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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.

JOHNNY GUEVARA,

Defendant and Appellant.

G045068

(Super. Ct. No. 09CF0613)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Marilee Marshall & Associates and Marilee Marshall, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Johnny Guevara challenges his convictions for murder, carjacking, and other offenses. He contends the court wrongly failed to sever the murder-related counts from the carjacking-related counts, and wrongly admitted evidence of two of his prior arrests. He further contends insufficient evidence supports the murder and carjacking convictions, and a street gang sentence enhancement.

We affirm. The counts were in the same class of assaultive crimes, not unusually inflammatory, and equally strong. The arrests were highly probative of defendant's alleged gang participation. Sufficient evidence supported the murder and carjacking convictions, including witness identifications and DNA evidence. And expert testimony sufficiently supported the street gang sentence enhancement.

FACTS

The Offenses

One night in October 2008, two men with guns approached a Ford Escort at the intersection of Fairview Street and Warner Avenue in Santa Ana. They got in the car and told the driver to start driving. The men later ordered the driver to get out, and they drove away.

On November 16, 2008, at around 3:00 a.m., Miguel Lopez was hanging out with some friends near the intersection of Fairview Street and Garry Avenue in Santa Ana. A white Acura Integra drove by. Lopez's friends made gang signs at the car.¹ The car made a U-turn and came back. The driver got out and confronted Lopez, asking something like are you "banging on me," "are you trying to gang-bang," or "Do you fools bang?" The driver then yelled "Southside," "Southside Santa Ana," or "Southside Woody," and began shooting. Lopez died from a gunshot wound to the head.

¹ Lopez's friends belonged to a "tagging group" that acted as a "minor league system" for the gang whose signs they used.

The next day at around 3:00 p.m., defendant borrowed a Jeep Cherokee from a friend. A police officer saw defendant driving the Jeep without a seat belt. The officer tried to pull defendant over, but he sped away at 60 miles per hour in a 25 miles per hour zone. Defendant and a female passenger jumped out of the Jeep while it was still moving, and ran away. Inside the Jeep, the police found a “speedy loader” for a revolver and CDs labeled “Woody.”

That night, defendant pounded on his friend’s door and yelled, “Let me in, let me in.” Defendant was sweating and out of breath. He told his friend he had to “ditch the vehicle,” and advised his friend to report it stolen to avoid paying an impound fee.

The police later apprehended the female passenger, a member of the Southside criminal street gang. She identified defendant as “Johnny” or “Woody” from the “Southside neighborhood.” She admitted being in the white Acura with defendant over the weekend of November 15 to 16, 2008. She denied being present when Lopez was shot.

The Trial

Defendant was charged by information with the following counts: murder (Pen. Code, § 187, subd. (a)),² active gang participation in November 2008 (§ 186.22, subd. (a)), possession of a firearm by a felon during the murder (§ 12021, subd. (a)(1)), vehicle theft of the Acura with a prior vehicle theft conviction (§ 666.5, subd. (a); Veh. Code, § 10851, subd. (a)), kidnapping in the commission of a carjacking (§ 209.5, subd. (a)); carjacking the Ford (§ 215, subd. (a)), possession of a firearm by a felon during the carjacking, active gang participation in October 2008, assault with a firearm of the Ford driver (§ 245, subd. (b)), and possession of a firearm by a felon in September 2008. It also alleged street gang sentence enhancements on each count (except the active

² All further statutory references are to the Penal Code unless otherwise stated.

participation counts) (§ 186.22, subd. (b)(1)), a street gang special circumstance (§ 190.2, subd. (a)(22)), and other enhancements and prior prison terms.

Before trial, the defense moved to sever the four counts related to the Lopez murder from the remaining counts. The court severed only the count of possession of a firearm by a felon in September 2008, finding it “very prejudicial” “[i]n a gun murder case, to put a gun in the defendant’s possession . . . a couple of months earlier.” It declined to sever the murder-related counts from the carjacking-related counts. It noted murder and carjacking were in the same class of crimes, the gang evidence would be cross-admissible, and no gun was recovered from the carjacking. The prosecution then filed an amended information, deleting the count of assault with a firearm. The remaining eight counts proceeded to trial.

