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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL - SECOND DIST.

FILED

DIVISION THREE

NOV - 8 2019

THE PEOPLE,

Plaintiff and Respondent,

v.

THEODORE JUSTIN BOWERS,

Defendant and Appellant.

B289443

DANIEL P. POTTER Clerk

(Los Angeles County
Super. Ct. No. TA142434)

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Modified and affirmed with directions.

Law Office of Corey Evan Parker and Corey Evan Parker for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Theodore Justin Bowers guilty of, among other crimes, assault with a semiautomatic firearm and found true gun and gang allegations. On appeal, he contends that the trial court improperly excluded evidence of his mental illness, there was insufficient evidence to support the gang allegation, his trial counsel provided ineffective assistance, and the trial court should have granted his mistrial motion. We reject these contentions but remand due to sentencing error.

BACKGROUND

I. The crimes

On December 4, 2016, Bowers was at a Denny's restaurant in Carson. He was "[g]angbanging on" customers, asking where they were from, throwing gang signs, and saying this was his hood. The victim was also at Denny's. Bowers made crass comments to the victim, prompting her to record Bowers with her phone. Bowers told her he didn't "give a fuck" about being recorded, and "[l]et these niggas know, nigga." Bowers began throwing gang signs and claiming, "East Side Blocc Crips, 190." He repeatedly used the terms "[c]uz" and "Crip." Bowers pointed a semiautomatic gun at the victim and pulled the trigger, but the safety was on.

The victim's friend was waiting outside. When the victim's friend came in to see what was taking so long, the victim told her about Bowers. Upset, the victim's friend confronted him. During their ensuing argument, Bowers repeatedly called the victim friend cuz. Saying he would pull a gun on whomever he chose, he pointed it at the victim's friend. Bowers's companion managed to get him into a car. As they drove off, Bowers fired about five shots out of the window.

A few months later, law enforcement found, hidden in Bowers's home, loose rounds and a gun magazine loaded with live ammunition.

The parties stipulated that Bowers had a prior felony conviction.

II. Gang evidence

At the time of the incident at Denny's, Bowers had a gang tattoo, three dots tattooed on his hand. In March 2016, Bowers admitted to a deputy sheriff that he is a 190 East Coast Crip (East Coast Crips) gang member.

The People's gang expert, a deputy sheriff, testified about gangs generally and the East Coast Crips specifically. Generally, reputation is important to a gang, and its members enhance the gang's reputation by creating fear in the community. Gang members therefore brag about the gang and commit crimes for the gang. Crips commonly use cuz in the same way one would say "hey, what's up, bro?"

The East Coast Crips had 135 to 150 members in December 2016. Its members traditionally wear blue. The gang has a hand sign symbolizing 190. Its primary activities are robberies, assaults, assaults with deadly weapons, vandalism, possessing firearms, and burglaries. The Denny's where the crimes occurred is in the gang's territory. In the deputy's opinion, Bowers is a gang member. Based on a hypothetical question modeled on the facts of this case, the deputy opined that such crimes, including the gun possession, were committed to promote and further the gang.

III. Verdict and sentence

A jury found Bowers guilty of possessing a firearm as a felon (Pen. Code,¹ § 29800, subd. (a)(1); count 5); felon in possession of ammunition (§ 30305, subd. (a)(1); count 6); and assault with a semiautomatic firearm (§ 245, subd. (b); counts 7 & 8).² As to counts 7 and 8, the jury found true personal gun use allegations (§ 12022.5, subd. (a)). As to counts 5, 7, and 8, the jury found true gang allegations (§ 186.22, subd. (b)(1)(C)).

On March 9, 2018, the trial court sentenced Bowers to six years on count 7, plus four years for the gun allegation and 10 years for the gang allegation. As to count 8, the trial court sentenced Bowers to two years, plus one year four months for the gun allegation, plus three years four months for the gang allegation. The trial court imposed a concurrent sentence of two years on count 5 and the same on count 6.

DISCUSSION

I. Exclusion of mental illness evidence

The trial court excluded evidence of Bowers's mental health, which he contends violated his constitutional right to present a complete defense. We disagree.

