of the attackers were armed; one of the attackers had a mop handle and one had a bat. As the attackers fled, Heng heard someone say, "A.C." or "A.B."

Kerry told Kevin someone hit him on the head and he felt tired. He laid down and appeared to fall asleep. His family members tried to wake him up but he did not respond. Kerry died.

¹ We will refer to the parties by their first names for clarity, and not out of disrespect.

Sergeant Brian Carpenter responded to the incident. Carpenter interviewed Heng, who told Carpenter someone hit him with a bat. Heng explained that Kerry was on the ground and someone hit him very hard on the head with a bat. Heng said another man was punching Kerry.

Detective James Wilson received a call that five individuals seen leaving the fight were across the street from the mall. Wilson responded to the call and detained the young men. They were, Nick Nguyen, Ba Bui, Danny Lai, Tony Nguyen, and Cuong Nguyen. They denied any involvement in the incident.

Eight years later, Detective Tim Walker was investigating an unrelated case when he learned of this case and began reviewing reports of this case. Walker prepared a search warrant for a telephone number, 714-928-9933. Walker learned the cellular telephone belonged to a Thuy Huynh, Huynh's sister. One of the telephone numbers on the records Walker received belonged to Frank Han, and another to Jason Do, a person Walker knew to be an Asian Crips gang member.

Walker interviewed Huynh on May 5, 2009, twice on May 18, 2009, July 20, 2009, and July 22, 2009.² Walker spoke with Huynh first on May 5, 2009, outside Huynh's residence. Walker, who was present with another detective, told Huynh he had been identified as being present at a large fight involving the Asian Crips at the Asian Mall on Thanksgiving day in 2001. Huynh initially denied he was there. He eventually admitted that in 2001, he was present at a fight at the Asian Mall with Asian Crips gang members, but he did not think it was Thanksgiving. Huynh denied he was involved in the fight.

About two weeks later, Walker spoke with Huynh during a vehicle stop. Huynh admitted he was in a fight at the Asian Mall in 2001, but he could not remember whether it was on Thanksgiving. He admitted that as he ran away from the fight, a few

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All the interviews were played for the jury.

members of the group yelled out “Asian Crips.” Huynh admitted he had not been “jumped out” of the Asian Crips.

Later that day, Walker interviewed Huynh at the Westminster Police Department. After he was advised of his *Miranda*³ rights, Huynh again admitted he was at a fight with Asian Crips gang members at the Asian Mall in 2001. Huynh stated he associated with Asian Crips but denied he was an Asian Crips gang member. He denied there were any weapons. When Walker asked him whether the “Natoma Boys” criminal street gang provides back up for the Asian Crips, Huynh responded, “we back each other when we see each other when [they are] at the scene”

About two months later, Walker again interviewed Huynh at the Westminster Police Department. After he was advised of his *Miranda* rights, Huynh said one of his fellow gang members started the fight and two of his fellow gang members yelled, “Asian Crips” as they ran. He again denied they had any weapons. Huynh admitted he was an Asian Crips gang member at the time of the incident.

Two days later, Walker interviewed Huynh at the courthouse in a jury room. Huynh requested the interview. After he was advised of his *Miranda* rights, Huynh said he received a telephone call from a guy who asked to help him collect a debt. Huynh admitted he associated with Asian Crips gang members before the incident but said he was not jumped in until after the incident. Huynh admitted he kicked someone.

An information charged Huynh with murder committed for a criminal street gang purpose (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(22))⁴ (count 1), and street terrorism (§ 186.22, subd. (a)) (count 2). As to count 1, the information alleged he

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ All further statutory references are to the Penal Code, unless otherwise indicated.

committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and he personally used a deadly weapon (§ 12022, subd. (b)(1)).

At trial, the prosecutor offered Kevin's testimony. Kevin testified that weeks after the incident he identified Huynh from a photographic lineup as the person who was hitting people with a mop stick. On cross-examination, Kevin stated he could not be sure the person he previously identified was the person hitting people with the mop stick.

Chamrotna testified for the prosecution. Chamrotna testified that weeks after the incident he identified Huynh from a photographic lineup as the person armed with a stick and hitting people. He explained Huynh was standing on a car with a stick near where Kerry was being beaten. On cross-examination, Chamrotna stated he was unsure whether Huynh was standing on top of the car with a stick.

