

Filed 1/27/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE PARTIDA,

Defendant and Appellant.

B161356

(Los Angeles County
Super. Ct. No. TA061403)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Hon. Arthur M. Lew, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and
Appellant

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters,
Supervising Deputy Attorney General, Laura J. Hartquist, Deputy Attorney General, for
Plaintiff and Respondent.

STATEMENT OF THE CASE

An information was filed in the Los Angeles County Superior Court charging appellant with one count of murder in violation of Penal Code section 187(a).¹ The following enhancements were also alleged: (1) personally and intentionally discharging a firearm which proximately caused great bodily injury and death within the meaning of section 12022.53, subdivision (d); (2) personally and intentionally discharging a firearm within the meaning of section 12022.53, subdivision (c); and (3) personally using a firearm within the meaning of section 12022.5, subdivision (a)(1) and 12022.5, subdivision (b). Appellant pled not guilty and denied the special allegations.

During a trial by jury, the allegations that appellant personally and intentionally discharged firearm causing great bodily injury and death was found true. Appellant was convicted of first-degree murder.

Appellant was sentenced to 25 years to life for the murder and a consecutive 25 years to life for the enhancement, for a total of 50 years to life in prison. Appellant was ordered to pay a restitution fine of \$10,000 pursuant to section 1202.4, subdivision (b). A parole revocation fine of \$10,000 was stayed pending successful completion of parole pursuant to section 1202.45. Appellant received 381 days of custody credit. Appellant timely appeals from the judgment.

STATEMENT OF FACTS

On August 11, 2001, Dominic Barboa was killed as he, Jesse Moreno, Evette Mendoza and Eric Mendoza ordered food at the Tacos El Unico taco stand. While at the taco stand, located at the corner of Glencoe Street and Long Beach Boulevard, the group

¹ All further undesignated statutory citations are to this code.

noticed a green van exit the parking lot onto Long Beach Boulevard. Appellant, the passenger in the van, tried to get Moreno's attention. Appellant then spoke to the driver of the van, and then asked Moreno, "Where are you from?" Moreno and Barboa turned around and told appellant, "We don't bang." Appellant responded, "I'm from USV, Unos Sin Verguenza." The van then left and did a U-turn on Glencoe.

After Barboa went to get his food, he sat facing Long Beach Boulevard, while Moreno sat on the guardrail with his back toward Long Beach Boulevard. While Barboa and Moreno began to eat, Evette remained standing, afraid and wanting to leave. Evette saw appellant approaching on foot down Long Beach Boulevard toward Moreno with a gun in his hand. When appellant pointed the gun at Moreno, Moreno attempted to jump the guardrail, but was blocked because Barboa was in the way. Instead, Moreno ran in the other direction toward the parking lot. After falling between two tables, Barboa got up and began to run, along with Evette and Eric. As appellant pointed the gun at Moreno and shot, he said, "Fuck you. I'm from USV, Unos Sin Verguenza." After Moreno fell to the ground, both Barboa and Evette ran towards him.

Moreno died from two gunshot wounds to his back. Los Angeles County Sheriff deputies, including Richard Tomlin, arrived at the scene, and found shell casings in the area. After Detective Tomlin inquired at the Sheriff's station about USV, he went to the area of Bennett Street and Long Beach Boulevard where he observed tagging on several apartment buildings. USV was written on one wall with an arrow pointing down along with several monikers, including the name "El Stalker."

Detective Tomlin later found information documenting appellant as "El Stalker," and included his photograph along with five other similar looking individuals. From this six-pack of photographs, Barboa reluctantly identified appellant as the shooter. Barboa circled appellant's picture and wrote "His The Shooter" and signed his name. After admitting that he did not want to be a snitch, at trial, Barboa testified that he randomly circled the photograph and was told what to write next to the picture. When Evette was

shown the photographs, she also circled appellant's picture and signed her name and wrote, "I know it's him. I remember his face."

On August 21, 2001, appellant and a female juvenile were arrested in appellant's mother's van. A handgun was recovered from the female juvenile, which was later determined to be the gun that fired the shell casings found at the crime scene.

One prosecution witness was Detective Richard Valdemar, a 31-year member of the Los Angeles Sheriff's Department. Prior to his testimony, defense counsel objected to his testimony on the grounds that it was more prejudicial than probative and that the testimony was cumulative. The objection was overruled and significant testimony regarding gangs was admitted. At first, Detective Valdemar testified as to his experience and qualifications as a gang witness. He detailed various work assignments over a 16-year period that brought him into contact with major crimes and with gangs, including prison gangs, the Mexican Mafia and the Brown Beret Organization.