The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324.) Although this right

¹ All further statutory references are to the Penal Code.

² The information charged two counts of assault with a firearm (§ 245, subd. (a)(2); counts 1 & 2) as lesser offenses to counts 7 and 8. A criminal threats charge (§ 422, subd. (a); count 3) was dismissed.~(1CT 5, 134-5)

can be abridged by rules of evidence that infringe on the weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve, the ordinary rules of evidence generally do not impermissibly infringe on the accused's right to present a defense. (*Id.* at pp. 324, 326–327; *People v. Lucas* (2014) 60 Cal.4th 153, 270.)

Here, evidence of Bowers's mental illness was irrelevant to the substantive crimes, as they were general intent crimes. (See *People v. Thiel* (2016) 5 Cal.App.5th 1201, 1209.) However, it was relevant to the gang allegations, because those require specific intent. (See *ibid.*) Even so, Bowers failed to comply with the trial court's order regarding admitting evidence of his mental health. At a pretrial hearing, the defense said it would call a doctor, who evaluated Bowers's competency to stand trial, to testify as to Bowers's mental health. The trial court found that the evidence was irrelevant due to the nature of the charges but told counsel to come to sidebar if the evidence became relevant. Thereafter, while cross-examining the People's gang expert, defense counsel posed a hypothetical question based on the incident but added that the gang member suffered from a mental health issue. The trial court admonished counsel that he had been ordered not to mention the issue of mental health without first asking for a sidebar.

As this shows, the trial court did not absolutely preclude counsel from admitting the evidence. The trial court merely ordered counsel to make a proper showing at sidebar. Defense counsel violated that order by asking the gang expert a hypothetical question that assumed the defendant was mentally ill. When the trial court admonished counsel about violating its order, counsel did not then make an offer of proof that he had

evidence relevant to rebut the specific intent necessary to prove the gang allegation, an issue counsel had never specifically raised.

Moreover, when counsel asked his question, no evidence of Bowers's mental health had been introduced. Therefore, a further offer of proof was necessary. We may not reverse a judgment for even the erroneous exclusion of evidence unless the substance, purpose, and relevance of the excluded evidence was made known to the court. (*People v. Anderson* (2001) 25 Cal.4th 543, 580–581; see *People v. Ramos* (1997) 15 Cal.4th 1133, 1171 [counsel must press for definitive ruling to preserve error].) Indeed, the only evidence of Bowers's mental health in the record was submitted with his posttrial sentencing memorandum. A forensic psychiatrist examined him before trial. He found that while Bowers was competent to stand trial, he had significant mental health and substance abuse issues. "His mental health would be a mitigating factor, though his inability to discuss the case in a rational manner made pursuing that difficult." Given that the focus of the report was Bowers's competency to stand trial and that it alluded to Bowers's mental health as a mitigating factor but did not otherwise connect it to his ability to form specific intent, an offer of proof was warranted.

The issue is therefore forfeited. And, given this conclusion, Bowers's due process challenge fails as well. (See *People v. Partida* (2005) 37 Cal.4th 428, 436.) Although the record does show that Bowers may have had a mental health issue, nothing connected it to an inability to form a specific intent to commit the gang allegation or any other potentially relevant issue before the jury. We therefore cannot conclude that any error so deprived

Bowers of his right to present a defense that his constitutional rights were violated.

II. Sufficiency of the evidence of the gang allegation

Next, Bowers contends that the true finding on the gang allegation must be reversed because there was insufficient evidence to support it. The standard to determine whether the evidence was sufficient to sustain a gang enhancement is the same as whether to sustain a criminal conviction. We review the record in the light most favorable to the judgment to determine whether it contains substantial evidence, defined as 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. Albillar* (2010) 51 Cal.4th 47, 59–60.) We presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Section 186.22, subdivision (b)(1), imposes additional punishment for a “person who is convicted of a felony committed 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.” The enhancement requires the prosecution to establish two things: first, the crime was gang related and, second, it was committed with the aforementioned specific intent. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.)

