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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.

MATHEW NAM SON LE,

Defendant and Appellant.

G045154

(Super. Ct. No. 08WF0247)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lise Jacobson and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

After two mistrials, a third jury convicted Mathew Nam Son Le of premeditated attempted murder and street terrorism. The jury also found true allegations he committed attempted murder for the benefit of, at the direction of, or in association with the Dragon Family criminal street gang and caused great bodily injury by discharging a firearm. The trial court sentenced Le to an indeterminate life term for the attempted murder and a consecutive term of 25 years to life for gun use causing great bodily injury.

Le argues the trial court violated Evidence Code sections 1101, subdivision (b) and 352 and his constitutional right to due process of law by permitting the prosecution to introduce evidence of a single police contact that occurred while he was on bail for the charged offenses. We conclude the trial court correctly admitted this evidence because it was relevant to prove Le's motive and intent and as evidence tending to rebut his claim to have recently disassociated from the Dragon Family gang. Consequently, the judgment is affirmed.

FACTS

Because Le does not challenge the sufficiency of the evidence to prove the underlying crimes, the facts may be briefly stated.

On December 16, 2007, someone shot Ivan Castro in the back of his head during a party in Westminster. Although Castro lived, he suffered great bodily injury as a result of the gunshot wound. Police investigators failed to link Castro to a criminal street gang, but after interviewing numerous party goers they learned someone had yelled "Dragon Family" as the shot was fired. Several people identified Le, a known member of the Dragon Family criminal street gang, as a party attendee and others said he was near Castro when the shot was fired.

Eventually, Randy Tran and Adam Nhan, both associates of the Dragon Family gang, identified Le as the shooter.¹ Tran told investigators he had gone to the party with Le, but they left sometime later so that Le could retrieve a gun from Tran's home. Le told Tran he thought a rival gang member and known enemy of his planned to come to the party. Le grabbed a gun and they returned to the party. They met two other members and/or associates of the Dragon Family gang, Adam Nhan and Hien Truong, inside the house before all four decided to leave together.

As Tran, Le, Nhan, and Truong walked out of the house they noticed a group of young Hispanic men and women standing to one side of a walkway. They believed members of this group looked at them in a disrespectful way or "mad dogged" them. Tran thought he heard someone say "D.K.," which he interpreted to mean "Dragon Killers." Truong pulled out a knife and shouted, "Dragon Family." Although the Hispanic group backed away, Le pulled out the gun he had retrieved from Tran's house, pushed Tran, Nhan, and Truong out of the way, and fired one shot into the group. This single shot hit Castro in the back of his head. Immediately after the shot, Le, Tran, and Truong left the area in Tran's car. Nhan ran home. The four of them met the next day. Collectively, they decided to keep silent about the shooting if asked about it by the police or anyone else. Tran and Truong later decided to tell anyone who asked that they left the party before the shooting.

After an extensive investigation, police officers obtained a search warrant for the residence Le shared with his parents. A detective involved with the search asked Le if he was affiliated with the Dragon Family gang. Le showed the officer some of his gang-related tattoos, including a "D" and "F" on his calf muscle and Chinese symbols Le said stood for "Dragon Family." He admitted past membership in the gang, but claimed

¹ Tran and Nhan testified pursuant to plea agreements with the district attorney.

he no longer associated with the gang. He admitted going to the party, but said he left before the shooting. He denied seeing Tran or Truong at the party.

Based on the results of the search and their investigation, the officers arrested Le and took him into custody. After giving him the standard *Miranda*² advisement, which Le said he understood and expressly waived, Le responded to questions. Throughout his three-hour videotaped interview with the detectives, Le repeatedly admitted attending the party and repeatedly claimed he left the party before the shooting. In fact, he denied knowing anything about the shooting until he read something about it on the internet. He said he had been playing basketball with a friend named Luong earlier in the day, and it was Luong who knew about the party and took him there. However, Le could not give investigators any other identifying information about this person.

