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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER ALFONSO BARRAGAN,

Defendant and Appellant.

H039096

(Santa Clara County

Super. Ct. No. C1114503)

Defendant Javier Alfonso Barragan appeals his conviction, following a jury trial, of second-degree murder (Pen. Code, §§ 187, 189)¹ and a gang enhancement (§ 186.22, subd. (b)(1)(C)). Defendant argues there was insufficient evidence for the jury to convict him of second-degree murder. Defendant also contends the trial court abused its discretion by admitting evidence of a prior juvenile adjudication and by not bifurcating trial of the murder charge from the gang enhancement. For the reasons stated here, we will affirm the judgment.

I. TRIAL COURT PROCEEDINGS

Maurillo Garcia was stabbed repeatedly shortly after 10:00 p.m. on August 27, 2011 by a group of men at the intersection of Ezie Street and Richdale Avenue in San Jose and later died. The jury heard two versions of the murder at defendant's trial. According to the victim's brother Jose Garcia, he and Maurillo were at their sister's birthday party on August 27 at a residence on Sawtooth Court near Ezie

¹ Unspecified statutory references are to the Penal Code.

Street and had each drank several beers. After Maurillo did not come back from having “a smoke” outside, Jose went to look for him and found Maurillo lying on the ground in the middle of Richdale Avenue. Maurillo was still alive when Jose found him but was bleeding badly and could not speak. Jose remained by his brother’s side until the paramedics arrived and took the victim away in an ambulance. Jose stated that the area was a Norteño gang neighborhood and that his brother was a member of the Sureño gang. Jose denied visiting the residence at 452 Ezie Street (across the street from Richdale Avenue) and also denied seeing anyone attack his brother.

Salvador Rivas presented a different version of the murder, testifying that on the evening of August 27 he was playing pool in the garage of 452 Ezie Street, which is across the street from where Richdale Avenue terminates at Ezie Street. According to Rivas, Jose Garcia stopped by the curb in front of the house and Rivas’s father invited Jose in for a beer around 10:00 p.m. Rivas looked out the open garage door a few minutes later and saw someone “tagging ... the[] stop sign in front of my house.” When Rivas asked Jose Garcia who the person was, Jose responded: “[D]on’t mind him. It is just my brother. He’s drunk.” Rivas then saw five or six men approach Maurillo Garcia. One of the men tripped him as Maurillo tried to run away and the group proceeded to “beat[] him down” At some point during the incident Rivas heard someone yell “Norte” and “get him.” Jose approached the group holding a cue stick but remained on the periphery until the group left. The group ran toward the house at 436 Ezie Street and drove away in a gray Cadillac. Rivas stated that “a group of guys ... would always be” at 436 Ezie Street smoking and hanging out but that he was not sure if the assailants were “the same group of guys.” Additionally, according to Rivas the street was “basically clear” of people and objects before Maurillo Garcia began spray-painting. San Jose Police Officer Jason Kidwell responded to the scene at 10:33 p.m. and saw Maurillo Garcia lying in the street “with [a] large amount of blood coming out of him,” and with Jose Garcia holding Maurillo’s head. Jose was “[p]anicking, yelling” for the police to

save his brother. Kidwell secured the scene, another officer tended to the victim, and paramedics eventually arrived to take the victim away.

In the early morning of August 28, San Jose Police Officer Patricia Bowers, a homicide investigator, arrived at the scene and cataloged evidence along with another investigator. Near the location of the stabbing, the officers found a cellular phone and beer cans. One of the beer cans, People's exhibit 11, was a "few feet" from the blood stains marking the former location of the victim's body.

Bowers then went to 436 Ezie Street, where she seized other evidence including another beer can, People's exhibit 30, which was next to a fire hydrant in front of the property. Officers searched the house based on the probation search condition of one of the residents. Bowers noted that the house was "filthy" and that there was a Huelga bird flag, described as "an Aztec design of an eagle that was used by the [Cesar] Chavez labor movement."

On August 31, 2011, a police officer found a gray Cadillac at an apartment complex south of the crime scene near the intersection of Monterey Road and Edenvue Road. Police had the car towed and, when inventorying the interior, located information linking the car to a man named Tommy Gonzalez. That same day police arrested David Martell, who owned the cellular phone left at the crime scene.

