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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.

JOSE CARLOS BONILLA,

Defendant and Appellant.

G050894

(Super. Ct. No. RIF143487)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Richard Todd Fields, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff
and Respondent.

Appellant Jose Carlos Bonilla stands convicted of special circumstances murder for killing Manuel Rosas during the course of a robbery and to further the activities of his gang. Appellant contends his trial was unfair because the prosecution presented evidence he committed a prior uncharged robbery and his gang has ties to the Mexican Mafia. He also argues the trial court erred in admitting into evidence a jailhouse letter he wrote pending trial, and the prosecutor committed misconduct in closing argument by pointing out inconsistencies in defense counsel's theory of the case. Finding appellant's arguments unavailing, we affirm the judgment against him.

FACTS

On Christmas Eve 2007, the day after he was paroled from prison, appellant was involved in a deadly incident at a strip mall in Riverside. Surveillance cameras captured appellant at the mall shortly after five o'clock that evening. He was wearing a white long-sleeved shirt, dark pants and white shoes, and his hair was so short he appeared to be bald. Adrian Murillo, a migrant worker who had been drinking earlier that day, was also at the mall. After buying beer and wiring money to his wife in Mexico, Murillo called his wife from a pay phone.

While Murillo was on the phone, Rosas approached him and asked if he could have one of his beers. Murillo obliged, and Rosas sat down on a short wall behind the pay phone to enjoy what would be his final drink. Two other Hispanic men then came up to Murillo. One of the men was wearing a black hooded sweatshirt and had short, spiky, sand-colored hair. Wielding a knife, he told Murillo he would kill him if he did not give him his money and belongings. Murillo gave the man \$40 and his cell phone. When the man said he wanted more, Murillo turned and ran away. Murillo did not see what the second man was doing or what happened to Rosas.

Kimberly Zamora did. At the time of the incident, 12-year-old Kimberly was sitting in her mother's car, just a few feet away from Rosas. While waiting for her mother to return from a store, she saw the second man approach Rosas. Consistent with

appellant's surveillance photo, the second man appeared to be bald and was wearing a white long-sleeved shirt, dark pants and white shoes. He demanded Rosas' money, but Rosas said he did not have any and turned away. At that point, the man got angry and stabbed Rosas multiple times. He and the other man then ran away as Rosas staggered onto the sidewalk and collapsed. After the police arrived, Rosas was taken to the hospital, where he died later that night. An autopsy revealed he had been stabbed twice in the back and once in the neck and arm.

Murillo and Zamora were unable to identify appellant from any police lineups or at any of the court proceedings in this case.¹ However, there was an abundance of evidence connecting appellant to the crimes. For starters, appellant's appearance in the surveillance photos matched Zamora's description of the stabber. In addition, appellant's then-girlfriend Maria Martinez noticed blood on appellant's shirt and shoes when he visited her soon after the murder. Martinez also noticed appellant had a cell phone with him at that time. When she asked appellant how he had managed to acquire a cell phone so soon after getting out of prison, he told her "he just came upon it from some fool," and he "stabbed the fucking fool just to get his money."

Over the course of the next few weeks, appellant used Murillo's cell phone to call Martinez and his relatives. He also showed Martinez a newspaper article about the stabbing as a way of explaining how he got the cell phone. However, when the police contacted appellant in April 2008, four months after the murder, he denied knowing anything about the stabbing or Murillo's cell phone. He claimed he was home with his mother at the time Rosas was killed.

Appellant's mother told a different story. At first she tried to cover for her son, but eventually she admitted she did not know where appellant was at the time Rosas was murdered. She also admitted appellant had blood on his shoes when he came home

¹ Murillo returned to his home in Mexico after the preliminary hearing and refused to come back for appellant's trial because he was "scared for his life."

that evening. As it turned out, appellant was wearing those very same shoes when the police arrested him in May 2008. The pattern on the sole of those shoes matched three bloody shoe print impressions that were found at the murder scene.

