Filed 6/16/16 P. v. Bates CA4/3

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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. TIMOTHY LAVERT BATES, Defendant and Appellant.	G050530 (Super. Ct. No. 13HF2959) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

It is hereby ordered that the opinion filed herein on May 26, 2016, be modified as follows:

On page 13, a new last paragraph prior to the disposition will read:

> The admission of evidence, even if erroneous under state law, results in a due process violation only if it makes a trial fundamentally unfair. Absent fundamental unfairness, a "reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Under the circumstances we find in this record, we cannot conclude there was fundamental unfairness in defendant's trial. The error here was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 23-24.)

This modification does not effect a change in the judgment. The petition for rehearing is DENIED.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.

Filed 5/26/16 P. v. Bates CA4/3 (unmodified version)

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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. TIMOTHY LAVERT BATES, Defendant and Appellant.	G050530 (Super. Ct. No. 13HF2959) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Kessler & Seecof and Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Timothy Lavert Bates of five counts of second degree robbery as charged in counts one through five of the information, and found that he personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b),[1] when he committed each of those five robberies. The jury also convicted him of the unlawful taking of a vehicle. The trial court sentenced defendant to 20 years in state prison.

In his appeal, defendant contends the trial court erred when it permitted gang evidence and when it instructed the jury it could consider the gang evidence in evaluating his credibility. Although we do find the trial court erred when it admitted gang evidence, we find that error to be harmless and affirm.

I

FACTS

The Toyota Camry

On September 29, 2013, at approximately 12:00 p.m., the owner of a gray Toyota Camry was sitting on the ground of his driveway cleaning his tools outside his home in Laguna Hills. He heard a car starting and stood up and saw his Toyota Camry "was going forward slowly." He saw a man in the Camry "blocking [his] face with his hand." The owner of the Camry could not tell if the man was white or black, stating: "Not white but kind of in a darker complexion, kind of like Hispanic but dark." The person drove the car away, and the owner called the police.

The Robberies

A retail sales consultant at an AT&T store located in Laguna Niguel said that at about 12:00 p.m., on September 29, 2013, he saw a Toyota Camry pull up right in front of the store. Two men came out of the car, and one of them carried a trash bag.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

He continued: "And then as soon as they came in, they pulled their guns in front – in front of us." The person without the trash bag "had an oversized hoodie." About the gun he was holding, the sales consultant said, "All I can remember was the barrel was just silver." He said it appeared "to be made of metal." The man without the trash bag who was holding the silver-barreled gun said "get down." The sales consultant identified defendant as that man. Defendant pointed his gun at the sales consultant and other employees. The other man, the one carrying the trash bag, was wearing shorts. The sales consultant thought that man went to the back of the store with the store manager.

A second retail sales consultant said: "The first thing that I noticed, I was helping a customer, and the first thing that attracted my attention was [*sic*] silver gun that was pointed in my direction." He said it was a "silver, large revolver." The second retail sales consultant testified he observed the manager go into the inventory room with one of the robbers.

An AT&T sales representative also testified. She said when the Toyota Camry pulled up in front of the store, it backed into the parking space. The sales representative described the circumstances: "I was with a customer so I like looked at my customer just to show him I was still paying attention even though I saw them speed in really fast. [¶] Basically, two men get out of the car really fast, pull their hoods up, have sunglasses on, and have sort of like a big bag with them and then they come in like running." They were both holding guns. She continued: "When they ran in, they yelled for everybody to get down and be quiet. At the same time, one was yelling, 'Where are the phones?'" About the gun defendant was holding, the sales representative said: "I just remember it was black and it wasn't very big. It was just like a handgun." The prosecutor said, "You thought it was black?" The witness responded, "I thought that, or silver."

One of the customers described what happened: "Two guys came in and told us to get on the ground and then they told us – one of them told us, the one that was

in the front, to go to the back room and they robbed the iPhones, [and] iPads. They grabbed all the stuff." Both men had guns. At trial, the customer said the gun of the robber who stayed in the front of the store was "black with a little silver," but immediately after the robbery, the customer told the police the gun was silver. The customer said the gun was a revolver. Two or three times, that man pointed the gun in the customer's direction. At some point, the man ordered the group to go to the back wall, and they did. The customer said: "We all got down on the floor, sat there. He was there, one of the guys was there with us, and then the other one took an associate to go get the stuff." At some point, "the other guy came and said he had all that they need and then they took off." The customer described the man who was with the group at the counter area: "He was wearing a beanie, sunglasses, [and] a black hoodie. I could see his leg hair, so he was wearing shorts and just regular shoes and a little bit of high top socks."