On September 9, 2011, police arrested defendant after he stole beer from a convenience store. Police seized defendant's cellular phone noting its number, and took a buccal swab for DNA analysis. On September 15, San Jose Police Officer Juan Vallejo interviewed defendant, who was approximately 5 feet 11 inches tall, weighed 250 pounds, and had long black hair extending at least six inches below his shoulders. Defendant also had a tattoo of a woman on his arm, which he described as "all Aztec work" Vallejo informed defendant that police had found his fingerprints on a beer can at the scene of the homicide but defendant denied any knowledge of, or involvement

with, the killing. Defendant admitted membership in the Norteño gang but claimed he was inactive.

Defendant was charged (along with David Martell and Juan Ramirez) by information in January 2012 with murder (§ 187); an enhancement for committing murder for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)); and a prior strike allegation based on a juvenile adjudication for attempted murder (§ 667, subds. (b), (d), (e).) The court granted the People's pretrial motion to sever defendant's trial from that of his codefendants and determined that defendant's trial would commence first. The court also heard a defense motion in limine under Evidence Code section 352 to exclude evidence of defendant's prior juvenile adjudication for attempted murder, which the prosecution intended to use as a predicate offense for the gang enhancement. The court denied the motion, explaining that the evidence was "highly probative" because it was relevant to show both defendant's membership with the Norteño gang and his specific intent to commit the murder for the benefit of that gang. The court also denied defendant's request to bifurcate the trial on the murder charge from trial on the gang enhancement, reasoning that "the intertwining of the charge itself as well as the gang enhancement is unavoidable particularly given the alleged motive being almost entirely gang-related"

The case proceeded to jury trial in June 2012. In addition to testimony consistent with the preceding factual summary, other testimony is relevant to this appeal. Dr. Joseph O'Hara, a forensic pathologist who performed an autopsy on the victim, testified as an expert witness regarding the cause of death. He noted the victim had the following tattoos: "Sur," "V-S-T," "13," and "Barrio." He opined that the victim's death was caused by multiple stab wounds. The victim sustained 15 stab wounds in various areas of his body including his head, chest, and abdomen. The wounds were of varying depths with some up to five inches deep. Based on the injuries, O'Hara stated it was

probable that more than one knife was used in the assault. The victim also suffered blunt force trauma.

Two individuals who lived at 436 Ezie Street in August 2011 testified. Raymond Gonzalez, Jr. testified that on August 27 he left the house around 7:00 p.m. for an event in Oakland and did not return until 2:00 a.m. on August 28. When he left for Oakland that night, defendant, who Gonzalez, Jr. knew only as “Dough Boy,” was at the house. Dough Boy had spent the night a few times at the house with Gonzalez, Jr.’s brother Tommy Gonzalez.

Raymond Gonzalez III (the son of Gonzalez, Jr.), who had also testified at defendant’s preliminary hearing, testified at trial but was uncooperative. Gonzalez III testified that he was 14 in August 2011 and was on felony probation at the time. He acknowledged that his grandmother, who also lived at 436 Ezie Street, owned a gray Cadillac. He was unable to recall any details regarding the night of August 27 and could not identify defendant as having been present that night. The prosecutor confronted Gonzalez III with his preliminary hearing statements, where he had testified that five guys had come over and hung out on the night of August 27, 2011, but Gonzalez III maintained that he could not remember. He also could not remember making prior statements to the police that the five individuals were Norteño gang members. Finally, Gonzalez III acknowledged that he and his family had been moved by the prosecutor to another county in October 2011 as part of a witness protection program but that the family was later dismissed from the program for breaking program rules.

San Jose Police Homicide Investigator Merlin Newton testified regarding Gonzalez III’s prior statements to police. Newton first interviewed Gonzalez III in the early morning of August 28, 2011. At that time, Gonzalez III told him he saw five “Northerners” who were with him in front of the house at 436 Ezie Street “go after” the victim and then jump into a “black Mercedes” and flee. The group of guys had arrived around 8:30 or 9:00 p.m. that night and included one nicknamed “Big Tone” who

Gonzalez III described as: 5 feet 8 inches tall; 180 pounds; Hispanic; about 27 years old; with long black slicked back hair; a black Mercedes; and a tattoo of a woman on his arm (later described as “an Aztec woman”).

