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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.

FRANCISCO MARTINEZ,

Defendant and Appellant.

G046034

(Super. Ct. No. 10CF2579)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Suzanne G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

One evening, Orange County Sheriff deputies Steve Hartz and Maury Rauch, both in uniform and on duty at the Theo Lacy jail facility, were conducting an hourly security check of a barrack. To ensure all of the inmates were accounted for, jail rules required each inmate to be on his assigned bunk. Hartz saw an inmate named Jacob Munoz in the wrong area. Munoz approached Hartz and when Hartz ordered him to go to a specific location, Munoz took an aggressive stance and began to remove his T-shirt. Expecting a fight, Hartz wrestled Munoz to the ground

Immediately, several other inmates surrounded Hartz and began to punch and kick him. Rauch came to Hartz's aid, dispersing the inmates with pepper spray. As a result of the attack, Hartz suffered bruises on his face and back of his head, plus a swollen knee.

Rauch was assigned to investigate the incident. He spent several hours reviewing videotapes from surveillance cameras that recorded the attack from four different angles. Rauch identified nine inmates who participated in the assault on Hartz. One of these inmates was defendant Francisco Martinez.

Defendant was charged with a single count of assault on a peace officer by means likely to produce great bodily injury. (Pen. Code, § 245, subd. (c).) At trial, the prosecution introduced a photograph of defendant as he appeared on the day of the assault and also played a digital video disc containing a copy of the surveillance videotapes. Rauch pointed to the segments of the videotapes he claimed showed defendant approach Hartz, punch him on the back of the head, and then return to his bunk. The jury found defendant guilty as charged.

The information also alleged defendant committed this offense in association with, for the benefit of, or at the direction of a criminal street gang. To support the latter allegation, the prosecution called two witnesses who testified as experts on criminal street gangs. One, Anaheim Police Department Investigator Jonathan Yepes, described a group named Barrio Small Town as a criminal street gang that claimed an

area of the city and testified defendant was an active participant in the gang. The second expert witness, Los Angeles Deputy Sheriff Francis Hardiman, testified concerning prison gangs. He described a prison gang named Southside consisting of all incarcerated persons who belong to Hispanic street gangs in the southern part of the state, and claimed Southside required the inmates to obey its rules. One rule is that if one member fights, all other gang members are expected to fight as well. Asked a hypothetical question based on the facts of this case, the expert opined the group assaulting Hertz consisted of Southside associates and the attack benefitted and promoted the gang. The jury returned a not true finding on the criminal street gang enhancement.

The court sentenced defendant to the middle term of four years in state prison. Defendant timely filed an appeal from the judgment.

We appointed counsel to represent him. Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, appellate counsel filed a brief setting forth the facts of the case and, while not arguing against her client, advised us that she found no issues to argue on defendant's behalf. Defendant was given 30 days to file written argument on his own behalf. That period has passed, and we have received no communication from him. However, counsel's brief mentions five issues for us to consider in conducting our independent review of the appeal: 1) sufficiency of the evidence for the conviction, 2) three matters relating to jury instructions, 3) plus one evidentiary ruling. (*Anders v. California* (1967) 386 U.S. 738, 744 [87 S.Ct. 1396, 18 L.Ed.2d 493].)

Having independently examined the appellate record, we find no arguable issue. The evidence supports a finding defendant and several other prisoners simultaneously attacked a uniformed deputy sheriff who was at the time attempting to subdue an uncooperative and aggressive inmate. A deputy sheriff is a peace officer. (Pen. Code, § 830.1, subd. (a).) Neither Hertz nor Rauch testified they saw defendant participate in the assault. But Rauch identified him as one of the perpetrators after reviewing videotapes from surveillance cameras and pointed out for the jury the portion

that depicted defendant punching Hartz. “The use of [a] . . . fist alone has been held sufficient to support a conviction of assault by means of force likely to produce great bodily injury. [Citations.]” (*People v. Wingo* (1975) 14 Cal.3d 169, 176.)

Over defendant’s objection, the court instructed the jury on aiding and abetting liability. (Pen. Code, § 31; CALCRIM Nos. 400 & 401.) The court reasoned that the copy of the videotape played for the jury “is quite blurry” and while “Rauch testified that he was able to pinpoint a punch from defendant on Deputy Hartz[,] . . . it is conceivable that the jury could come to the conclusion that the defendant did not connect That being the case, then the defendant becomes an aider and abettor to anyone who did connect” The court did not err. The prosecution introduced uncontradicted evidence that Hartz suffered injuries from the attack. “One who aids or abets the crime may be found guilty of an assault by means of force likely to produce great bodily injury. [Citations.]” (*People v. Brown* (1980) 110 Cal.App.3d 24, 34.) Given the quality of the videotape shown to the jury, plus the fact nine inmates concurrently participated in the attack, it was proper to instruct the jury on aider and abettor liability.

Since defendant’s conviction was based primarily on photographic and videotape evidence, a jury instruction on eyewitness identification, even if requested, would not have been proper. (*People v. Wright* (1988) 45 Cal.3d 1126, 1144 [eyewitness “instruction should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence”].)

The trial court instructed the jury on the lesser included offense of assault on a peace officer (Pen. Code, § 241, subd. (c)). Because the uncontradicted evidence established Hartz is a deputy sheriff, was in uniform and performing his duties when the assault occurred, no basis existed for giving a lesser offense instruction on assault by means for force likely to produce great bodily injury. “[A] trial court errs in failing to instruct on a lesser included offense only if the lesser offense is supported by substantial

evidence in the record. [Citation.] ‘[T]he court is not obliged to instruct on theories that have no such evidentiary support.’ [Citation.]” (*People v. Golde* (2008) 163 Cal.App.4th 101, 115-116.)

Anaheim Investigator Yepes, who identified defendant as a member of Barrio Small Town, testified over a defense hearsay objection that one basis for his opinion was a deputy sheriff’s report defendant had said he associated with the gang. At the time, the court instructed the jury the statement could be considered “not for the truth of its content, but . . . because officer Yepes factored it into his opinion. . . .” The court also read CALCRIM No. 360, informing the jury that a statement relied on by an expert in reaching a conclusion could be “consider[ed] . . . only to evaluate the expert’s opinion” and “not . . . as proof that the information contained in the statement is true.”

Again, there was no error. “The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. [Citations.]” (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

“Hearsay relied upon by experts in formulating their opinions is not testimonial because it is not offered for the truth of the facts stated but merely as the basis for the expert’s opinion. [Citations.]” (*People v. Cooper* (2007) 148 Cal.App.4th 731, 747.) “Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.]” (*People v. Montiel* (1993) 5 Cal.4th 877, 919.)

That is the case here. Yepes was allowed to specify the bases for his opinion that defendant was an active participant in Barrio Small Town, including his consideration of a statement defendant purportedly made to a third person. However, the trial court instructed the jury, both at the time this testimony came in and at the end of trial, the statement could not be used as proof of the statement’s truth. Furthermore, since

Yepes's testimony went solely to the gang enhancement allegation, which the jury rejected, any possible error was harmless.

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.