At trial, the prosecution offered evidence tying defendant to the carjacking. The Ford’s driver testified he had given the police general descriptions of the carjackers — defendant matched one of them. A police officer testified the police recovered the Ford and swabbed its steering wheel for DNA. Defendant was a major contributor to that DNA — the chance someone other than defendant had left it was one in 8 million.

The prosecution also offered evidence implicating defendant in the Lopez murder. Three eyewitnesses had picked defendant out of a photo lineup. One identified defendant from the stand as the shooter. The officer who followed the speeding Jeep, the day after the shooting, identified defendant as its driver. The bullets in the speedy loader found in the Jeep were consistent with a bullet fragment recovered from the murder scene. The police had recovered the Acura, which had been reported stolen before the shooting. Inside it was a water bottle containing defendant’s DNA. The chance someone other than defendant left that DNA was one in 1 trillion.

A gang expert testified Southside was a criminal street gang engaged in driving stolen vehicles and possessing firearms. Its territory included the site of the

carjacking. And the site of the murder was “technically” “just outside” of its territory by about “30 yards.”

The expert concluded defendant was an active participant of Southside in October and November 2008, with the moniker of “Woody.” The expert relied upon defendant’s tattoos: “South” “Side” and “S.A.” (for Santa Ana) on his chest, “S.A.” and “South” on one arm and “Side” on the other, and the Aztec symbol for 13 (representing the 13th letter, M, a nod to the Mexican Mafia). He also relied upon interviews with Southside gang members and prior police contact with defendant. Those prior contacts included a February 2003 arrest for vehicle theft and a May 2003 arrest for possession of a controlled substance. Defendant was wearing the gang’s colors each time he was arrested. He committed the vehicle theft in the gang’s territory. And upon his May 2003 arrest, defendant told a police officer “he had been kicking it with Southside for approximately two years.”

When asked about hypothetical offenses mirroring the murder and carjacking, the expert concluded each would promote the Southside gang by increasing fear in the community. He noted the hypothetical perpetrator shouted the gang’s name during the murder, and committed the carjacking in gang territory.

The jury found defendant guilty on all counts. It found true the street gang special circumstance, and a sentence enhancement for personally and intentionally discharging a firearm causing death. (§ 12022.53, subd. (d).) It found true sentence enhancements that defendant personally used a firearm during the kidnapping and carjacking. (*Id.*, subd. (b).) And it found all of the criminal street gang sentence enhancements true. In a bifurcated bench trial, the court found true four prior prison term commitment allegations (§ 667.5, subd. (b)), and the prior vehicle theft conviction allegation.

The court sentenced defendant to life without the possibility of parole for the murder, plus 25 years for the corresponding firearm enhancement. It imposed two

concurrent terms of 15 years to life for the kidnapping and carjacking, plus concurrent 10-year terms for the carjacking and kidnapping firearm enhancements. It imposed various concurrent determinate sentences on the remaining counts and enhancements.

DISCUSSION

The Court Permissibly Declined to Sever the Murder-related Counts

Defendant contends the court should have severed the murder-related counts from the carjacking-related counts. “An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts” (§ 954.) “[S]ection 954 permits joinder of all assaultive crimes against the person, all of them being considered ‘of the same class.’” (*Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135.) Carjacking is an assaultive crime against the person. It is the “felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence . . . against his or her will . . . accomplished by means of force or fear.” (§ 215, subd. (a).) Thus, carjacking may be charged with murder. (See *Coleman*, at p. 135; cf. *People v. Walker* (1988) 47 Cal.3d 605, 622 [robbery charged with murder].) Defendant does not contend otherwise.

The court retains discretion to sever properly joined counts. In “the interests of justice and for good cause shown, [the court] may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.” (§ 954.)

“When the statutory requirements for joinder are met,” as they are here, “a defendant must make a clear showing of prejudice to establish an abuse of discretion by the trial court” in declining to sever them. (*People v. Marshall* (1997) 15 Cal.4th 1, 27 (*Marshall*)). “The pertinent factors are these: (1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame

the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case. [Citation.] A determination that the evidence was cross-admissible ordinarily dispels any inference of prejudice.” (*Id.* at pp. 27-28.)