Newton stated that he interviewed Gonzalez III again on September 12, 2011 and asked him if he recognized several photographs of males generally meeting the descriptions he had previously provided. From those pictures, Gonzalez III identified David Martell as one of the assailants. According to Newton, when shown a picture of defendant, Gonzalez III said Big Tone “kind of” looked like the picture, “but that is not him. He’s big like that, but he’s a little darker.” Newton treated that as a positive identification of defendant because he said gang associates often provide a physical description of a suspect but will not actually identify the individual when presented with a picture “because they can go back to the community ... and say, No, they showed me his picture, but I didn’t say it was him”

San Jose Police Detective Chris Gridley testified as a gang crimes expert. Regarding the Norteño gang, he opined that they meet the Penal Code section 186.22, subdivision (f), definition of a criminal street gang and that they are associated with the color red, the number 14, the letter “N,” the Nuestra Familia prison gang, the Huelga bird, the San Francisco 49ers, and Aztec imagery. Their main rivals are the Sureños, who are associated with the color blue, the number 13, the letter “M,” and the Mexican Mafia prison gang. Gridley classified the neighborhood where the homicide occurred as a Norteño neighborhood based on the presence of Norteño graffiti in the area. He stated that a Sureño gang member spray-painting Sureño graffiti in a Norteño neighborhood in front of a group of Norteños would be “a huge form of disrespect,” making retribution likely.

Regarding the gang affiliations of the victim and defendant, Gridley stated that the victim was a Sureño based on his tattoos, the blue bandana he was wearing when he was killed, and that he spray-painted “Sur” and “XIII” on the ground before being attacked.

Gridley opined that defendant was a Norteño based on his admission of Norteño ties to the police, his tattoos, his association with known Norteño gang members, and his prior juvenile adjudication for attempted murder with a Norteño gang enhancement. His tattoos included the following: “San Ho”; “N”; a girl wearing a sombrero with “East Side” written on it; “X4” on his right hand; and a Huelga Bird.

Gridley opined that the murder was committed for the benefit of the Norteño gang because reacting forcefully to Sureño activity in the neighborhood would demand respect and confirm that the Norteño gang controlled that neighborhood. Gridley also discussed evidence from five other criminal cases as evidence of predicate offenses related to the Norteño gang, including defendant’s juvenile adjudication for attempted murder. The other four predicate gang offenses included convictions for assault with a deadly weapon and felony vandalism.

The prosecution presented circumstantial evidence to connect defendant to the homicide. Elaine Campoy, an expert in fingerprint identification, testified that defendant’s fingerprints matched those found on two beer cans: People’s exhibit 11, found a “few feet” from the location of the attack, and People’s exhibit 30, found in front of 436 Ezie Street. Jeremiah Garrido, an expert in DNA identification, testified that defendant’s DNA matched DNA on those same beer cans as well as People’s exhibit 32, another beer can found near 436 Ezie Street.

In addition to the fingerprint and DNA evidence, the prosecution presented evidence related to defendant’s cellular phone records. According to records obtained from defendant’s cellular phone provider, defendant ceased using a previous number and activated a new number on August 28, 2011, the day after the homicide. Those records also disclosed numerous text messages between defendant’s phone and a cellular phone owned by David Martell both before and after the homicide. Police were able to map the approximate locations of calls made by defendant. Between 8:00 and 10:00 p.m. on August 27 defendant made several calls through three cellular phone towers near the

crime scene. At 10:34 p.m. that night, defendant made a call through a cellular tower south of the crime scene near where the police eventually found the gray Cadillac.

Among the court's instructions to the jury was CALCRIM No. 1403, titled "Limited Purpose of Evidence of Gang Activity": "You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related allegation and/or the defendant had a motive to commit the crimes charged. [¶] 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."

The jury convicted defendant of second-degree murder and found true the gang enhancement. Defendant waived jury on the prior strike allegation and the court found it true. Defendant was sentenced to a total of 40 years to life, consisting of 30 years to life for the murder plus a 10-year consecutive term for the prior strike enhancement.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE MURDER CONVICTION

Defendant claims "the evidence presented was insufficient to prove beyond a reasonable doubt that he participated in the attack on Maurillo Garcia which resulted in Maurillo's death." Specifically, defendant notes that the People only presented circumstantial evidence supporting the conclusion that he participated in the attack and that the evidence was insufficient to support the jury's conclusion because two or more reasonable conclusions could be drawn from the evidence.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We will affirm a conviction if “ ‘ “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ [Citations.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 224, original italics.) In cases based on circumstantial evidence, if a jury “can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, [the jury] must accept the one that points to innocence.” (CALCRIM No. 224.) Importantly, however, on appeal “ ‘ “[i]f the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citation.]” (*People v. Bean* (1988) 46 Cal.3d 919, 933 (*Bean*).)

Defendant argues “the only evidence that implicated [defendant] in Maurillo’s murder was the presence of his fingerprints on some beer cans at or near the scene; the fact that he had made and received phone calls to or from Martell and Ramirez on the day of the murder and the day after, and the fact that he has a tattoo of a woman on his arm.” His argument minimizes the importance of that evidence.