Regarding graffiti, Valdemar testified "I call it the newspaper of the street. By reading graffiti gang members are able to tell who is prominent in that community and by carefully reading it and seeing whose marking the graffiti out you can tell who's in conflict with them and who are their allies and what the current squabbles may be. [¶] I also know the gang members' nicknames and sometimes their alliances with prison gangs." As between various gangs, graffiti can also be "a marking out of territory and often an act of disrespect."

After seeing photograph of graffiti in the area of the crime he testified that USV means *Those Without Shame* or *Ones Without Shame*. A mark of "USV 13" would mean a southern gang associated with the Mexican mafia. Examining a photo showing "USV 13", "Hood" and an arrow pointing to the ground, Valdemar opined this meant the gang is claiming the particular point as their neighborhood. An additional photo showing initials and nicknames was identified as follows: "I would say that was a roll call. . . . A roll call is a list of names that are associated with that gang and probably with the [clique]

of that gang which would be a subdivision of the gang.” Since he was not familiar with this particular graffiti he assumed it meant that a new gang was coming into the territory.

Asked about how gangs acquire territory, Valdemar answered, “Well, first of all, they will try to claim as much territory as they can get away with and then they’ll hope to recruit more members and make the gang larger so they can claim more territory.” He was next asked how gangs recruit new members, to which he responded, “They sometimes use coercion to get members, but most of the time they attract their members. They consider themselves elite and so they try to draw members to themselves by establishing their power, their influence within the community, their respect.”

The next series of questions developed the issue of reputation and respect, as it exists within the gang culture. “How does a gang or gang members gain . . . influence and power and respect?” was answered: “Their definition [of respect] is fear and that’s how they gain respect. [¶] . . . [¶] So they try to establish this fear, this ability to commit crime and violence on the street and that is in their opinion producing respect.” When the District Attorney asked, “When gangs commit crimes, the more crimes they commit the more enhancement they have for their reputation?” Valdemar answered, “Yes, sir.” He described the types of crimes that enhance a gang’s reputation could vary “completely from sniffing paint or graffiti or with a murder. But the more noteworthy crimes that draw the most attention to the gang are the crimes of violence.” The District Attorney then asked “So the more violent the crimes, the more they’re respected, the more they’re feared?” The answer was “Yes, sir.”

The enhancement of respect “would make their enemies reluctant to challenge them for fear that they would be overcome by the stronger gang. [¶] It also enhances their ability to offer protection to people who might want to join their gang. It also helps them enforce the regulations in their culture against snitching and other things that they consider violations of their code of conduct.” Further, the enhanced respect for the gang “makes the community reluctant to do their civic duty of reporting the violations of crime and it makes them fearful of being a witness, even being a victim in recording and

identifying gang members.” A snitch was defined “[i]n their culture a snitch is anyone who cooperates with law enforcement. That person is marked for death.”

Detective Valdemar also testified regarding the process by which members of Hispanic gangs acquire their monikers. He testified that in Hispanic gangs, members are given name by older members of the gang when they first come in. “and so names like **stalker**, killer, psycho, sniper – those are names to be especially mindful of. That would mean in the gang’s eyes these people have the potential to be especially violent.”

[Emphasis added.]

At the conclusion of this testimony, the District Attorney posed the following hypothetical:

“Let’s assume that we have this person who admits that he is a gang member from USV and has admitted to a deputy sheriff that he is, and he has indicated that his moniker is Stalker. [¶] . . . [¶] And this person in this hypothetical – this person . . . is in a van with another individual. They drive through a taco restaurant or taco stand where there is an outdoor patio and they contact a group of individuals, more or less and 18 year-old male Hispanic, 16 year-old male Hispanic, 16 year-old female Hispanic and a 12 year-old male Hispanic and this person, Stalker, says to the individuals – primarily to the₂ male individuals – this 18 year-old and this 16 year-old, ‘where you from’

[¶] . . . [¶]

“After that is said the individual says ‘we’re not – we’re from nowhere. We don’t gang bang’ or ‘we don’t gang,’ and then . . . Stalker says, ‘this is USV, Unos Sin Verguenza,’ then drives away. [¶] Several minutes later the same individual, Stalker, then comes walking up to those individual and as he’s walking up with a gung in his hand says, ‘fuck you’ or ‘fuck.’ This is USV

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In the middle of the hypothetical, the District Attorney stopped and asked, “What does *where you from* mean? Valdemar answered “[w]here you from?” in the gang culture is a challenge. It’s a rhetorical question. There is no correct answer. [¶]. . . [¶] If they ask you that type of question in the gang’s mind or the person’s mind who’s asked you that question, he has already formed the opinion that you look like a gang member or you might be a gang member so he’s asking you to either say ‘yes’ and claim your gang or do what is shameful and rank out which means you deny you’re a member of the gang.”

