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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY BANCHON,

Defendant and Appellant.

B186899

(Los Angeles County
Super. Ct. No. BA265029)

APPEAL from judgments of the Superior Court for Los Angeles County,
Rand S. Rubin, Judge. Affirmed as Modified.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney
General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson,
Supervising Deputy Attorney General, and Michael A. Katz, Deputy Attorney
General, for Plaintiff and Respondent.

Defendant and appellant Danny Banchon appeals from a judgment sentencing him to 16 years in prison after a jury found him guilty of assault with force likely to result in great bodily injury, a violation of Penal Code section 245, subdivision (a)(1),¹ and found that he personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a), and that he committed the assault for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). Banchon was tried with two co-defendants, Pedro Hernandez and Eliseo German, both of whom also were found guilty of the assault committed for the benefit of a criminal street gang.² Hernandez and German appealed from the judgments against them, and on June 21, 2006, we affirmed the judgment against Hernandez, and modified and affirmed the judgment against German in Case No. B182673. We now modify and affirm the judgment against Banchon.

BACKGROUND

We previously set forth the facts of this case in our opinion affirming the judgments against Hernandez and German. We repeat that same statement of facts here, with some additional facts relevant to Banchon that were not included in our previous opinion.

During the early morning hours of May 12, 2004, Lawrence Brodbar, who worked in the Los Angeles Times warehouse on Westmoreland Avenue near Cosmopolitan Street in Los Angeles, saw a homeless man, Charles Burst, run into the warehouse yelling, “Call the police.” Two men ran in after Burst and started hitting him with sticks. A third man also came into the warehouse, bleeding and

¹ Further undesignated statutory references are to the Penal Code.

² German also was found to have personally inflicted great bodily injury.

yelling that Burst tried to rob him and had stabbed him. Brodbar went back into his office and called 911. When he came out of his office he saw the first two men dragging Burst out of the warehouse. Brodbar could not identify any of the men involved in the incident.

Sergeant Eddie Solomon was the first police officer to arrive at the scene in response to the 911 call. As he drove north on Westmoreland, he saw a male Hispanic, whom he identified as German, walking south on Westmoreland. When Solomon asked him what was happening, German changed direction and started walking north, where he met up with another man, whom Solomon identified as Hernandez, wearing a bloody T-shirt. Solomon continued to follow Hernandez. He tried to determine whether Hernandez was a victim or a suspect, and whether he needed assistance. When Hernandez continued to walk away, Solomon got out of his patrol car and grabbed Hernandez's T-shirt. Hernandez lowered his head to slip out of the T-shirt, and walked away. Solomon eventually was able to detain Hernandez with the assistance of a security guard. Solomon then called for an ambulance to take Hernandez to the hospital, where he stayed for eight days.

In the meantime, Officer Carlos Diaz and his partner responded to the scene and saw Burst, bleeding from his head, sitting on the sidewalk on Cosmopolitan near Westmoreland, near a makeshift tent. Diaz asked Burst what happened to him. Burst told him that he was asleep in his tent when three male Hispanic "gangsters" started tearing down his tent and hitting him with broken bottles and wooden sticks. He told the officer that he grabbed a knife that he keeps in his tent, stabbed one of the men, and ran across the street to the warehouse to plead for help. He said that the men chased after him, continued to hit him, and then dragged him outside into the street. Diaz looked around the area where Burst was sitting and saw two wooden sticks on the ground, one of which had nails or screws sticking out of it. Diaz secured the sticks and accompanied Burst in an ambulance

to the hospital. Blood was found on the nails or screws. D.N.A. testing showed that the blood matched Burst's blood.

Officer Marco Oropeza and his partner also responded to the scene. When they arrived they saw two male Hispanics running in their direction. When the officers got out of their patrol car and identified themselves, the men started to run away. The officers chased after them and Oropeza saw them run into the Los Angeles Times warehouse. The officers secured the building and called for backup to help search the building. Eventually, Oropeza found the two men, identified as German and Banchon, hiding in the rafters. When German and Banchon came down from the rafters, German was not wearing a shirt, and Banchon was not wearing shoes or socks. Oropeza then climbed into the rafters and recovered a shirt, a pair of shoes, and a pair of socks, all of which had blood stains on them.