Incident to appellant's arrest, the police found various items in his residence connecting him to Arlanza 13, a Riverside gang that claims the territory where Rosas was murdered, and whose primary activities include robbery and assault. A gang expert for the prosecution testified appellant's gang moniker is "Crook" and his alleged crimes benefited Arlanza 13 by enhancing the gang's reputation for violence. Testifying to the contrary, a gang expert for the defense opined the crimes were committed solely for the perpetrator's personal benefit.

In closing argument, defense counsel contended appellant was merely an innocent bystander in the wrong place at the wrong time. While conceding appellant was present during the crimes, defense counsel argued they were carried out by appellant's friends without appellant's assistance.

The jury rejected this theory. It found appellant guilty of first degree murder, robbery, attempted robbery and active participation in a criminal street gang. (Pen. Code, §§ 187, subd. (a), 211, 664/211, 186.22, subd. (a).)² It also found true special circumstances allegations appellant committed the murder during the course of a robbery and to further the activities of his gang. (§ 190.2, subds. (a)(17), (22).) In addition, the jury found appellant acted for the benefit of his gang, personally used a deadly weapon in committing the murder and the attempted robbery, and had suffered a prior serious felony conviction as well as a prior strike conviction. (§§ 186.22, subd. (b)(1), 12022, subd. (b), 667, subds. (a), (c), (e)(1), 1170.12, subd. (c)(1).) The prosecution sought the death penalty, but the jury deadlocked on the issue of punishment, so appellant was sentenced to life in prison without the possibility of parole.

² Unless noted otherwise, all further statutory references are to the Penal Code.

DISCUSSION

Admissibility of Prior Uncharged Robbery

Appellant contends the trial court abused its discretion and violated his due process rights by admitting evidence he committed a prior robbery. We disagree.

The subject robbery occurred at a Wal-Mart in Arlanza 13's claimed territory on Christmas Eve 1999, exactly eight years before the present case arose. That night, security guard Mark Pendleton saw appellant shoplift some razors from the store. When Pendleton confronted appellant in the parking lot, appellant took off running, and Pendleton chased him until they reached the street. At that point, appellant stopped and pulled a knife on Pendleton. He then asked Pendleton if he wanted to get stabbed and gestured toward him with the knife. However, Pendleton and his partner forcibly detained appellant and turned him over to the police. After waiving his Miranda rights, appellant admitted stealing the razors and pulling a knife on Pendleton, but he denied trying to stab anyone. He said pulled the knife for his own protection because he did not know who Pendleton was or why he was chasing him.

In seeking to exclude this evidence, appellant argued it was irrelevant and unduly prejudicial. However, relying on *People v. Jones* (2011) 51 Cal.4th 346 (*Jones*), the trial court determined the Wal-Mart robbery was indicative of appellant's intent to commit the charged robbery offenses. The court also found the evidence was relevant to show appellant's knowledge of his gang's criminal activities, which was an element of the gang charges. (See § 186.22, subd. (a).) In instructing the jurors, the trial court limited their consideration of the Wal-Mart robbery to these two issues and emphasized the robbery was not a reflection of appellant's character or criminal disposition.

As appellant correctly notes, Evidence Code section 1101 generally prohibits evidence of a defendant's uncharged conduct to prove his conduct on a specific occasion or his propensity for criminal activity. (Evid. Code, § 1101, subd. (a).) But such evidence may be admitted if it is relevant to establish a material fact in the case,

such as motive or intent. (*Id.*, subd. (b).) While evidence of uncharged conduct may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by its prejudicial effect, the trial court has considerable discretion in making this determination. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405.) In fact, rulings made under Evidence Code sections 1101 and 352 will not be disturbed on appeal unless they are arbitrary, capricious or patently absurd. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

Appellant does not dispute the Wal-Mart robbery was relevant to prove he was aware of his gang's criminal activities. However, he argues the robbery was not indicative of his intent to steal from Rosas or Murillo, which is the other purpose for which the robbery was admitted. Appellant's argument is based on the factual circumstances surrounding the Wal-Mart robbery. While conceding he used a knife in that robbery, appellant contends he did so only for purposes of effectuating his escape, not to take property that did not belong to him, i.e., steal. But at the time appellant pulled his knife on security guard Pendleton, he was carrying merchandise he had just taken from Wal-Mart. So, one could reasonably infer that in using the weapon, appellant was not just trying to get away from Pendleton, he was trying to get away from Pendleton *with the recently stolen loot*.