Unos Sin Verguenza.” As he starts shooting the individual in the back as the individual is running – the victim is running.”

“First of all, when this person, this hypothetical person, Stalker, shouts out the name while he’s shooting – what does that do to the gang, if anything?”

Detective. Valdemar answered, “He’s making sure that the victims and any bystanders know that it is a gang related crime; that he’s claiming that territory. [¶] It’s also a second challenge to the person who might have denied gang membership. You know, he’s saying, ‘here’s my gang’ and the person again has an opportunity to claim his own gang or show cowardice and run.” The District Attorney next asked whether there was any significance to the fact that the shooter in the hypothetical did not hide his face. The answer was: “Yes sir, the person who commits the crime while not disguised has some esteem placed upon that act -- the brazen act of doing it that way, and he also claiming affiliation when he’s going to claim it as a gang killing.

The District Attorney’s final question in this area was “Finally sir, hypothetically, this person is arrested a week or so later after this incident. With this person, Stalker, is a female juvenile, and when they are both contacted . . . there are no weapons found on Stalker. However, on the female juvenile there’s a gun found that evidence shows was used by Stalker in the earlier shooting I had just mentioned to you. Detective Valdemar explained, “In my experience many times the females carry the weapons since they’re less likely subject to pat down searches.”

APPELLANT’S CONTENTION

Appellant contends that his due process rights were violated by the admission of inflammatory gang evidence.

DISCUSSION

Waiver

A defendant who fails to raise an objection at trial may waive his right to have that objection considered on appeal. In this case, we have the option to decline to review the claim of whether appellant's due process rights were violated by the admission of inflammatory gang evidence because the defendant failed to raise it at trial. (*People v. Johnson* (1967) 254 Cal.App.2d 119.) Evidence Code section 353 states, "[a] verdict . . . shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears on record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion" California courts have reasoned that such an objection is necessary to "alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." *People v. Williams* (1998) 44 Cal.3d 883, 906.)

Requiring a timely objection to evidence also ensures that the court has a chance to remedy the situation before any prejudice accrues. (*People v. Boyette* (2002) 29 Cal. 4th 381.) Even if an objection is timely, it still will not be considered on appeal unless it is also proper. In *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, the court held that inadmissible hearsay can become competent evidence where the party opposing its introduction fails to raise a proper objection. An improper objection may include the failure to state the correct ground, objecting on different grounds than advanced in trial, or lacking specificity in objecting. When the plaintiff's counsel in *Mosesian* chose the incorrect grounds for attacking Dr. Whaley's hearsay statements, the reviewing court could not consider the claim. (*Ibid.*)

Although she did not object on the basis of a due process violation, appellant's counsel made it clear throughout the trial that she objected to the admission of the expert gang testimony. She attempted to exclude the evidence by requesting a Evidence Code

section 402 hearing, renewing her objection prior to opening statements, and objecting prior to the prosecution's gang expert testifying. If appellant's due process rights were not violated, the appellant argues in the alternative that the defense attorney provided ineffective assistance of counsel by not preserving this federal constitutional issue.

People v. Coddington (2000) 23 Cal.4th 529, 651-652 held that in order "[t]o establish constitutionally ineffective assistance of counsel under either the state or federal constitutional right to counsel, appellant must demonstrate (1) . . . that counsel's performance . . . did not meet the standard to be expected of a reasonably competent attorney, and (2) that he suffered prejudice as a result of that failure. Prejudice [can be] established if there was a reasonable probability that, absent counsel's errors, the result would have been different. [Citations.]"