Discussing the evidence in the order presented by defendant, police found defendant’s fingerprints and DNA on beer cans in the vicinity of the crime scene. Police found a beer can with defendant’s fingerprints (People’s exhibit 11) a “few feet” from where the victim was attacked. Given that Salvador Rivas testified that the street was “basically clear” before the attack, People’s exhibit 11 supported an inference that defendant participated in the attack. Defendant’s fingerprints and DNA evidence on beer cans found at 436 Ezie Street provide further support for defendant’s presence in the vicinity of the homicide on August 27.

Regarding the cellular phone records, in addition to showing that defendant made calls to David Martell and Juan Ramirez, the records showed that he was near the crime

scene in the time period leading up to the attack and that shortly after the attack he made a call in the vicinity of where the gray Cadillac was later recovered. Additionally, the evidence showed that defendant activated a new cellular phone number on August 28, just one day after the homicide at which David Martell left his cellular phone. That cellular phone evidence reasonably supports an inference that defendant participated in the homicide and then changed his cellular phone number after realizing he might be identified based on calls made to Martell's phone.

As for the tattoo on defendant's arm, at trial the prosecution argued that defendant was the person with the nickname of Big Tone who Raymond Gonzalez III described to homicide investigator Newton as: 5 feet 8 inches tall; 180 pounds; Hispanic; about 27 years old; with long black slicked back hair; a black Mercedes; and a tattoo of "an Aztec woman" on his arm. At the time of his arrest in September 2011, defendant had a tattoo of a woman on his arm but was actually 5 feet 11 inches tall and weighed 250 pounds. When shown a picture of defendant, Gonzalez III said the picture was not the person he knew as Big Tone, explaining Big Tone was "big like that, but he's a little darker." Even though Gonzalez III said the picture of defendant was not Big Tone, homicide investigator Newton testified, without objection, that he treated Gonzalez III's statements as a positive identification of defendant because gang associates often provide a physical description of a suspect but will not actually identify the individual when presented with a picture. The jury could reasonably credit homicide investigator Newton's testimony and treat Gonzalez III's statements as an identification of defendant. That inference is reasonable when considered with the cellular phone records placing defendant in the general vicinity of the crime scene and Raymond Gonzalez, Jr.'s testimony that defendant was at the 436 Ezie Street house around 7:00 p.m. on August 27.

Considered in the light most favorable to the judgment, the foregoing circumstantial evidence could lead a reasonable trier of fact to decide that the only

reasonable conclusion to be drawn from the evidence was that defendant participated in the killing of the victim on August 27. Because the evidence reasonably justified the jury's decision, defendant's conviction was supported by sufficient evidence.

(*Bean, supra*, 46 Cal.3d at p. 933.)

B. ADMISSION OF DEFENDANT'S ATTEMPTED MURDER JUVENILE ADJUDICATION

Defendant contends the trial court abused its discretion by denying his motion in limine under Evidence Code section 352 to exclude evidence of a juvenile adjudication against defendant for attempted murder for the benefit or in association with the Norteño gang. Alternatively, defendant claims the admission of that evidence violated his Fourteenth Amendment due process rights by rendering his trial fundamentally unfair.

To prove the gang enhancement alleged against defendant, the prosecution had to show that defendant committed the murder “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) In order to show that the Norteño gang was a “criminal street gang” within the meaning of section 186.22, the prosecution had to “prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period. (§ 186.22, subs. (e) and (f).)” (*People v. Gardeley* (1996) 14 Cal.4th 605, 617, italics omitted.)

The prosecution proffered expert testimony by Officer Gridley and introduced five predicate offenses, one of which was defendant's juvenile adjudication. The trial court denied defendant's motion in limine under Evidence Code section 352 to exclude his juvenile adjudication, reasoning that its potential for prejudice did not substantially

outweigh its probative value as it was relevant to show both defendant's membership with the Norteño gang and his specific intent to commit the murder for the benefit of that gang. Defendant contends the trial court abused its discretion.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As the California Supreme Court has explained, while evidence of a prior offense is "inherently prejudicial," Evidence Code section 352 calls for exclusion "only when its probative value is *substantially* outweighed by its prejudicial effect." (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*), original italics.)