This is the key factor under *Jones*. Even though the Wal-Mart robbery was factually dissimilar to the present crimes in many ways, "Evidence that [appellant] intended to rob [Pendleton] tended to show that he intended to rob [Murillo and Rosas] when he participated in the [charged] crimes. This made the [Wal-Mart] evidence relevant on that specific issue[.]" (*Jones, supra*, 51 Cal.4th at p. 371.)

Appellant suggests his intent was irrelevant because he did not dispute that issue at trial. However, "[t]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." [Citation.]" (*Jones, supra*, 51 Cal.4th at p. 372.) Therefore, even though

appellant effectively conceded the issue of intent, that does not mean the issue was off the table. The People were well within their rights in presenting evidence of the Wal-Mart robbery in order to prove appellant harbored the requisite mental state to support the present charges. (*Ibid.*)

And even though the Wal-Mart robbery probably consumed a little bit more time at trial than the prior robbery at issue in *Jones* did, the evidence regarding the Wal-Mart robbery was presented relatively quickly, “and the parties did not dwell on it. The [Wal-Mart] robbery was not particularly inflammatory when compared with the horrendous facts of the charged crimes. [And] [t]he court instructed the jury on the proper purpose for which it could consider the evidence, which we presumed the jury followed. [Citation.]” (*Jones, supra*, 51 Cal.4th at p. 371.) For all of these reasons, we uphold the trial court’s decision to admit the evidence regarding the Wal-Mart robbery. The decision did not constitute an abuse of discretion or undermine appellant’s right to a fair trial.

Evidence about the Mexican Mafia

Appellant also claims the trial court violated his right to a fair trial by admitting evidence his gang has ties to the Mexican Mafia. This contention also fails.

The subject evidence came in through the prosecution’s gang expert James Simons, who testified to the characteristics of Hispanic criminal street gangs in general and appellant’s gang in particular. Over appellant’s objection, Simons explained the “13” in Arlanza 13 stands for the 13th letter of the alphabet, M, which signifies the Mexican Mafia. He said the Mexican Mafia operates out of prison and controls all of the Hispanic gangs in Southern California. In its role as an umbrella organization, the Mexican Mafia “taxes” these gangs by taking a percentage of their spoils. Given this taxing system, Simons opined appellant was not only a member of Arlanza 13, but a “soldier” for the Mexican Mafia, as well. And if appellant refused to pay his taxes to the Mexican Mafia, his disobedience would likely be met with violent consequences.

Appellant argues this evidence was irrelevant because there was no evidence the Mexican Mafia was specifically involved in or benefited from the crimes alleged against him in this case. However, Simons' testimony about the Mexican Mafia was not designed to prove that organization had a direct hand in or derived any particular benefit from Rosas' murder. Rather, it was intended to show appellant's motive for confronting Rosas and the intent behind his actions. Simons' testimony suggested appellant wasn't just out to get money for himself, but that he was motivated on a deeper level to appease his bosses in the Mexican Mafia. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 223 (*Albarran*) [gang evidence may be used to prove a material fact in the case, such as motive or intent].)

Gang evidence, particularly references to the Mexican Mafia, can become unduly prejudicial if they are used for improper purposes. For example, in *Albarran, supra*, the court condemned the gang expert's testimony about the Mexican Mafia where "[t]he paramount function of this evidence was to show Albarran's criminal disposition — a fact emphasized in the prosecutor's closing argument[.]" (*Albarran, supra*, 149 Cal.App.4th at p. 228.) But in our case, the prosecutor did not use Simons' testimony about the Mexican Mafia to prove appellant had a propensity for criminal conduct. In fact, as appellant readily admits, the prosecutor did not mention that testimony at all in his closing argument. Its only use was to show appellant had a need for money over and above that of most people. Under these circumstances, we do not believe the testimony was improper or unduly prejudicial. Appellant has failed to show the relatively brief testimony about the Mexican Mafia deprived him of due process or rendered his trial unfair.