Officer Iris Santin also responded to the scene and interviewed Abel and Victor Godinez, who worked in the warehouse. Abel told Santin that he saw two people, who appeared to be nervous and looking for a rear exit, enter the warehouse. He field identified German and Banchon as the two people he saw. Victor told Santin that he saw two male Hispanics run into the warehouse. He said they appeared to be nervous and sweating, and were looking for a place to hide.

Officer Fernando Prieto interviewed Burst in the hospital on the day of the incident. Burst told Prieto that he was attacked by three male Hispanics. He said he was asleep in his tent when he was awakened by someone entering his tent. One of the men yelled at him and hit him in the head with a bottle, and then all three men started hitting him with sticks and other objects. He told Prieto that, fearing for his safety, he grabbed a knife and stabbed one of the men. He was able to break away and ran to the warehouse, where he was beaten again and then dragged outside. Prieto asked Burst whether he knew the men. Burst said he knew they were Rockwood gang members from seeing them in the area and knowing

that the area was Rockwood territory. But Burst told Prieto that he would not identify anyone in court and wanted to “drop the whole thing.” Prieto observed that Burst appeared to have puncture wounds on his hands and arms, among other injuries.

Hernandez, German, and Banchon were charged by information with attempted premeditated murder in violation of section 664/187, subdivision (a), and assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1). As to both counts, it was alleged that all three defendants personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a), and that the offenses were committed 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)(A)). In addition, the information alleged that Hernandez and German had prior felony convictions and prison terms.

At trial, Burst gave a description of the events that was different than the description he gave to Officers Diaz and Prieto. He testified at trial that he was asleep in his tent in the early morning hours of May 12 when he heard loud noises that sounded like someone was trying to knock over his tent. He came out of his tent with his knife and saw two men. One of the men, whom Burst identified as Banchon,³ made a sudden move and Burst stabbed the other man, who was larger and closer to Burst. Banchon then hit Burst once in the head and Burst lost his coordination. The two men “took off” and Burst walked over to the Los Angeles Times warehouse because he was bleeding and thought he needed help. He asked the man who was working at the warehouse to call the police. While Burst was in

³ Burst said that he “presumed” the man was Banchon because Banchon was the smallest of the three defendants.

the warehouse, Banchon returned with another man (not the man Burst stabbed) and did “plastic surgery” on Burst, kicking and hitting him, possibly with sticks or other objects. The third man also came into the warehouse, but he did not participate in the beating; Burst stated that that man never touched him. At some point, Banchon and the other man partially dragged him out of the warehouse and ran away when the police arrived.

Burst testified that he did not remember having any conversation with a police officer at the scene, or with Prieto at the hospital. When questioned about specific statements that Diaz and Prieto reported Burst made to them, Burst said that he either did not make them or did not remember making them and probably did not make them. He specifically denied telling any officer or detective that he knew the area was Rockwood gang territory, and said that he never knew there were any gangs in the neighborhood. But Burst also testified that sometime between the incident and the trial, a male Hispanic who drove a black S.U.V. approached and asked him about the incident, and Burst believed he was a Rockwood gang member. Burst contended at trial, however, that no one ever threatened him about his testimony.

Abel and Victor Godinez also testified at trial and denied making some or all of the statements Officer Santin reported they made. In fact, Victor denied seeing anything or speaking to any police officer at the time of the incident. Although both men testified that no one threatened them about their testimony, they admitted they were aware of some graffiti that was written on the side of the warehouse shortly before the trial started. The graffiti said, “watch your back in court, all of you.” Abel admitted that he felt threatened by the graffiti, but Victor said he was not afraid to testify.

The jury acquitted all three defendants of attempted murder and of attempted voluntary manslaughter as a lesser included offense. It found all three guilty of the

assault count, and found the gang allegation to be true. It also found that Banchon and German personally inflicted great bodily injury on Burst, but found that allegation not to be true as to Hernandez.

The court sentenced Banchon to the midterm of three years on the assault count, plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)), and 10 years for the section 186.22, subdivision (b)(1)(C) gang enhancement, for a total of 16 years. Banchon timely filed a notice of appeal from the judgment.

