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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.

LUIS ERNESTO MENDEZ,

Defendant and Appellant.

G046051

(Super. Ct. No. 10CF3412)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed as modified.

Douglas G. Benedon, 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, Felicity Senoski and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Luis Ernesto Mendez of robbery (Pen. Code, § 211; all further statutory references are to this code; count 1) and street terrorism (§ 186.22, subd. (a); count 2). The court sentenced him to three years on count 1 with a concurrent two-year sentence on count 2. Defendant contends the evidence is insufficient to support his conviction for street terrorism and the court erred in not severing the robbery from the street terrorism count. We reject these claims but modify the sentence on count 2 to stay it under section 654, subdivision (a) until defendant completes the sentence on count 1, at which time the stay shall become permanent. In all other respects, the judgment is affirmed.

FACTS

After purchasing a few items, defendant walked to the back of 7-Eleven, picked up a case of beer, and walked out of the store without paying for it. One of the store clerks, Daniel Martinez, ran after him and tried to grab the beer from defendant. Defendant placed the beer down and punched Martinez in the face and head 10 to 12 times while Martinez tried to fight back. After bystanders broke up the fight, defendant left in a car driven by a woman.

Martinez found a cell phone in the parking lot. Upon examining it, gang expert Nicholas Lopez found photographs of defendant, a contact listing for a “Stalker” aka Christian Ramos, a member of the Laurel Hood Thugs (LHT) criminal street gang, and a text message from “Huero from Laurel Hood” aka Dean Roskovich, another LHT member, stating he was hiding from the police.

Lopez testified a criminal street gang’s main focus is to gain respect by committing crimes and the more violent the crime the greater the respect earned for the gang member and gang. LHT consisted of approximately 10 persons who claimed a

territory that included the area where the 7-Eleven robbery was committed. Its primary activities at that time were felony assaults, vandalism, and sale of narcotics. Lopez identified two predicate offenses: a gang-related attempted murder, robbery, and burglary committed by an LHT member in 2005 and a gang-related aggravated assault committed by another member in 2006.

When defendant was arrested, Lopez's background investigation revealed 18 police contacts including 4 STEP (Street Terrorism Enforcement Prevention) notices issued between 2004 and 2010 relating to defendant's involvement in LHT. Upon being issued the notice in 2004, defendant told police he had been gang-banging for four years. Defendant was with another LHT member when he received his last notice in 2010.

Lopez also found nine interview cards for defendant between 2003 and 2008. On one occasion, when misidentified as being from a different gang, defendant's companion told the officer, "we are LHT, you might as well get it right," to which defendant added, "Yeah, get it right." On another occasion, defendant and another LHT member assaulted a member of a rival gang. Searches of defendant's home and car in 2008 turned up items connecting him to LHT. Defendant also has the letters "LH" tattooed below his right armpit. Based on the evidence, Lopez opined defendant was an active participant of LHT at the time of the robbery.

Defendant testified in his own defense. According to him, when he went to pay for the beer, he discovered he was short on cash and decided to steal the beer. Upon being confronted by Martinez, defendant apologized and tried to hand the beer back to him but Martinez grabbed his arm. Martinez punched defendant in the face, grabbed him by the shirt, and held a knife to his neck, which cut defendant's arm when he took a swing at Martinez. The two fought until a bystander told them to stop, at which point defendant backed away. The other store clerk, Anil Tandon, tried to throw the case of

beer at defendant but at defendant's request, Martinez stopped him. Martinez and Tandon went back inside the store and defendant got into the car where his friends were waiting and left.

Defendant described LHT as a group of high school boys, which later became a gang. He joined them in high school and got the tattoo when he was 17 years old. He broke ties with LHT two years later because he did not want to go to prison and was not an LHT member at the time of the robbery. He started working, moved away from Tustin at age 20 or 21, and was going to college.

DISCUSSION

1. Street Terrorism

To establish the crime of street terrorism (§ 186.22, subd. (a)), the prosecution must prove defendant (1) actively (as opposed to nominally or passively) participated in a criminal street gang, (2) knew the gang's members engage in or have engaged in a pattern of criminal gang activity, and (3) willfully promoted, furthered, or assisted in any felonious conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) Defendant disputes only the third element, claiming there was insufficient evidence the robbery was gang related. But the Supreme Court has recently held the criminal conduct promoted, furthered, or assisted need not itself be gang related. (*People v. Albillar* (2010) 51 Cal.4th 47, 55-56.) Defendant's argument thus lacks merit.

2. Denial of Motion to Sever

The court denied defendant's pretrial motion to sever the robbery from the street terrorism count, finding the evidence "inextricably intertwined" because both were committed in gang territory, one of the gang's predicate crimes was robbery/murder, and

testimony about a gang's need for respect supported the prosecution's theory of motive. Defendant contends this was error and that he is entitled to a new trial without the gang evidence. We disagree.

When two or more offenses are charged, the court, "in the interests of justice and for good cause shown, 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 a motion to sever is denied, the defendant bears the burden of demonstrating the court prejudicially abused its discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 508.) Factors to consider include the cross-admissibility of the evidence in separate trials. (*Ibid.*) A determination evidence is cross-admissible ordinarily dispels any inference of prejudice. (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

"In cases *not* involving the gang enhancement, . . . evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) At the same time, "any inference of prejudice [is] dispelled" when evidence of gang membership is admissible on an issue such as "identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*Id.* at pp. 1049-1050.) Defendant asserts the gang evidence was not admissible for any of these reasons. His contention lacks merit.

The court reasonably concluded the gang evidence was cross-admissible and relevant to the prosecution's motive theory. Evidence defendant committed the robbery was necessary to prove the third element of the street terrorism count. (§ 186.22, subd. (a) [promoting, further, or assisting felonious criminal conduct].) Although the gang evidence was not needed to prove the robbery, it established a motive (i.e., earning respect in the gang) for repeatedly punching the store clerk over a case of beer. As detective

Lopez explained, gang members gain respect by committing crimes, with more violence earning greater respect for the gang member and the gang. The robbery was committed in an area claimed by LHT and the cell phone found at the scene not only contained contact information for fellow LHT members but also helped identify him as the perpetrator.

Defendant maintains the gang evidence “seriously undercut” his credibility on his self-defense claim, which was plausible because Martinez admitted he was upset and had decided to confront defendant, in violation of store policy, instead of calling the police, and had picked something up off the table where knives and box-cutters are kept before following defendant out of the store. But because the evidence was both cross-admissible and admissible to prove motive, the asserted prejudice was dispelled.

3. Section 654

Section 654, subdivision (a) provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” In *People v. Mesa* (2012) 54 Cal.4th 191 the Supreme Court recently held this statute precludes separate punishment for both street terrorism and the underlying felony used to prove the “felonious criminal conduct” element of that offense. (*Id.* at pp. 197-198.) Under *Mesa*, section 654 bars the imposition of additional punishment for street terrorism and requires the sentence for that count to be stayed.

DISPOSITION

The sentence on count 2 is modified to stay it under section 654, subdivision (a) until defendant completes the sentence imposed on count 1, at which time the stay shall become permanent. As so modified, the judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.