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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. YANIRA BARAJAS ALCARAZ, Defendant and Appellant.	G047088 (Super. Ct. No. 10CF1368) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Arielle Bases, 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, William M. Wood, Marvin E. Mizell and Charles Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Yanira Barajas Alcaraz was convicted of two counts of second degree robbery, and one count of using tear gas and a tear gas weapon. She challenges her conviction, arguing on appeal that the trial court erred by admitting evidence that defendant had taxed individuals in territory claimed by the Lopers criminal street gang. We conclude there was no error in admitting the evidence. The evidence was relevant to defendant's claim that she acted under duress when committing the robberies. Even if there had been error, it was not prejudicial, given the weakness of the evidence supporting defendant's duress defense. We therefore affirm.

STATEMENT OF FACTS

I.

PROSECUTION CASE

On July 17, 2007, Maricella Josemaria and Jose Palacios were working in their produce truck. Defendant approached the open window of the truck and asked Josemaria if she sold shampoo. Josemaria showed defendant the shampoos that she had available; defendant left, claiming she needed to speak to her boyfriend. Defendant returned with a young man to the window of the truck, and told Josemaria and Palacios to give them all their money, or the young man would kill them. The young man tried to enter a door on the side of the truck, but was prevented from doing so by Palacios. Defendant pepper sprayed Josemaria through the truck window.

Josemaria ran out of the truck, followed by Palacios, and screamed for help. Defendant ran after Josemaria and tried to take her phone. Defendant grabbed Josemaria by the shirt and they both fell to the ground. Defendant also ripped off a medallion that Josemaria was wearing around her neck.

At the same time, the young man who had approached the produce truck with defendant, having been joined by two other men, attacked Palacios and threw him to

the ground. Defendant and the three men then got into a car and drove away. A pair of sunglasses found at the scene contained DNA consistent with defendant's DNA profile.

II.

DEFENSE CASE

When interviewed by the police and again at trial, defendant admitted her involvement in the robbery, but claimed she was acting under duress. Defendant contended that, at the time of the robbery, she had been in a dating relationship with Jorge Gomez, a member of the Lopers criminal street gang. According to defendant, Gomez was abusive, physically attacked her, and threatened her and her family. Defendant claimed Gomez beat her two times a week, and threatened every day to kill her. She also said that on more than one occasion, Gomez had locked her in a room and refused to let her out. Defendant claimed Gomez had stabbed her, threatened her by holding a knife to her throat, hit and punched her in the face and the body, beaten her with a bat, handcuffed her, and hit her on the head, "popp[ing]" it open. She also claimed Gomez repeatedly threatened to cut off her son's head. Defendant testified Gomez told her that if anything happened to him or his neighbors, he would blame her and her family.

Defendant never reported Gomez's abuse to the police. On the few occasions when Gomez's parents called the police, defendant denied Gomez had assaulted her. Defendant testified she tried to leave Gomez but he prevented her from doing so.

Defendant further testified as follows: On the day of the robbery, defendant was driving Gomez's car; Gomez was in the front passenger seat, and two other Lopers gang members, Chucky and Trouble, were in the backseat. Gomez needed money, so he decided to commit a robbery, and planned the crime. When Chucky tried to enter the truck to steal Palacios's money, defendant thought Palacios was trying to stab her or Chucky, so she pepper sprayed Palacios. The pepper spray accidentally hit

Josemaria. As Josemaria ran from the truck, Gomez or Trouble ordered defendant to go after her. When defendant caught up with Josemaria, defendant told her not to call the police because she feared Gomez and the others would hurt Josemaria. Defendant did not want to hurt Josemaria. When Gomez and Trouble drove up, defendant did not feel she had any choice but to get back in the car with them. Defendant believed Gomez took her share of the proceeds from the robbery.

Defendant told the police officer who interviewed her that she felt trapped in the relationship with Gomez, which she described as "worse than jail." Defendant testified she only participated in the robbery because of her fear of Gomez, and that she felt she had no choice but to do what he told her to do.