DISCUSSION

Banchon contends on appeal that: (1) the trial court erred by excluding the testimony of a witness Hernandez sought to call; (2) the trial court abused its discretion by admitting evidence of the graffiti that appeared on the side of the warehouse shortly before trial; (3) substantial evidence did not support the gang allegation; and (4) the trial court improperly imposed two enhancements based upon the jury's finding that Banchon personally inflicted great bodily injury upon Burst. Each of these issues was raised in Hernandez's and German's appeals. Banchon presents no additional facts or law to cause us to resolve those issues differently in this appeal.

A. *Exclusion of Vicki Edwards' Testimony*

Banchon contends the trial court erred by excluding the testimony of Vicki Edwards, a witness Hernandez sought to call. There was no error.

The theory advanced at trial by all three defendants was that Burst was the aggressor in this incident, that Hernandez did not participate in any way in the assault on Burst, and that Banchon and German acted in self defense. Banchon and Hernandez testified at trial that the incident at issue started when they were

attacked by Burst without any provocation, and Banchon and German fought with Burst to try to disarm him after he stabbed Hernandez.

Banchon testified that he and Hernandez were on the sidewalk near Burst's tent, arguing with raised voices, when Burst appeared "out of nowhere" and stabbed Hernandez for no apparent reason. He said that Burst then started swinging the knife at him, so he picked up a stick and used it to try to dislodge the knife from Burst's hand. When he was unsuccessful, German came over and started hitting Burst until Burst fell and dropped the knife. German then dragged Burst to move him away from the knife. Hernandez's testimony was consistent with Banchon's.

After Hernandez testified, his attorney informed the court and prosecutor that he wanted to call a homeless person he had just located, Vicki Edwards, to testify regarding Burst's character. The attorney explained that he expected Edwards to testify that Burst was very aggressive toward people who came near his tent and had pulled a knife on someone else who had come near it.⁴ The prosecutor objected, in part on the ground of late discovery.

Edwards testified outside the presence of the jury at an Evidence Code section 402 hearing. During the course of Edwards' testimony, it became clear that much of what she purportedly knew about Burst's conduct was based upon hearsay. The only incidents regarding Burst that she actually observed involved a

⁴ Hernandez also expected Edwards to testify that she had no problems with Rockwood gang members, and that gang members had given her food, money, and cigarettes. He contended on appeal that this testimony was relevant to show that the assault was not gang related. Banchon does not challenge the exclusion of this portion of Edwards' proposed testimony.

few incidents when Burst used racial epithets and told her or her friends to “get the hell out of here” when they walked near his tent while talking.

In ruling on the prosecution’s motion to exclude Edwards’ testimony, the court noted that Edwards had only a couple of encounters with Burst, and the only conduct she observed was that Burst would “say stuff.” The court also expressed concern that if Edwards testified, it would have to continue the trial for at least a week to allow the prosecution to locate rebuttal witnesses. In addition, the court found that Edwards’ proposed testimony was only slightly relevant, had little probative value, and would be confusing and tend to distract the jury from what actually happened on the day in question. Therefore, the court granted the prosecution’s motion to exclude Edwards’ testimony.

On appeal, Banchon contends that Edwards’ testimony was “highly relevant to the most important issue in this case: whether Burst was attacked by [Banchon] or whether [Banchon] merely reacted in self defense to Burst’s violent outbreak.” He argues that the proposed testimony was character evidence that is admissible under Evidence Code section 1103 and *People v. Rowland* (1968) 262 Cal.App.2d 790, and that exclusion of the testimony was error because the testimony showed that Burst’s conduct as described by Banchon and Hernandez was consistent with Burst’s character. We disagree.