Admissibility of Jailhouse Letter

Appellant fares no better on his claim regarding the admissibility of a letter that was found in his jail cell pending trial. Although appellant contends the letter was

highly prejudicial and misused by the prosecutor, we do not believe it is cause for reversal.

Written by appellant to one of his fellow gang members, the letter is four pages long. The jury, however, was only exposed to a few snippets of the letter, through the testimony of gang expert Simons. Appellant's argument here is limited to a single passage in which he recalled an apparent robbery. In the passage, appellant wrote, "Hey remember that day when I got that black dude for that cash? Ay fool, that shit was straight up G-rated, que-no?" Simons explained the term "G-rated" means gangster-rated. Asked how that reference and appellant's reference to getting cash affected his opinion as far as Arlanza 13's primary activities were concerned, Simons testified, "It's obvious to me that [appellant] jacked this guy for his cash, robbed him, like the gangsters of Arlanza are known for." Defense counsel objected to this testimony as calling for speculation, but the court overruled the objection. At that point, the court also instructed the jury the subject passage was not being admitted for its truth; rather, it was admissible only for the limited purpose of establishing the basis for Simons' opinions.

When the admissibility of the passage was litigated before trial, appellant's primary objection to it was that, as originally written, it referred to appellant's robbery victim as a "nigger." Recognizing the obvious prejudicial impact of that word, the court ordered the prosecutor to find a neutral substitution for it, and he came up with the term "black dude," which defense counsel conceded was satisfactory. Appellant argues the passage should have been excluded altogether because it was still irrelevant and unduly prejudicial. However, the passage was relevant to the gang charges in several respects. Not only did it show appellant's allegiance to Arlanza 13 and his willingness to put in work for the gang, it also proved Arlanza 13's primary activities and appellant's knowledge of the same. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) While appellant asserts the passage lacked relevancy because it did not contain any information as to when he took the victim's cash, this argument goes to the weight, not

the admissibility, of the passage. We do not believe the trial court abused its discretion in allowing Simons to rely on the passage in forming his opinions about the case.

Appellant also contends the prosecutor misused the passage by inviting the jury to use it for its substantive truth, i.e., to show appellant had previously committed a robbery. The point is well taken because even though the trial court admitted the letter for the limited purpose of establishing the basis for Simons' opinions, the prosecutor implored the jurors in closing argument to "believe what [appellant] wrote" in the letter. In defending the comment, the Attorney General submits the prosecutor was simply trying to establish appellant's commitment to his gang and to show the present crimes were gang related for purposes of the gang charges. In fact, respondent correctly notes that, in arguing the significance of the letter, the prosecutor reminded the jurors they had "heard expert testimony" from Simons on those very issues, which arguably linked the letter to its proper function, which was to provide foundational evidence for the gang charges.

But while that may have been the prosecutor's intent, we think it unlikely that is how the jury actually perceived his argument. Rather, we think the jury would have been more inclined to take the prosecutor's words at face value and literally "believe" the information that was contained in the letter. This is a close call, to be sure, but the phrasing of the prosecutor's argument leads us to conclude he went a little too far in terms of arguing the significance of the letter.

The challenged argument is not cause for reversal, however. Appellant did not object to the argument or request any sort of curative admonishment from the court. (*People v. Wilson* (2008) 44 Cal.4th 758, 800 [claims of prosecutorial misconduct are generally waived absent a timely and proper objection in the trial court].) And more importantly, the prosecutor's brief reference to the letter in closing argument could not have materially prejudiced appellant because other properly admitted evidence firmly established appellant had committed robbery in the past (see discussion of the Wal-Mart

robbery above) and appellant was a member of a criminal street gang that specialized in that crime. It is simply not reasonably probable appellant would have obtained a more favorable result had the prosecutor refrained from making the challenged remark.

(People v. Watson (1956) 46 Cal.2d 818.)