Finally, Walker testified as the prosecutor's gang expert. After detailing his background, training, and experience, Walker testified concerning the culture and habits of Asian criminal street gangs. Walker explained how to join a gang, what it means to claim a gang, and the concepts of "hit[ting] up" rival gang members and backing up your own gang members. He also explained the importance of tattoos, respect, weapons, and violence within the gang culture. He stated Asian gangs are not territorial but they are known to frequent the same establishments.

Walker testified that at the time of the offenses, Asian Crips was an ongoing organization with more than three members. He described its formation and history, allies and rivals, its common signs or symbols (A.C.), its color (blue), and where its members are known to congregate. Walker opined Asian Crips primary activities were assault with a deadly weapon. He also testified concerning the statutorily required predicate offenses. He stated he believed two men who were identified as being at the incident were Asian Crips gang members.

Based on his review of police reports, Street Terrorism Enforcement and Prevention (STEP) notices,⁵ his tattoos (“A.C.” on his back), photographs, and the details of the incident, Walker opined Huynh was an active participant of Asian Crips at the time of the offense. Walker explained that a few months before the incident here, police contacted Huynh and 15 Asian Crips gang members; Huynh claimed he was an Asian Crips gang member. On three occasions after the incident here, Huynh was in the company of Asian Crips gang members and admitted he was an Asian Crips gang member.

As relevant to this appeal, the following colloquy occurred:

“[The prosecutor]: With respect to this current incident that happened on November 22nd, 2001, what, if anything, about what happened is relevant to your opinion as to [Huynh’s] gang status on that date?

“[Walker]: Well, there’s several things. During this investigation I not only talked with . . . Huynh, but I talked with several of his fellow gang members who also had indicated to me that they are aware that he is, in fact -- or was, in fact, an active participant within the Asian Crips street gang back in November of 2001, November 22nd, 2001. His own statements about his participation with the gang and when he started within the gang and his knowledge, his vast knowledge of the members within that gang also to me are indicative of his status as an active participant within the gang. And then his police contacts. We named a few of the police contacts, but showing a pattern from 2000 to 2009 of constantly associating with these individuals. That to me is also an important factor to note.

⁵ A STEP notice is a document a police officer uses to record a contact with a possible gang member. The STEP notice includes the details of the contact and the person’s physical characteristics. The STEP document also notifies the person the gang he or she is affiliating with is a criminal street gang and that the gang commits certain specified crimes.

“[The prosecutor]: Is it important, in your opinion, that [Huynh] was involved in this murder on November 22nd, 200[1]?”

“[Walker]: Absolutely.

“[The prosecutor]: So based on everything --

“[Defense counsel]: Objection, your honor, move to strike. Ultimate issue in the case. The witness can’t testify to that.

“[Trial court]: It’s vague as phrased. The answer will be stricken. The jury is ordered to disregard it.

“[The prosecutor]: Does it factor into your opinion what [Huynh’s] contact was on November 22nd, 200[1]?”

“[Walker]: Yes.

“[Defense counsel]: Same objection, foundation, incomplete hypothetical.

“[Trial court]: Overruled.

“[The prosecutor]: So based on everything you talked about, the contacts, the pictures, the tattoos, the conduct on this date, the statements made by [Huynh], everything you’ve just testified about, do you have an opinion as to whether [Huynh] was a gang member actively participating in the Asian Crips criminal street gang on November 22nd, 200[1]?”

“[Walker]: Yes.

“[The prosecutor]: And what was that opinion?”

“[Walker]: That on November 22nd, 2001[,] [Huynh] was definitely an active participant with the Asian Crips criminal street gang.”

Based on a hypothetical question mirroring the facts of this case, Walker opined the offenses were committed in association with and for the benefit of a criminal street gang. He added that the offenses were done to promote, further, and assist the criminal street gang. Walker explained there was a gang hit up, the gang committed violent acts, and the attackers claimed gang membership. Walker stated that at the

May 18, 2009, interview, Huynh admitted the 714-928-9933 telephone number was his. Defense counsel did not cross-examine Walker.