Expert Gang Testimony

Appellant contends that because there was no gang allegation in this case and because the victim was not a gang member, evidence of appellant's gang affiliation was not relevant and was highly prejudicial. Appellant argues:

"In the instant case, the gang expert's testimony about the criminal activities committed by Hispanic gangs, particularly its goal of committing violent acts in order to instill fear in the populace and thus gain respect was more prejudicial than probative. . . . However, the prosecutor went beyond the evidence to prove that appellant, by virtue of his name, 'Stalker,' and the reputation of Hispanic gangs in general, did not just commit murder, but did so to solidify his reputation as someone to [be] feared by everyone in the community. The prosecutor essentially sought to prove that appellant was not just guilty of murder, but of being a terrorist in the streets."

Appellant's trial counsel objected continuously to the admission of gang evidence in this case. The arguments started with an Evidence Code section 402 hearing on the admissibility of the evidence. The prosecution's theory was that the gang evidence

would help to show the motive for the murder. He also argues that the evidence was important to show identity and helped to prove premeditation.

After considering the arguments, the trial court permitted evidence of gang graffiti in the area, evidence of appellant's gang membership and statements about his gang activity into evidence to show motive. Immediately prior to opening statements, appellant's defense attorney renewed her objection to any gang evidence and the objection was again overruled.

A further objection was raised prior to the prosecution's gang expert. The denial of this motion is the basis for the appeal. Appellant contends that admission of this evidence was a violation of appellant's due process. At trial, trial counsel argued that the evidence was both cumulative and more prejudicial than probative.

Appellant argues, "[a]s soon as the irrelevant and inflammatory evidence about Hispanic gangs and their propensity for violence and other intimidating activities came in, it was impossible for appellant to get a fair trial. (*McKinney* [*v. Rees* (9th. Cir. 1993)] 993 F.2d 1378; [*People v.*] *Maestas* [(1993)] 20 Cal.App.4th 1482."

The respondent's position at trial and argument in this appeal is that:

"The trial court properly admitted evidence of the gang expert, as the evidence was relevant to prove appellant committed first-degree murder (§187, subd. (a)) and did so due to his suspicion that Moreno was a member of a rival gang, to claim that area as USV territory, and to enhance 'respect' for the gang in that neighborhood. As noted by the court, an explanation was necessary for the jury to understand appellant's motive for the shooting, namely why appellant would ask Moreno where he was from, why he would shout his gang name while committing the shooting, and why appellant would want to shoot Moreno. The jury would not have understood what 'where you from' meant, or the meaning and relevance of the tagging in the area, without a gang expert explaining gang culture generally, the significance of gang graffiti, and the meaning being the words appellant used. . . . The significance of the gang graffiti, i.e., an act of claiming gang territory, combined with the fact that appellant confronted Moreno and Barboa shortly before the shooting, and that appellant shouted 'USV' both before and during the shooting, showed he was contemplating and planning violent confrontation to establish the neighborhood as USV territory. . . . The fact that

appellant [was] contemplating and planning a violent confrontation was relevant to show Moreno's murder was intentional and premeditated.”

For these reasons, respondent argues that the evidence was “highly relevant to prove appellant guilty of first degree premeditated murder rather than the lesser included offense of second degree murder.” Respondent also argues that “the testimony was limited to only the gang evidence that was necessary to explain the meaning of certain evidence to the jury and to provide the jury with needed information regarding gang culture.”

Respondent also argues that, even if admission of the evidence was erroneous, the error was harmless. The respondent's rationale is that even without the gang evidence, the remaining evidence provided substantial evidence to support the jury's verdict. Respondent notes that the jury had already heard testimony concerning appellant's gang affiliation. This evidence came from the testimony of Evette, testimony from Deputy Aguilar of appellant's admission of gang membership and his moniker. Further, evidence of USV and “El Stalker” tagging in the area had already been admitted into evidence. As a result “the testimony of the gang expert served to explain the gang evidence, but was no more inflammatory than the evidence already presented as to appellant's gang affiliation.” Respondent argues that the gang evidence showed that appellant was contemplating and planning violent confrontation to establish the neighborhood as USV territory. The fact that he was contemplating and planning a violent confrontation was relevant to show Moreno's murder was intentional and premeditated.

The California Supreme Court held in *People v. Williams* (1997) 16 Cal.4th 153, 196, “we have without question permitted police to provide expert testimony regarding gangs.” It is well settled that the prosecution may “introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) “[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial

effect, and wide latitude is permitted in admitting evidence of its existence.” (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85; see *People v. Beyea* (1974) 38 Cal.App.3d 176, 195.) Indeed, “the decision of a trial court to admit expert testimony will not be disturbed on appeal unless a manifest abuse of discretion is shown.” (*People v. Roberts* (1992) 2 Cal.4th 271, 298.)