One of the retail sales persons at the store owns a .38 special revolver. She said the silver revolver used by the man with the group "seemed a little bit larger" than the one she owns.

The AT&T store's assistant manager was standing by the front door checking in customers as they entered the store. She heard the screech of brakes and looked out the window. Two men holding silver revolvers came into the store, and "[o]ne of them says, 'get down, get down.' And then I hear somebody say, 'Need to get in the back.'" When the assistant manager heard that, because she was in charge and had been trained to comply during a robbery, she entered the code for the back room. One of the robbers held a gun to her head and she incorrectly entered the code the first time and he yelled at her to hurry up. She then had to enter a different code to go into the inventory room. The man holding the gun on her was carrying "a hefty garbage bag," and said, "Where are the iPhones at?" The man started putting iPhones in the bag and told the assistant manager to help him, so she started putting phones into the bag, aware

that one of them was a tracking device. He took iPads as well as iPhones. The bag was about full. As the man with the bag and the assistant manager exited the back room, the other robber, still holding a silver revolver asked, "Where's the money at?" The robber with the bag responded, "No, no, I got enough. Let's go, let's go." The assistant manager said the bag was so heavy, the man couldn't lift it and that he dragged it out. The assistant manager called 911 and was told "they had – already were able to locate the tracking device."

Police Involvement

An Orange County deputy sheriff assigned to the aviation support unit testified he pilots a helicopter. He said shortly after 12:00 p.m., he and his partner received a radio request "to go assist in looking for a car that was just stolen in the Laguna Hills area." The stolen car was a Toyota Camry and the officers were given a possible license plate number. While en route to the Laguna Hills area, the officers got another radio transmission about an armed robbery in Laguna Niguel. The helicopter officers spotted the car. Additionally, they started receiving updates from dispatch regarding the path of the tracking device. From approximately 800 feet above ground, the officers followed the suspects' car as it headed north along the 73 Freeway. Just as the helicopter was above Mariner's Church, dispatch informed the officers the GPS position of the tracking device was at Mariner's Church. The helicopter hovered above the church and observed the arrival of sheriff's patrol units.

The church campus was "packed," and it appeared the church service had just gotten out. After 10 or 15 minutes, the helicopter officer saw two men matching the description of the suspects on a bridge or walkway, and he broadcast their location. He observed deputies take the suspects into custody. Defendant was one of the two arrested.

Mariner's Church

Sometime after 12:20 p.m., during a time when two church services were letting out, an employee of Mariner's Church in Irvine went to the parking lot because someone mentioned there was "an incident." When he went outside, the man "heard several helicopters and then noticed several police cars in the parking lot." He heard what sounded to him like one car hitting another car and walked over to inspect what it was he heard. He described what he observed: "There was an empty parking space and a bag, plastic bag with iPhones [*sic*] cases and iPad cases kind of strewn about." They appeared to be new because they were sealed with plastic wrap. There was a car backing up.

Another man, who had attended church services, testified he was in the restroom and "two gentlemen came out of the same stall, the stall for disabled people." The witness, who is six feet tall, described the two men as follows: "Two . . . African-American males, I'd say maybe in their twenties or less. I'd estimate about my height, maybe a little shorter than me, maybe." About their clothes, he said: "Just that I remember shorts and also remember black and white . . . clothing." One of the deputies on the ground went into the men's restroom. He found a trash bag containing "a ski mask or a beanie, a pair of sunglasses, and metal scissors with a purple handle."

One of the AT&T store customers was transported to Mariner's Church and given an admonishment about witness identification, and signed it. The customer remained in the police car, which had tinted windows, and told police the man was too far away to see, but that "it looks like it could be him." Ten days later, the customer identified defendant from a photographic lineup.