Huynh offered the testimony of husband and wife Frank Han and Cynthia Bui. They testified Huynh spent the entire day at their house in Westminster for Thanksgiving. They said Huynh did not leave until late that night.

The jury convicted Huynh of both counts and found true the enhancements. Huynh's new defense counsel moved for a new trial on the grounds his trial counsel provided ineffective assistance of counsel. He argued trial counsel failed to do the following: (1) offer evidence or cross-examine witnesses to establish the victims were affiliated with a gang; (2) offer evidence or cross-examine witnesses concerning identification because two other individuals had been identified as holding the mop stick; (3) failed to object to admission of portions of Walker's gang expert testimony; and (4) failed to object to admission of Huynh's cellular telephone records because they established Huynh called Han 24 times during the time Huynh and Han testified they were together. The prosecutor opposed the motion.

At the hearing on the motion, defense counsel argued trial counsel failed to adequately contest the witnesses' identification of Huynh; portions of Walker's testimony were without foundation and were improper, and the cellular telephone records were without foundation. The trial court denied the motion for new trial, reasoning there were tactical explanations for trial counsel's decisions. Relying on *People v. Diaz* (1992) 3 Cal.4th 495 (*Diaz*), the court opined, "The issues raised by [new defense] counsel . . . go to tactics as opposed to competency."

The court sentenced Huynh to life in prison without the possibility of parole on count 1 plus a consecutive term of one year for personally using a deadly weapon. The court imposed and stayed the sentence on count 2 pursuant to section 654.

DISCUSSION

I. Prosecutorial Misconduct

Huynh argues the prosecutor committed misconduct when he elicited testimony from Walker that Huynh was guilty of murder. As we explain below, Huynh forfeited appellate review of this issue because he did not object on the ground the prosecutor committed misconduct, and in any event, his contention is meritless.

“In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]’ [Citation.]” (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Here, Huynh’s defense counsel did not object to the prosecutor’s statements and request an admonition, and therefore, his claim is forfeited.

In any event, his claim is meritless. To prove a defendant committed the substantive offense of street terrorism, the prosecutor must prove the following: (1) active participation in a criminal street gang; (2) knowledge the gang’s members have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 55-56 (*Albillar*).)

It is well established, “[t]he subject matter of the culture and habits of criminal street gangs[]” is the proper subject of expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) In cases involving the substantive crime of active participation in a gang, “expert testimony regarding the ‘culture, habits, and psychology of gangs’ is generally permissible because these subjects are “sufficiently beyond common experience [and therefore] the opinion of an expert would assist the trier of fact.” [Citations.]” (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.) The permissible breadth of this evidence includes “the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like”

(*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Thus, a gang expert may testify about the extent of a defendant's gang involvement because this inquiry "is not a simple matter and requires the accumulation of a wide variety of evidence over time and its evaluation by those familiar with gang arcana in light of pertinent criteria."

(*People v. Valdez* (1997) 58 Cal.App.4th 494, 507, fn. omitted (*Valdez*).

Expert testimony is admissible even though it encompasses the ultimate issue in the case. (Evid. Code, § 805; *People v. Vang* (2011) 52 Cal.4th 1038, 1048.) However, "A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant. [Citations.] [O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt."

(*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47 (*Torres*)). "[A] trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]' [Citation.]" (*Valdez, supra*, 58 Cal.App.4th at p. 506.)

Here, the prosecutor did not ask Walker whether Huynh committed the murder. The prosecutor asked Walker whether Huynh's "involve[ment] in this murder" was a factor in his opinion Huynh was an active participant in Asian Crips at the time of the offense. The prosecutor then asked Walker whether "the conduct in this case" was a factor in that case. In every interview, Huynh admitted to Walker he was present at the fight. In his last interview, Huynh admitted to Walker that after another Asian Crips gang member started the fight, he kicked someone.

Huynh relies on *Torres, supra*, 33 Cal.App.4th 37, to argue the prosecutor elicited and Walker offered an opinion on the ultimate issue in this case. *Torres* is inapposite. Contrary to Huynh's contention otherwise, the *Torres* court did not find the

prosecutor committed misconduct. (*Id.* at p. 49, fn. 4 [“We find no prosecutor misconduct in this case”].) Therefore, the prosecutor did not commit misconduct and Walker did not improperly offer his opinion on an ultimate issue in this case.