After leaving Gomez in 2008, defendant never told the police about Gomez's assaultive behavior. By 2010, defendant no longer had contact with the Lopers street gang. She had moved away so no one in the Lopers gang could find her. When contacted by the police, Gomez denied any knowledge of or involvement in the robbery of the produce truck. Chucky and Trouble either declined to speak to the police or provided no useful information.

III.

REBUTTAL

The prosecution offered the testimony of a gang expert to rebut defendant's claim of duress. The expert testified the Lopers street gang is a traditional Hispanic criminal street gang, whose members are involved in shootings, homicides, robberies, murders, attempted murders, and narcotics dealing. A Lopers gang member would only commit a crime with someone whom he or she trusts. Several field interview cards and police contacts documented defendant's activities in 2008 in territory claimed by the Lopers gang and with individuals in the Lopers gang. One police report from 2008 stated

that defendant had taxed transvestite prostitutes, demanding money from them in order to operate in the territory claimed by the Lopers gang.

The gang expert opined that defendant was an active participant in the robbery of Josemaria and Palacios's truck because it occurred in territory claimed by the Lopers gang, Lopers gang members had been involved in similar robberies, defendant made contact with Josemaria at the truck, and defendant sprayed pepper spray into the truck. The gang expert further opined that defendant was an active member of the Lopers gang on the date of the robbery, based on her conduct during the robbery, tattoos, and uncharged criminal conduct.

IV.

PROCEDURAL HISTORY

Defendant was charged in an information with two counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)) (counts 1 and 2), and one count of using tear gas and a tear gas weapon (*id.*, § 12403.7, subd. (g)) (count 3). A jury convicted defendant of all counts. The trial court sentenced defendant to the low term of two years on count 1, the low term of two years on count 2, and the low term of 16 months on count 3; the court imposed the sentences on counts 2 and 3 to run concurrently to the sentence on count 1. Defendant timely appealed.

DISCUSSION

Defendant argues the trial court committed prejudicial error by admitting the gang expert's rebuttal testimony regarding taxing. We review the court's admission of evidence for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.)

Duress is a defense to the crimes charged when defendants "committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

(Pen. Code, § 26, subd. Six.) The jury was instructed as follows regarding duress: "The defendant is not guilty of second-degree robbery if she acted under duress. The defendant acted under duress if, because of threat or menace, she believed that her life would be in immediate danger if she refused a demand or request to commit the crime. The demand or request may have been express or implied. [¶] The defendant's belief that her life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all of the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been immediate. [¶] The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of second-degree robbery." (CALCRIM No. 3402.)[1]

Defendant argued that her guilt was negated due to duress because she reasonably believed her life or the lives of her children would be in immediate danger from Gomez if she did not participate in the crime. On rebuttal, the prosecution offered the following testimony of the gang expert:

"Q Have you had a chance to do that kind of background investigation on the defendant, Yanira Alcaraz?

"A Yes.

"Q And did you find police contacts during your investigation?

"A I did.

[1] The trial court did not instruct the jury that duress was a defense to the charge of use of tear gas, and defendant does not claim this was error. The court instructed the jury that it could consider the defense of self-defense for the crime of use of tear gas and a tear gas weapon.

"Q Okay. And did you find field interview cards during your investigation?

"A Yes.

"Q Okay. And, in general, and I'm not going to go through each one, were all of those within the Lopers criminal street gang territory?

"A I believe roughly, yes.

"Q And were they mostly involving herself and other criminal street gang members?

"A Yes.

"Q Okay. Did any of them specifically stand out that you would base an opinion on?

"A Yes.

"Q Which one?

"A There was an incident involving the defendant where she confronted some transvestite prostitutes."

Defendant's trial counsel objected to the testimony on the ground of relevance.[2] The court never ruled on defendant's counsel's objections, and counsel never moved to strike the last response by the gang expert. Following a conference between the court and counsel in chambers, the gang expert's testimony continued as follows:

"Q By [the prosecutor]: Detective, did you review a police report in which the defendant was alleged to have been taxing certain individuals?

"A Yes.

"Q Okay. And when I say 'taxing,' in general, what does that mean?