When evidence is introduced to show participation in a criminal street gang, its probative value is high because, unlike evidence introduced under Evidence Code section 1101, subdivision (b), to establish an intermediary fact, evidence of a gang-related offense "provides direct proof of several ultimate facts necessary to a conviction." (*Tran, supra*, 51 Cal.4th at p. 1048, italics omitted.) These ultimate facts include "direct evidence of a predicate offense, that the defendant actively participated in the criminal street gang, and that the defendant knew the gang engaged in a pattern of criminal gang activity." (*Ibid.*) Thus, "the use of evidence of a defendant's separate offense to prove a predicate offense should not generally create 'an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." ' [Citation.]" (*Ibid.*) Finally, in *Tran* the court rejected an argument that the evidence of defendant's prior offense was 'cumulative' of other evidence available to the prosecutor. (*Ibid.*) The court reasoned that while "[t]he prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute[,] ... the prosecution cannot be compelled to " "present its case in the sanitized fashion suggested by the defense." ' [Citation.]" (*Id.* at p. 1049.)

Defendant's arguments are similar to those rejected in *Tran*. His juvenile adjudication is inherently prejudicial and this prejudice is increased because it involved attempted murder, which is almost the same charge as the murder charge he faced in this case. However, the evidence was also highly probative because it was the only predicate offense involving defendant. Compared with the predicate offenses involving other individuals, defendant's juvenile adjudication was the most probative regarding defendant's knowledge of, and association with, the Norteño gang, which was necessary to show defendant had the specific intent "to promote, further, or assist in any criminal conduct by gang members" when taking part in the murder. (§ 186.22, subd. (b)(1).) Given its highly probative nature, the trial court did not abuse its discretion in concluding its probative value was not substantially outweighed by its prejudicial effect.

Defendant's claim that his juvenile adjudication was merely cumulative evidence, relying on *People v. Leon* (2008) 161 Cal.App.4th 149 (*Leon*), is unpersuasive. The *Tran* court distinguished *Leon*, stating "that case considered only if the evidence was admissible under Evidence Code section 1101, subdivision (b), governing admission of 'other crimes' evidence to prove an intermediary fact" while evidence supporting a section 186.22 active participation charge or gang enhancement is "admitted to prove an ultimate fact necessary for conviction." (*Tran, supra*, 51 Cal.4th at p. 1049, fn. 3.) Even setting aside that distinction, *Leon* is factually distinguishable because in that case the prosecution had ample other evidence to support Leon's gang activity, including: 12 contacts between Leon and the police related to gang activity, Leon's admission of gang membership, presence of a gang tattoo, and frequent association with other gang members. (*Leon*, at p. 166.) Unlike Leon, defendant's record of gang involvement was not so expansive as to make the juvenile adjudication " 'merely cumulative regarding an issue that was not reasonably subject to dispute.' [Citation.]" (*Id.* at p. 169.)

Our decision that the trial court did not err in admitting defendant's juvenile adjudication also disposes of his Fourteenth Amendment due process claim that the

admission rendered the trial fundamentally unfair. (Citing *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [rejecting facial due process challenge to Evidence Code section 1108].) Defendant bases his argument on “all the reasons set forth in the previous section” and does not show how this evidence was so prejudicial as to make his entire trial fundamentally unfair. His argument is particularly unpersuasive in light of CALCRIM No. 1403, by which the jury was instructed to “consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related allegation and/or the defendant had a motive to commit the crimes charged, ... [¶] 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” Because the trial court did not abuse its discretion in admitting the evidence and also properly instructed the jury regarding the limited purpose for which it could be considered, we find no due process violation.

C. REQUEST TO BIFURCATE MURDER COUNT FROM GANG ENHANCEMENT

Trial courts have discretion to bifurcate determination of the truth of an enhancement from determination of guilt for the charged offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*)). In cases involving a gang enhancement, “evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*Id.* at p. 1049.) “To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (*Id.* at pp. 1049–1050.) Defendant had the burden to “ ‘clearly establish that there is a substantial danger of prejudice requiring that the

charges be separately tried.’ ” (*Id.* at p. 1050, quoting *Bean, supra*, 46 Cal.3d at pp. 938–939.)

We find no abuse of discretion in the trial court’s implicit conclusion that defendant did not meet his burden. The trial court explained that “the intertwining of the charge itself as well as the gang enhancement is unavoidable particularly given the alleged motive being almost entirely gang-related” Evidence of defendant’s gang affiliation was highly probative because it helped establish a motive for the attack. The gang expert testified that a Sureño gang member spray-painting in a Norteño neighborhood would be perceived as highly disrespectful and would make retribution or retaliation likely. As the gang enhancement was closely related to the charged offense and the evidence of gang membership was independently admissible at trial, the trial court did not abuse its discretion in denying defendant’s request for bifurcation.

III. DISPOSITION

The judgment is affirmed.

Grover, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Márquez, J.

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