The day after his arrest, Le made a telephone call from the Orange County jail to Hao Nguyen, another Dragon Family gang member. Their conversation was recorded. Speaking in Vietnamese, Le lamented, “[Tran is] going to tell it all. [F]ucken (inaudible) That bitch, dude.” He also warned Nguyen, “Don’t say anything else”

At trial, Detective James Wilson, the lead detective in the case, testified as the prosecution’s gang expert. He explained the character, habits and customs of Asian gangs in general and the Dragon Family gang in particular. He recounted some of Le’s numerous contacts with various police departments and officers. For example, Wilson testified that in April 2006 Le was questioned and he admitted associating with Dragon Family Junior, a recognized subgroup of the Dragon Family gang. At the time, Le was with Dragon Family gang member, Hao Nguyen. The following month, another police officer found Le in the company of Nguyen and Hien Truong, who were admitted Dragon Family gang members. This time Le admitted membership in Dragon Family Junior.

² *Miranda v. Arizona* (1966) 384 U.S. 436

Around July 2007, an officer stopped a car and found Le with a member of the Nip Family gang, one of the other Asian street gangs allied with the Dragon Family gang. The officer found a baseball bat, a Samari sword, and two pocket knives in the car. Then, a mere one month before the shooting, Le and Randy Tran were together in a car when Le threw a bottle at another car and yelled, “D.F.J.”

Wilson also testified to a police contact that occurred after the commission of the instant crimes. In October 2008, a Huntington Beach police officer stopped a car with Le and two other self-admitted members of the Dragon Family gang. Wilson testified to the circumstances of the stop and said police officers had found a pocket knife in Le’s shoe and a second pocket knife under his leg.

Le did not testify at trial or call any defense witnesses. In closing argument, defense counsel challenged the credibility of the accomplice testimony, the veracity of all prosecution witnesses, and the sufficiency of the prosecution’s evidence Le was the shooter.

DISCUSSION

Prior to trial, the prosecutor moved to admit evidence of Le’s October 2008 contact with police, including the fact Le possessed a pocket knife. Defendant counsel objected to any postarrest evidence of Le’s contact with police and any reference to his possession of a pocket knife on grounds such evidence violated Evidence Code sections 1101, subdivision (a) and 352.³ The prosecutor argued the evidence was

³ Evidence Code section 1101, subdivision (a) states, in pertinent part, “evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.”

Evidence Code section 352 provides, “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

relevant to prove consciousness of guilt, for purposes of impeachment, to corroborate the accomplice's testimony (Pen. Code, § 1111),⁴ and to support the gang expert's testimony.

The court decided to conduct an Evidence Code section 402 hearing and took testimony from Detective Wilson regarding Le's subsequent contact with police. During the pretrial hearing, Wilson testified Huntington Beach police officers responded to a report of an assault with a deadly weapon. As a result, they stopped a car containing four young men. Le was in the car with a founder of the Dragon Family Junior subgroup of the Dragon Family gang, and another Dragon Family gang associate. The detaining police officer arrested Le for weapons possession and providing a false name. Wilson explained evidence of this contact was an important part of his conclusion Le actively participated in the Dragon Family gang at the time of the shooting, notwithstanding Le's postarrest denial of gang membership.

After listening to the arguments of counsel and taking the matter under submission, the court ruled as follows: "There is significant support for the People's position in a number of the cases the court has reviewed [¶] . . . [t]he court finds that the admission of evidence relative to the subsequent contact by the police, which relates to the defendant's conduct, would not be propensity or character evidence. Its purpose is to address the issue of consciousness of guilt[] as well as corroboration as these subjects relate to defendant's membership and participation in the gang, as well as his presence and participation regarding the crimes alleged in the information." The court also limited the scope of the prosecution's evidence by precluding the prosecution from referencing the crime report that led to Le's subsequent police contact and excluding evidence of Le's arrest after this contact.

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

Le argues the trial court erroneously permitted the prosecution to introduce evidence police officers contacted him after the shooting while he was with two self-admitted Dragon Family gang members and possessed a pocket knife. We review the trial court's evidentiary ruling for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Moreover, Evidence Code section 353 prohibits reversal of a judgment for the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) We conclude the trial court properly admitted evidence of Le's postarrest conduct.

Because evidence of gang membership is highly inflammatory, it is generally not admissible if only tangentially relevant to the case. (*People v. Cox* (1991) 53 Cal.3d 618, 660, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) However, the evidence at issue here was more than "tangentially relevant."