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[2] Defendant's trial counsel also objected on the ground of hearsay. Defendant does not pursue this argument on appeal. An expert witness may generally base his or her opinion on hearsay. (Evid. Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

"A Taxing is a term within the criminal street gang world. Obviously, we all know about taxing in the traditional method, but this is very similar in the sense that criminal street gangs will contact either legitimate or illegitimate business owners, people conducting either criminal conduct or legal conduct, within their criminal street gang territory and tax them for monies, meaning money for protection, money to not be harassed, money for a variety of things. But in the criminal street gang world, they refer to it as taxing.

"Q And is that conduct that, based on your training and experience, the Loper criminal street gang engages in within their territory?

"A Yes, it is."

We first consider whether the evidence was relevant to an issue in the case. To be relevant, evidence must have a tendency in reason to prove or disprove a disputed issue in the case. Defendant correctly notes that her membership in or participation with the Lopers gang was not directly at issue in the case because she was not charged with street terrorism and there were no allegations that she committed the robbery for the benefit of, at the direction of, or in association with a gang. This does not make the evidence irrelevant, however. The Attorney General argues the evidence was relevant to show defendant was not acting under duress when she committed the robbery, but rather was acting freely when committing the crime with Gomez and other members of the Lopers gang. Defendant counters that her participation in other acts of criminal conduct is more proof that she was living her life in fear of Gomez, and was subject to committing other crimes at his behest to avoid further abuse.

There is no direct evidence of a threat, relating to the crime charged, made by Gomez, so the issue is whether defendant's belief in an implied threat by Gomez, due to his alleged history of abusing defendant, was reasonable. Evidence tending to disprove defendant's testimony of constant, ongoing abuse by Gomez has a tendency in reason to disprove the reasonableness of defendant's fear of immediate harm.

Defendant's trial counsel argued to the jury that the culture of fear in and among gangs tended to show defendant's fear was reasonable.

We conclude the trial court did not abuse its discretion by admitting the expert's testimony regarding taxing. The evidence was relevant to refute defendant's claim of duress. The evidence was not unduly prejudicial. It is true that, given its inflammatory impact, evidence of gang membership or activity should not be admitted "if it is only tangentially relevant to the charged offenses." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223, italics omitted.) In this case, however, the evidence of taxing for the Lopers gang in 2008 in territory claimed by the Lopers gang was directly related to the credibility of defendant's testimony that she was acting under duress when committing the robbery of Josemaria in 2007.

Defendant argues the trial court abused its discretion by admitting the evidence of defendant's taxing to rebut her evidence of her own good character. Evidence of a defendant's character is generally inadmissible, unless it is offered to prove a fact such as motive, opportunity, intent, plan, or knowledge. (Evid. Code, § 1101.) If a defendant offers good character evidence, the prosecution may rebut that evidence with opinion or reputation evidence of the defendant's bad character (Evid. Code, § 1102, subd. (b)); evidence of a defendant's specific acts is not admissible to rebut good character evidence (*People v. Felix* (1999) 70 Cal.App.4th 426, 431-432). Evidence that a defendant committed specific acts of taxing would be inadmissible to rebut any good character evidence.

The Attorney General counters that the trial court did not admit the evidence of taxing to rebut defendant's good character evidence, apparently conceding it would have been error for the trial court to admit the gang expert's testimony on this ground.

Even if the trial court erred in admitting the gang expert's testimony, we could only reverse defendant's conviction if it is reasonably probable defendant would

have received a more favorable result in the absence of the error. (*People v. Stewart* (2004) 33 Cal.4th 425, 494; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence supporting defendant's duress defense was weak. Her claim of duress was supported only by her own testimony. She offered no evidence that her life was in immediate danger. Defendant testified Gomez did not tell her he would kill her if she did not commit the robbery. Josemaria testified that defendant never asked for help, never apologized, and did not seem upset during the attack. When Josemaria fled the truck after being pepper sprayed, defendant chased her, grabbed her by the shirt, threw her to the ground, and ripped a medallion off Josemaria's neck because, in defendant's own words, she "just wanted to steal it." Defendant never reported Gomez's abuse to the police (until she was questioned about the robbery in this case), denied to the police that any abuse had occurred when it was reported by others, and did not leave Gomez.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.