"No weapon was recovered." But a bag with some of the stolen contents was recovered by the church. Other stolen items were found on Newport Coast Drive just south of the toll road.

Defendant's Police Interview and Testimony

After defendant was placed under arrest, he was interviewed by the police. An audio version of the interview was played to the jury.

Defendant told the police he was at church that day to get involved in activities and change his life around, but he did not know the name of the church or the city where it is located. Defendant said he went from Los Angeles to the church and did not go to an AT&T store. When asked about a robbery, he replied, "I know nothing about a robbery."

He told the officers both he and the man who was with him are in the Black P Stones gang. When asked about a gun, he said, "Nothing's real," "[i]t was a toy," it was "a fake gun," it was "[l]ike a cowboy gun" and "[i]t's cardboard." He said he threw it in a trash can "like outside."

About the car, defendant said, "I didn't steal [the] car. I told you it was my chick's car." He said the owner of the car is his friend and her name is Deborah, but he did not have her phone number.

Defendant testified at trial. On direct examination, he said he had previously been convicted of a felony. On cross-examination, defendant testified he lied in his police interview about what he did "that morning," how he got to the church, why he went to the church, what vehicle he was using, using drugs, and going into the restroom at the church.

Gang Testimony

The prosecution's first witness was a detective with the Santa Ana Police Department. He said he came in contact with a gang known as the Black P Stones when he served on the Los Angeles Police Department. He said, "I investigated crimes involving, in part, members of the Umbrella gang known as the Bloods criminal street

gang of which the Black P Stones are a subset." The witness testified the Black P Stones "fit the definition of a criminal street gang."

The prosecution's last witness was a gang expert who is a detective with the Santa Ana Police Department and was previously with the Los Angeles Police Department. He described extensive investigative experience working on gang cases in both Orange and Los Angeles Counties. He said he is familiar with a criminal street gang known as the Black P Stones.

About guns in gangs, the gang expert stated: "In the criminal street gang subculture, respect and violence go hand-in-hand. The topics or the concepts of fear and intimidation allow criminal street gang members to further their activities, both criminal and non. In regards to these two areas and in regards to garnering added respect, usually through acts of violence, the firearm has become one of the easiest and most prominent ways to become known, as a criminal street gang member, as a violent individual due to one's immediate ability to injure another and/or take a life."

At that point, the court instructed the jury: "You may consider evidence of gang activity only for the limited purpose of deciding whether the firearm enhancement is true. You may not consider this evidence for any other purpose. You may not consider from this evidence that the defendant is a person of bad character or he has a disposition to commit the crime. [¶] So that's the limited purpose of which the court is allowing this. As I indicated to you earlier before this witness, you're going to be hearing from a subsequent witness in terms of the subject matter."

The gang expert then continued explaining how guns play a part in gang culture: "As I was saying, respect, being one of the utmost concepts in the criminal street gang subculture, is primarily garnered through acts of violence or criminal acts wherein the concepts of fear and intimidation are employed heavily. The use of firearms in and/or by criminal street gang members is used for both offensive and defensive purposes: one being defense against rivals or perceived rivals; secondarily, to eradicate, to assault any

rivals or perceived rivals. Also, firearms are used in the furtherance of criminal enterprises or activity in order to benefit the gang as a whole . . . ." He added that firearms are prized possessions of gang members. He explained that a "hot gun" is one that needs to be discarded "to distance the gang as a whole from that firearm which may have been used in multiple instances in multiple criminal activities" and "not to have that individual gang member traced back to that crime."

Gang Instruction

During the court's instructions to the jury after the close of evidence, the following instruction was given: "You may consider evidence of gang activity only for the limited purpose of deciding whether the firearm enhancement is true. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. [¶] You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

II

DISCUSSION

Defendant argues the trial court erred in admitting evidence concerning his affiliation with the Black P Stones gang, in admitting the testimony of the gang expert and in instructing the jury it could consider the gang evidence in evaluating his credibility.

We review for abuse of discretion whether the trial court erred in allowing gang evidence under Evidence Code section 352. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) "'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows

from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'"' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1035.) "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so," if the record shows the court was aware of its duty and undertook Evidence Code section 352's balancing functions. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.)