Evidence Le associated with Dragon Family gang members while he was out on bail for the instant offense bears directly on the issue of his active participation in the gang at the time of the shooting. This evidence has a "tendency in reason" to prove the level of his entrenchment in the gang, his proclivity to carry weapons, and shows how this behavior increased his status in the gang. (See Evid. Code, § 210 [evidence is relevant if it "[has] any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].)

Furthermore, Evidence Code section 1101, subdivision (b) permits the introduction evidence of Le's continued association with Dragon Family gang members if relevant to prove his motive and intent. (Evid. Code, § 1101, subd. (b).) Contrary to Le's assertion, subsequent conduct may constitute circumstantial evidence of his intent at the time of the offense. (See, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 508; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1182; *People v. Wong* (1973) 35 Cal.App.3d 812, 831 [acts of concealment, constitute "circumstantial evidence of consciousness of guilt and

hence of the fact of guilt itself”].) Although this evidence does not definitively establish Le’s mental state at the time of the shooting, it permits an inference he acted in service of the gang and to enhance his reputation within the gang.

Furthermore, evidence Le associated with Dragon Family gang members after the shooting rebutted his pretrial claim of disassociation from the gang. (See, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 913; *People v. Jordan* 108 Cal.App.4th 349, 365-366.) His attempt to distance himself from the gang correlates to his attempt to distance himself from the crime. Le’s continued gang affiliation and weapons possession corresponded to Wilson’s expert testimony about how Asian gang members differ from turf-based gangs. As he stated, Asian gang members tend to carry weapons whenever and wherever they gather because they are always defending themselves. His opinion was verified by Tran’s testimony Le retrieved a gun because he thought a rival gang member intended to come to the party.

Finally, Wilson testified he relied on Le’s numerous police contacts in forming his opinion Le actively participated in the gang at the time of the shooting. In all, Wilson testified to five instances where Le had been found to have a weapon while associating with Dragon Family gang members, four instances before the instant crimes and one while he was on bail for these crimes. Le contends defense counsel’s willingness to stipulate to Le’s active participation in the Dragon Family gang proves the prosecution sought to admit this evidence for some ulterior motive, but we are not persuaded. “[T]he prosecution may not be compelled to accept a stipulation where the effect would be to deprive the state’s case of its persuasiveness and forcefulness.” (*People v. Streeter* (2012) 54 Cal.4th 205, 238.) Here, the prosecution needed to prove not only active participation by a gang member, but also Le’s identity as the shooter and his intent to commit murder. Thus, evidence Le continued his gang association and continued to carry weapons even after the shooting was probative of his motive and intent with respect

to the crimes of attempted murder and street terrorism, and the alleged gang enhancement.

In sum, this is not a case where evidence of Le's continued association with Dragon Family gang members was irrelevant or of limited probative value. Nor is this the kind of evidence that invited the jury to infer Le's identity as the shooter simply based on his gang membership. (Compare *In re Wing Y.* (1977) 67 Cal.App.3d 69, 78-79 [evidence of gang membership and activity was not relevant to prove the identity of the person who committed the offense and allowed "unreasonable inferences . . . by the trier of fact that [the defendant] was guilty . . . on the theory of 'guilt by association'"], italics omitted.)

What is more, we disagree with Le's perception evidence of his postarrest contact with police was uniquely prejudicial. "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "The governing test [under Evidence Code section 352], however, evaluates the risk of 'undue' prejudice, that is, "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues," not the prejudice 'that naturally flows from relevant, highly probative evidence.'" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; accord, *People v. Salcido* (2008) 44 Cal.4th 93, 148.)

The evidence at issue here was certainly unfavorable, but it is not the type of evidence which tended to evoke some type of emotional bias. The trial court sanitized the most prejudicial aspects of Le's postarrest encounter with police, which left only those facts relevant to issues raised by the charges. Under the circumstances, we conclude the court properly admitted evidence Le possessed a pocket knife and consorted with Dragon Family gang members after the shooting.

Le also challenges the trial court’s evidentiary ruling on constitutional grounds. He did not object on this basis at trial and a specific objection is required by statute. (Evid. Code, § 353, subd. (a).) But even assuming Le’s constitutional claim is preserved, it fails “because, generally, violations of state evidentiary rules do not rise to the level of federal constitutional error.” (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) We have found no violation of California’s evidentiary rules. Therefore, the admission of Le’s gang-related conduct after the offense does not violate his state or federal Constitutional right to due process of law.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.