Defendant shows no such prejudice. First, much of the gang evidence would be cross-admissible in separate trials. The carjacking-related counts included an active gang participation count, as did the murder-related counts. The carjacking- and murder-related counts both included street gang enhancements. Second, the carjacking-related counts were not especially inflammatory, despite defendant’s claim. The carjacking victim was neither physically harmed nor held under gruesome conditions — he just drove his own car for “a block and a half, maybe two blocks.” The carjacking-related counts did place a gun in the defendant’s hand before the murder, and the court severed one firearm possession count for that exact reason. Taken as a whole, the carjacking count was not so unusually inflammatory as to mandate severance.

Moreover, the murder count was not nearly as weak as defendant contends. Three eyewitnesses picked defendant out of a photo lineup, one identified him at trial, and his DNA was found on the water bottle inside the Acura. And his conduct on the day after the murder — fleeing the police by jumping out of the borrowed Jeep while it was still moving — suggests consciousness of guilt. Defendant doubts the reliability of each identification, as discussed *post*, but taken together they are robust. And defendant fails to explain away his DNA in the Acura, other than with unsupported speculation about the water bottle somehow being placed in the car after the shooting.

Finally, the active participation count and gang enhancement related to the carjacking were also not as weak as defendant asserts. Driving stolen vehicles is a primary activity of Southside. And the carjacking was committed in Southside territory.

Keeping these “weak” gang charges joined with the “strong” murder-related gang charges, as defendant sees them, did not clearly prejudice him. (See *Marshall, supra*, 15 Cal.4th at p. 27.)

The Court Permissibly Admitted Evidence of Two of Defendant’s Prior Arrests

Defendant contends the court erred by admitting the gang expert’s testimony about two of his prior arrests. In explaining his opinion defendant was an active Southside gang participant, the expert began discussing defendant’s February 2003 arrest. Defense counsel objected “pursuant to Evidence Code section 352.” The court overruled the objection “at this point,” stating “[w]e are not quite there.” The expert next testified about defendant’s May 2003 arrest. Defense counsel again lodged an Evidence Code section “352 objection.”³ The court stated it was “inclined to sustain the objection,” but agreed to “revisit this when we take a break.” After the jury had been excused, the expert told the court about five additional police contacts with defendant. The court stated: “The cases . . . suggest that the court has to be careful with respect to 352 and admitting just a long litany of prior misconduct under the guise of gang information.” It excluded the admission of the five additional contacts, implicitly overruling the objection to the May 2003 arrest.

“Without doubt, evidence a defendant committed an offense on a separate occasion is inherently prejudicial. [Citations.] But Evidence Code section 352 requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect. ‘Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome” [citation].’” (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*)). “When the evidence has probative value, and the potential for prejudice resulting

³ This objection was made promptly enough to be preserved for appeal, even if (as the Attorney General asserts) it was made a question or two late.

from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion.” (*Id.* at p. 1049.)

“In prosecutions for active participation in a criminal street gang, the probative value of evidence of a defendant’s gang-related separate offense generally is greater because it provides direct proof of several *ultimate facts* necessary to a conviction. Thus, that the defendant committed a gang-related offense on a separate occasion provides direct evidence . . . that the defendant actively participated in the criminal street gang” (*Tran, supra*, 51 Cal.4th at p. 1048.) And “because the prosecution is required to establish the defendant was an active participant in a criminal street gang and had knowledge of the gang’s criminal activities, the jury inevitably and necessarily will in any event receive evidence tending to show the defendant actively supported the street gang’s criminal activities. That the defendant was personally involved in some of those activities typically will not so increase the prejudicial nature of the evidence as to unfairly bias the jury against the defendant.” (*Ibid.*)

Here, defendant shows no abuse of discretion in admitting the two arrests. They were highly probative of his active gang participation. In the February 2003 arrest, he was arrested in gang territory, and was wearing the gang’s color. In the May 2003 arrest, he was again wearing the gang’s color and told the police he had been “kicking it” with Southside. The two arrests were just part of the “inevitabl[e] and necessar[y]” evidence “tending to show the defendant actively supported the street gang’s criminal activities.” (*Tran, supra*, 51 Cal.4th at p. 1048.) They were “not *unduly* prejudicial” (*Id.* at p. 1049.)