There is overwhelming evidence Bowers is a gang member who committed the crimes to benefit his gang. Months before the crimes at issue, Bowers admitted his membership to law enforcement. The Denny’s where Bowers committed his crimes is in East Coast Crips territory. On the day at issue, Bowers was

challenging the potential gang membership of other customers while boasting about his own gang affiliation. When the victim took umbrage at Bowers's remarks and began recording him, he intimidated her by throwing gang signs, claiming East Coast Crips, and repeatedly calling her cuz and saying Crip. This evidence directly connected to the expert's testimony that a gang member enhances his gang's reputation by bragging about it and by committing crimes.

Bowers, remarkably, characterizes this as "very little evidence" of his gang membership. He refers to the testimony of a deputy sheriff who, although a lead investigator for the East Coast Crips for 15 years, had never encountered Bowers, and to another deputy sheriff's testimony that he did not see any gang tattoos on Bowers. This evidence in no way contradicts the evidence cited above. Even if it did, we may not reweigh evidence and reverse a judgment simply because the circumstances can be reconciled with a contrary finding. (*People v. Brown* (2014) 59 Cal.4th 86, 106.)

Bowers next likens this case to *People v. Ramon* (2009) 175 Cal.App.4th 843. The defendant in *Ramon* drove a stolen vehicle and possessed an unregistered gun. The only evidence supporting the alleged gang enhancement was a gang expert's testimony that the defendant and his codefendant were members of the same gang, were in their gang's territory, and the car and gun could be used to further gang activities. (*Id.* at pp. 848–849.) *Ramon* found this insufficient to establish the gang allegation. In contrast, evidence to support the gang allegation came from Bowers's own mouth in multiple ways: Bowers admitted his gang membership to law enforcement shortly before the crimes. Bowers then told everyone inside Denny's where he was from:

East Coast Crips. When the victim pushed back against his aggressive behavior, Bowers responded by claiming his gang and assaulting her with a gun. Thus, this case is more like *People v. Margarejo* (2008) 162 Cal.App.4th 102, 105, where the defendant led police on a car chase defiantly throwing gang signs the entire time, rather than like *Ramon*.

III. Ineffective assistance of counsel

Bowers contends his trial counsel provided ineffective assistance by, first, failing to introduce evidence Bowers was voluntarily intoxicated, and, second, failing to move for a mistrial after the People failed to produce surveillance footage from Denny's. However, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) We defer to trial counsel's reasonable tactical decisions, and there is a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Bowers's first claim of ineffective assistance rests on trial counsel's failure to elicit evidence Bowers was intoxicated. A Denny's security guard testified at the preliminary hearing that Bowers appeared to be drunk or high at the time. The guard also smelled alcohol on Bowers. Defense counsel did not elicit that evidence at trial.

Nonetheless, a defendant is entitled to an instruction on voluntary intoxication "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'"

(*People v. Williams* (1997) 16 Cal.4th 635, 677.) In *Williams*, no such instruction was warranted where the evidence was just that the defendant was “‘spaced out.’” (*Ibid.*) Here, even if the security guard’s testimony at the preliminary hearing would have been sufficient evidence of intoxication, there was no evidence any intoxication resulted in Bowers’s inability to form the specific intent required for the gang allegations. (See *People v. Olivas* (2016) 248 Cal.App.4th 758, 771.) Indeed, the evidence is to the contrary. Bowers responded to the victim’s refusal to answer his questions and her recording him by threatening her with gang challenges and pulling out a gun. These deliberate reactions demonstrate a specific intent to intimidate the victim using his gang status and force.

Second, Bowers argues that his counsel should have asked for a mistrial upon learning that the prosecution had failed to produce surveillance footage from the front lobby of Denny’s. The issue came up during the deputy’s testimony, when he referred to the video. Upon learning that the deputy had not produced the video, the trial court ordered him to do so immediately. Although the trial court said it would entertain a mistrial motion, defense counsel did not make one. Noting that the video contained no exculpatory evidence, the trial court instructed: “Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose the video of the interior entry of the Denny’s within the legal time period. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of the late discovery.”