II. New Trial Motion

Relying on *People v. Andrade* (2000) 79 Cal.App.4th 651 (*Andrade*), Huynh contends the trial court erred in denying his motion for new trial because the court did not conduct an evidentiary hearing and failed to make any determinations trial counsel’s conduct was that of a reasonably competent attorney. His claims are meritless.

In *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27 (*Hoyos*),⁶ the California Supreme Court addressed the issue of whether the trial court erred in denying defendant’s new trial motion, which alleged ineffective assistance of counsel and a *Brady*⁷ violation. After framing the issue as one where defendant asserts his constitutional rights were violated, the court stated, “On appeal, a trial court’s ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard. [Citation.] Its ruling will not be disturbed unless defendant establishes ‘a “manifest and unmistakable abuse of discretion”’ [Citation.]” (*Hoyos, supra*, 41 Cal.4th at p. 917, fn. 27.) We will review Huynh’s claims for an abuse of discretion.

The Sixth Amendment right to counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*); see also Cal. Const., art. I, § 15.) “Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel’s representation fell below an objective standard of

⁶ Disapproved on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 641.

⁷ *Brady v. Maryland* (1963) 373 U.S. 83.

reasonableness; *and* (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126 (*Rodrigues*)). The reasonableness of an attorney’s performance is measured under prevailing professional norms. (*Strickland, supra*, 466 U.S. at p. 688.)

Huynh spends the majority of his time grousing the trial court did not offer him an evidentiary hearing on the issue of whether his trial counsel provided ineffective assistance of counsel. Trial counsel did not request an evidentiary hearing; counsel requested a new trial. Huynh cites to no legal authority, and we found none, that requires a trial court to hold an evidentiary hearing in such a case. (*People v. Duran* (1996) 50 Cal.App.4th 103, 113 [trial court may conduct an evidentiary hearing; defendant not entitled to one as a matter of right].) Contrary to Huynh’s assertion, a court is not “obligate[ed]” to conduct such a hearing unless a defendant demonstrates trial counsel’s performance was deficient and prejudicial.

In ruling on the new trial motion, the trial court relied on *Diaz, supra*, 3 Cal.4th at pages 557-558, where the court stated: “If ‘counsel’s omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.’ [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel’s reasons. To engage in such speculations would involve the reviewing court “in the perilous process of second-guessing.” [Citation.] Because the appellate record ordinarily does not show the reasons for defense counsel’s actions or omissions, *a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal.* [Citation]” (Italics added.)

Here, the trial court opined the issues raised by Huynh's new defense counsel were tactical choices as opposed to an issue of competence. With respect to the gang evidence, the court explained that based on its vast experience presiding over gang cases, defense counsel will often times decide not to highlight the gang evidence. The court concluded there was a reasonable explanation for not imputing gang membership to the Eng group because that could have certainly established this was a gang-on-gang attack. As to the cellular telephone records, the court reasoned the documents were submitted by the custodian of records and there was no need to require the custodian of records to appear in court to recertify the records to lay a proper foundation.

With respect to the eyewitness identifications, the trial court admittedly stated the record was silent as to why trial counsel did not offer the testimony of the witnesses who identified individuals other than Huynh as carrying the mop stick. The court reasoned though there are many reasons why a trial counsel would not offer testimony, especially if they are not going to be of assistance. The court opined trial counsel effectively impeached the witnesses who identified Huynh to the point where prior identifications had to be used.

Finally, Huynh's reliance on *Andrade, supra*, 79 Cal.App.4th 651, to support his contention the trial court was obligated to conduct an evidentiary hearing on the issue of whether he received effective assistance of counsel is misplaced. In that case, the court held an "exhaustive evidentiary hearing" where the defendant testified on his own behalf. (*Id.* at p. 661.) We do not read *Andrade* to hold a trial court must conduct an evidentiary hearing where defense counsel does not request one or make a compelling offer of proof as to why one is warranted.

Based on the record before us, we cannot conclude the trial court abused its discretion in denying Huynh's new trial motion. As is often said, a petition for writ of habeas corpus, rather than on appeal, is the better vehicle for a claim of ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.