"[A]dmission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) Even when gang membership is relevant, however, "because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it." (*Ibid.*)

With regard to the initial decision to permit the prosecutor to introduce gang testimony, during a pretrial conference with counsel, when the prosecutor indicated an intent to call a gang expert and defense counsel objected, the court stated: "[It] does find that an issue, a disputed issue of fact in this case is whether the object that was used during this robbery was real or was it not. Both sides have an opportunity to present evidence on that. The People have the burden of proving by proof beyond a reasonable doubt that it was, in fact, a real gun. [¶] I do find that an admission by your client that he is a member of a gang coupled with a duly qualified gang expert who tells the jurors about the importance of guns will have meaning to the jury in their discussion of whether this gun was real or not. And I cannot conclude, I cannot conclude that if they hear that, that they're going to use, with a limiting instruction, this gang membership for an

improper purpose. This is not a gang case, and the court feels that, based on the totality of the circumstances, that there is probative value of the defendant's admission as a member of a gang in conjunction with an expert telling the jurors the importance of guns."

There was a discussion about CALCRIM No. 1403, the limiting instruction given to the jury after the close of evidence which instructed that the gang evidence could be used in determining the credibility of witnesses when deciding whether or not the firearm enhancement was true, the court stated: "The defense is going to be arguing that the defendant lied to the police but was truthful to the jury and the reason he lied to the police is because of the reasons he gave that have to do with him convincing them that he was a member of the gang. [¶] So I want to hear from the defense on this because I do find this to be significant. Should the court change [CALCRIM No.] 1403 to read as follows: 'You may consider evidence of gang activity only for the limited purpose of deciding whether the firearm enhancement is true and for the credibility of witnesses'?" Defense counsel responded: "I felt that [defendants]' statements were never an admission. When he was talking about those times he's been stopped out on the streets and essentially harassed, it was because he was not a gang member in the way that the law enforcement has defined it, and – and I thought [defendant] was very clear that how he defined when he said, 'I'm a gang member,' it was not in the aspect of . . . section 186.22, but 'I'm a member of this community and I identify with this gang because I'm a member of this community, and therefore, when I'm in custody, I identify with that gang so I'm housed in a manner that's safe for me and my life is not threatened.'"

"Gang evidence is . . . relevant on the issue of a witness's credibility." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168.) With regard to CALCRIM No. 1403, the *Samaniego* court stated: "The evidence here also supported instructing the jury that it could consider gang evidence on the issue of witness credibility." (*Samaniego*, at p. 1169.)

Nonetheless, we are concerned about the admission of gang evidence in the first place. Despite the fact that gang evidence may be considered on the issue of credibility, had there been no gang evidence, there would have been no need for CALCRIM No. 1403, with or without the added credibility language. Because of the highly inflammatory nature of gang evidence and the emotional bias such evidence often evokes, the prejudicial value of gang evidence in this case so far outweighed its minimal, if any, probative value, we must conclude the trial court erred in admitting gang evidence.

The use of gang evidence here to somehow prove the gun used in these robberies was real and not a replica appears to us to amount to prosecutorial overkill. The record demonstrates the prosecution had substantial evidence about the existence of a real gun. A retail sales consultant at the AT&T store testified defendant held a silver-barreled gun in front of the employees and patrons when he ordered them to the floor. A second sales consultant talked about a large silver revolver. Both a sales representative and a customer described the gun as either black or silver or black and silver. One of the retail sales persons at the store knows something about guns as she owns a .38 special revolver. She said the silver revolver used by defendant was "a little bit larger" than the one she owns. Defendant held the gun four inches from her face, and she said it appeared to be a real gun to her. At one point, defendant nudged her with his gun, and she testified it felt real to her. "The testimony of one witness, if believed, may be sufficient to prove any fact." (*People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508.)

When admission of evidence is erroneous, we evaluate the evidentiary error under *People v. Watson* (1956) 46 Cal.2d 818, 836. Under the circumstances we find in this record which contains overwhelming evidence defendant stole the Toyota Camry, committed the robberies and used a firearm within the meaning of section 12022.53, we conclude it is not reasonably probable the result would have been different had gang

evidence not been admitted. Accordingly, we find the admission of gang evidence in this case to be harmless error.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.