Given this instruction, defense counsel was not ineffective for failing to pursue a mistrial. A mistrial will only be granted if any prejudice cannot be cured by an admonition or instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) It is the rare case in which the merits of a mistrial motion were so clear that counsel's failure to make the motion would amount to ineffective assistance. (*Ibid.*) Although the trial court here said it would entertain a motion for mistrial, it is unlikely in the extreme it would have been granted. The video was not exculpatory, as highlighted by the defense's decision not to play it for the jury. True, the video might have helped defense counsel identify witnesses, but given the overwhelming evidence of the assaults, it is not clear that witnesses could have provided exculpatory evidence. Thus, the instruction was the proportionate response to the discovery violation. (See, e.g., *People v. Verdugo* (2010) 50 Cal.4th 263, 289.) Counsel was not ineffective for failing to seek the more extreme remedy of mistrial.

IV. Denial of mistrial motion

The trial court interrupted defense counsel during his closing argument, which Bowers claims prejudicially interfered with his Sixth Amendment right to counsel. The interruptions occurred when defense counsel argued in closing that an assault with a deadly weapon did not occur because Bowers did not pull the trigger.³ At a sidebar, the trial court admonished counsel that one need not pull the trigger to complete an assault with a firearm. The mere act of pulling out a gun constituted the assaultive behavior. Back in front of the jury, the trial court said

³ In fact, the victim testified that Bowers did pull the trigger but the safety was on.

that counsel misspoke, and that the crime did not require defendant to pull the trigger. Counsel nonetheless repeated his argument that pointing gun, “in and of itself, cannot be an assault.” The trial court sustained the prosecutor’s objection, struck the misstatement of law, and told jurors to take a break. Outside of the jury’s presence, the trial court and counsel continued discussing whether the mere act of pulling a gun out and pointing it constitutes an assault. At the end of the sidebar, counsel moved for mistrial because the interruption in his argument prejudiced his client’s case. The trial court denied the motion, noting that the stoppage was due to counsel’s misstatement of law and her obligation to correct him. The trial court called the jurors back in, but then immediately recessed from 11:33 a.m. to 11:51 a.m. During that recess, the trial court gave counsel case authority for its position. Defense counsel renewed his mistrial motion, stating that “at this point it’s over a 30-minute delay.” After denying the motion, the trial court apologized to the jury for the delay, saying it’s “my fault” and that it was ensuring the instructions were correct.

The trial court was correct on the law. Assault occurs when the defendant commits an act that by its nature will probably and directly result in injury to another. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) To complete the crime, it is not even necessary to point the gun at the victim. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) The mere act of “presenting a gun at a person who is within its range” or “any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another” is sufficient to constitute an assault. (*People v. McMakin* (1857) 8 Cal. 547, 548.) Thus,

counsel misstated the law, and the trial court was obligated to correct the misstatement. Counsel therefore is not correct that the trial court deprived him of any constitutional right. Counsel cannot persist in conduct necessitating the trial court's intervention and then fault the trial court for supposedly taking too long to research the law and correct a situation of counsel's making. In any event, the delay was of short duration, apparently about 30 minutes, and the trial court conscientiously, perhaps even graciously, placed the blame for the interruption on its, rather than counsel's, shoulders.

V. Sentencing errors

There are several sentencing errors. Although the jury found the gang allegation true as to count 5, the trial court did not impose a sentence on the enhancement. The People speculate that the trial court would have imposed the midterm on count 5. Bowers speculates it would have stricken the enhancement. We decline to speculate. Remand is necessary so that the trial court can exercise its discretion to impose or to strike the enhancement under section 186.22, subdivision (g). On remand, the clerk of the superior court shall also correct the abstract of judgment to reflect that the trial court imposed a concurrent sentence on count 6 and that the assaults with semiautomatic firearms (counts 7 & 8) are violent felonies. (See *People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence correctable on appeal if facts are undisputed].)

DISPOSITION

The trial court is directed to impose a sentence on the gang allegation in count 5 under Penal Code section 186.22, subdivision (g). We further direct the trial court to modify the judgment reflecting the sentence on count 5 as well as the concurrent sentence imposed on count 6 and that counts 7 and 8 are violent felonies. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.