Defendant complains the vehicle theft arrest was especially prejudicial because he was charged with carjacking. But the vehicle theft arrest was also especially probative because driving stolen vehicles is one of the gang’s primary criminal activities. Thus, the probative value of the vehicle theft still was not “*substantially* outweighed by its prejudicial effect.” (*Tran, supra*, 51 Cal.4th at p. 1047.) And defendant could not

force the exclusion of the two arrests by offering to admit his active gang participation. The prosecution “cannot be compelled to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness.” (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.)

In any event, defendant fails to show prejudice. No reasonable probability exists defendant would have obtained a more favorable result had the court excluded the two arrests. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Ample evidence implicated him in the charged offenses, including the witnesses’ identification and DNA evidence discussed in the next section.

Sufficient Evidence Supports the Challenged Convictions and Sentence Enhancement

Defendant contends insufficient evidence supports the murder and carjacking convictions and the street gang sentence enhancement related to the carjacking. “[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’” (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*)). “Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness” (*People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*)).

First, defendant contends the eyewitness identifications do not support the murder and carjacking convictions because they were not made with absolute certainty. The carjacking victim's description was limited to age, height, weight, gender, ethnicity, and hair color. The murder eyewitnesses conceded they had been drinking, the street was dark, and it was hard to see the shooter's face. One eyewitness did not see the shooter in the photo lineup. Another selected defendant's photo because "that's the one that [he] kind of looked like." Yet another testified he chose a photo because he felt pressured by the police to pick someone. Only one eyewitness was able to identify defendant in court, and even he stated he was only "80 percent sure" it was defendant.

Defendant has it backwards when he suggests out-of-court identifications are inherently suspect. "[A]n out-of-court identification generally has *greater* probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification: '[T]he [out-of-court] identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations.] The failure of the witness to repeat the [out-of-court] identification in court does not destroy its probative value . . .'" (*People v. Cuevas* (1995) 12 Cal.4th 252, 265.)

Moreover, the jury heard all of the reasons why the identifications should or should not be credited. We will "neither reweigh[] evidence nor reevaluate[] a witness's credibility'" (*Albillar, supra*, 51 Cal.4th at p. 60), even when his or her testimony is "subject to justifiable suspicion" (*Maury, supra*, 30 Cal.4th at p. 403). And "reversal . . . is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar*, at p. 60.) Even if the jury had grounds to reject the identifications, they reasonably accepted them.

Next, defendant contends the DNA evidence does not support the murder and carjacking convictions because it does not necessarily connect him to the crimes. He

may have touched the Ford's steering wheel after the carjacking, defendant offers, and maybe the water bottle was thrown into the Acura after the shooting. But these points were explored at trial. Defense counsel argued the DNA on the Ford's steering wheel. "doesn't say that he was in the car, what was it 12 hours earlier?" And a police officer testified the Acura was missing for about a week. The jury rejected the inferences the defense asked them to draw. Instead, the jury reasonably concluded defendant left his DNA on the Ford steering wheel during the carjacking, and left the DNA-containing water bottle in the Acura when he drove up and shot Lopez. We will not second-guess the jury. (See *Albillar, supra*, 51 Cal.4th at p. 60.)

Finally, defendant contends the evidence was insufficient to show the carjacking was "committed for the benefit of" Southside, or "with the specific intent to promote" Southside criminal conduct. (§ 186.22, subd. (b)(1).) But "[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*Albillar, supra*, 51 Cal.4th at p. 63.) And the required specific intent is just the intent to promote "any criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Id.* at p. 66.) "The jury may infer a defendant's specific intent . . . from all of the facts and circumstances shown by the evidence." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "We cannot look into people's minds directly to see their purposes. We can discover mental state only from how people act and what they say. Here, [the defendant] acted like he wanted to help his gang." (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 110.)

Here, the record sufficiently supports the sentence enhancement. The carjacking dovetailed with Southside's criminal focus on driving stolen vehicles. Carjackings procure vehicles that Southside can use "to commit further crime [and] avoid

detection from law enforcement,” the expert explained. And defendant committed the crime in gang territory. His use of a gun “sen[t] a message to . . . people that live in that particular territory” that Southside should be feared, the expert concluded. Thus, the expert testimony allowed the jury to conclude the carjacking benefitted Southside (*Albillar, supra*, 51 Cal.4th at p. 63), which in turn supported the reasonable inference that defendant acted with the specific intent to promote Southside criminal conduct (*id.* at p. 68).

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.