Moreover, “[i]n general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’” (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506; see Evid. Code, § 801, subd. (a).) The admission of expert testimony has been upheld when used to educate the trier of fact “concerning territory, retaliation, graffiti, hand signals, and dress.” (*Valdez* at p. 506.) “The subject matter of the culture and habits of criminal street gangs” meets the “criterion” for admissibility of expert testimony under Evidence Code section 801. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

Although we agree with the general propositions regarding the admissibility of gang testimony, we agree with the appellant that in this case the trial court’s admission of voluminous gang expert testimony was in error. Keeping in mind the fact that evidence of gang affiliation had already been received through the testimony of other witnesses and the fact that no gang allegation was made in this case; we find the testimony of Detective Valdemar to be both cumulative and more prejudicial than probative. The testimony of the gang expert went well beyond what was necessary to support the offer of proof given by the prosecution. The testimony of the gang expert may have been useful to explain the meaning of the graffiti and the meaning of the “where you from” greeting. But, as described above, much more about the operations of gangs was received into evidence.

Relevant evidence is that which goes to prove or disprove a material issue in dispute in the litigation. Some understanding of gang actions was relevant in this case and as a result certain of the gang evidence was undoubtedly admissible. Without an

appropriate gang context to explain the murders in the present case, the killings would appear inexplicable. The victims did nothing to provoke the shooting by appellant. They were unarmed and merely standing in the fast food restaurant when they were killed. Neither victim knew appellant, and appellant had apparently never met the victims before he killed them. Although appellant's "gang membership and [his] gang activities were prejudicial to a certain degree, the evidence was highly relevant to the prosecution's theory of how and why" the victims were killed. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; see *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.)

The trial court however, allowed the testimony of the gang expert to go far beyond the relevant and allowable portion. We specifically find the admission of the following testimony was error: The testimony, 1) that a gang gained influence, power and respect through fear and that to establish fear, they commit crime and violence; 2) that the more crimes a gang committed, the greater their reputation was enhanced; 3) that the more violent the crime, the more the gang was feared and therefore "respected" because it made a gang's enemies reluctant to challenge them; 4) the testimony the gang's violent behavior prevents "snitching" because witnesses were reluctant to report crimes, testify as witnesses, to identify gang members; and 5) the testimony that a "snitch" is marked for death.

The gang testimony cited above is highly prejudicial evidence and was at best only marginally relevant to any disputed issue in this case. While motive is always relevant, it is not an element of the crime and the balance between probative and prejudicial was tipped toward prejudicial due the volume and inflammatory nature of the gang expert's testimony. We also disagree with respondent that this evidence would go to prove the element that Moreno was contemplating and planning a violent confrontation and therefore the murder was intentional and premeditated. Respondent's brief did not adequately articulate how this evidence would go to establish Moreno's mental state beyond a reasonable doubt and we do not independently find the connection. This highly

prejudicial evidence regarding the violent behavior of gangs went well beyond proving the motive for Moreno to shoot the victim in this case, or his mental state in doing so.

This analysis may have proceeded differently had there been an actual gang allegation in this case. However, since the prosecution elected not to make that allegation, this extensive testimony about gang culture was admitted in error.

The trial court's erroneous admission of the evidence, however, does not require reversal unless it is reasonably probable appellant would have obtained a more favorable outcome had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Even if the trial court ruling was erroneous, respondent argues that the error was harmless. Our analysis of the impact of the error centers on the gang expert testimony is described above.

Nevertheless, the evidence in this case was strong. There was convincing evidence of appellant's guilt absent the expert testimony. There was eyewitness testimony of the identity of the shooter. It was undisputed that the shooter passed the victims in a van and then returned on foot with the weapon and shot the victim in the back as he fled the scene. The weapon used in the shooting was found in the possession of appellant's companion one week after the incident. We also found relevant and admissible the portion of the gang evidence which explained the "where are you from" challenge delivered to the victim. Also relevant was the testimony regarding the significance of new gang graffiti in a neighborhood. In light of this evidence, we cannot say it is reasonably probable that exclusion of the objectionable portion of the expert gang testimony would have resulted in a more favorable verdict for appellant. Any error, therefore, was harmless.

DISPOSITION

The judgment is affirmed.

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COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.