Remarks Regarding Appellant's Theory of the Case

Lastly, appellant contends the prosecutor undermined his right to a fair trial by arguing his defense was fabricated and untrue. We do not see it that way.

During his opening statement, defense counsel told the jury appellant was wrongly implicated as the person who murdered Rosas. Counsel suggested the evidence would show the murder was actually carried out by appellant's half-brother, who is known as "Negro." However, the evidence at trial did not support that theory. So, in closing argument, defense counsel changed tack and pinned the murders on two of appellant's friends. While conceding appellant was present at the murder scene, counsel argued he was merely an innocent bystander, not an active participant in the crimes.

Addressing this change of course, the prosecutor told the jury in his closing argument, "Think about how this has changed since [defense counsel's] opening statement. [In defense counsel's] opening statement, he told you Negro did it. He got up here and said Negro . . . was . . . the stabber That's what his theory was at that point. He looked you all in the eye and said, this was Negro. Negro did this.

"Now, he gets up here and says there's three people. Negro wasn't there, and it was some guy in a white shirt I didn't talk to you at all about in opening statements. [¶] The thing about the truth, it doesn't evolve or []change, ever. It stays the same. Not like [defense counsel's] theories; not like his attempts. It doesn't change. The truth remains consistent. [¶] I told you what happened in opening statements. The evidence played out that way. I told you in closing argument. It stayed the same, because that's what happened. It doesn't have to change, because it's the truth. It's not

evolving, trying to fit with what [defense counsel] wants it to fit, and that's the reality of it.”

Returning to this theme later in his argument, the prosecutor asserted the evidence against appellant was so overwhelming “the defense has had to flip in what they're doing. They've had to change completely. [¶] The truth doesn't flip. The truth is a straight line and stays a straight line. And the truth is that he's guilty of all charges.”

Appellant construes the prosecutor's argument as “a direct and unequivocal attack on defense counsel's integrity[.]” He contends it was improper for the prosecutor to disparage defense counsel for changing theories and to hold himself out as the “sole purveyor of the truth.” He also claims the jurors would have reached a different result if the prosecutor had focused on the facts of the case instead of “lambasting” defense counsel for his tactical decisions.³

In so arguing, appellant asserts the prosecutor's remarks are “virtually indistinguishable” from those found to be improper in *People v. Pantages* (1931) 212 Cal. 237. But in that early case, the prosecutor did not just point out defense counsel had failed to present certain evidence he had promised in his opening statement, he argued defense counsel *knew* he was not going to be able to present that evidence at the time he promised to do so. In other words, the prosecutor accused defense counsel of intentionally manipulating the trial process to get unproven allegations before the jury. (*Id.* at p. 243.) To make matters worse, the trial judge indicated his approval of the prosecutor's remarks when defense counsel objected to them. (*Id.* at p. 242.) Under these circumstances, the *Pantages* court found “the prejudicial effect on the substantial rights of the defendant becomes apparent.” (*Id.* at p. 245.)

³ Although appellant did not object to the prosecutor's arguments in the trial court, we will review his claims because he contends his attorney was ineffective for failing to do so. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 93-94.)

In contrast to what happened in *Pantages*, the prosecutor in our case did not accuse defense counsel of intentionally lying to the jury about what the evidence would show. Instead, he simply highlighted the fact defense counsel had been forced to change arguments after failing to present evidence in support of his initial theory of the case, which is an entirely proper thing to do. (*People v. Pantages, supra*, 212 Cal. at p. 245.) While prosecutors generally may not accuse defense counsel of fabricating a defense, they have wide latitude in terms of pointing out the deficiencies in opposing counsel's tactics and factual accounts. (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) Viewing the prosecutor's comments as a whole, it is not reasonably likely the jury would have construed them as a personal attack on defense counsel's integrity as opposed to a legitimate criticism of defense counsel's failure to present evidence in support of a particular theory he offered in his opening statement. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1217; *People v. Harris* (1989) 47 Cal.3d 1047, 1085, fn. 19.) The comments did not constitute misconduct.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.