The trial court has broad discretion to exclude evidence it determines has little probative value and would require an undue consumption of time or create a danger of confusing the issues or misleading the jury. (Evid. Code, § 352; *People v. Ayala* (2000) 24 Cal.4th 243, 282.) On appeal, we must defer to the trial court’s determination unless it appears the court “exercised its discretion “in an arbitrary, capricious or patently absurd manner.”” (*People v. Frye* (1998) 18 Cal.4th 894, 948.) Edwards testified that she had only a couple of encounters with Burst, and that he was verbally aggressive. She had no direct knowledge that Burst ever

physically attacked anyone without provocation. Therefore, her testimony was, at best, only marginally relevant to support Banchon's and Hernandez's testimony that Burst attacked Hernandez without provocation. The trial court reasonably could find that the risk that the presentation of the testimony would unduly consume time or would confuse the jury outweighed this very slight relevance. Hence, the court did not abuse its discretion by excluding Edwards' testimony.

B. *Admission of Graffiti Evidence*

Over defense objections, the prosecution introduced evidence of some graffiti -- "watch your back in court, all of you" -- that appeared on the side of the Los Angeles Times warehouse shortly before trial began. Although there was no evidence that any of the defendants was responsible for the graffiti, the prosecution's gang expert, Officer Romeo Tamparong,⁵ testified that in his opinion, the Rockwood gang wrote the graffiti because it was in Rockwood territory. He also testified that he believed the graffiti related to this case based upon its location and content. The court found that evidence regarding the graffiti was relevant to explain why some witnesses' trial testimony was different than the story they initially told the police, and that it also was relevant to the gang allegation. The court allowed the prosecution to introduce the evidence, and instructed the jury that the evidence could be considered only for the purpose of determining the credibility of witnesses and that the jury could not draw any inference of the defendant's guilt of the charges from that evidence.

Banchon contends on appeal that, although the trial court did not err in finding the graffiti evidence relevant to the witnesses' credibility, it nevertheless

⁵ We discuss Officer Tamparong's qualifications to testify as an expert witness in section C., *post*.

abused its discretion in admitting it. He argues that the graffiti evidence was unnecessary to show that witnesses changed their testimony out of fear of the gang, because some witnesses testified that they were afraid to testify in court because they feared gang retaliation. He also contends that the evidence was not admissible as relevant to the gang allegation because the graffiti appeared nine months after the assault on Burst and has no bearing on whether Banchon committed the assault for the benefit of a gang. Therefore, Banchon contends the graffiti evidence had “scant probative value” because it was merely cumulative of other evidence. He argues that because the graffiti evidence was highly prejudicial, the court abused its discretion by failing to exclude it under Evidence Code section 352.

“We will not disturb a trial court’s exercise of discretion under Evidence Code section 352 “*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]” (*People v. Jones* (1998) 17 Cal.4th 279, 304.) No such showing has been made here.

The trial court reasonably could conclude that the graffiti evidence had more than “scant” probative value, and that its probative value was not substantially outweighed by its possible prejudicial impact. First, the evidence was not merely cumulative of other evidence that witnesses were afraid of testifying. Evidence of the graffiti, warning potential witnesses to “watch [their] back in court,” provided a *specific* reason for the changes in the witnesses’ testimony -- a specific threat of retaliation against anyone who testified in this case, rather than a general fear of the Rockwood gang. Second, the graffiti evidence, along with Officer Tamparong’s expert testimony linking the graffiti to the Rockwood gang, tended to show that the gang linked its reputation to this crime. Therefore the evidence was relevant to show that the crime itself was related to the Rockwood gang.

In light of the probative nature of the graffiti evidence, we cannot conclude that the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner by overruling defendants' objection under Evidence Code section 352.

C. *Sufficiency of the Evidence to Support the Gang Allegation*

Banchon was subjected to 10 year sentence enhancement under section 186.22, subdivision (b)(1), which provides for additional punishment for felonies that are "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." Banchon challenges the imposition of the gang enhancement, contending there was no evidence that the assault was committed for the benefit of a criminal street gang with the specific intent to promote it. He is incorrect.

When a conviction or factual finding is challenged on sufficiency of the evidence grounds, we apply the substantial evidence standard of review: "we review the whole record in the light most favorable to the judgment below to determine whether it discloses 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. [Citations.] "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

To support the gang allegation in the present case, the prosecution presented expert witness testimony by Officer Tamparong. Tamparong had been assigned to the Rampart Division gang unit for one and a half years at the time of trial, and had worked in patrol in the Rampart Division for four years prior to that assignment.

He was familiar with the Rockwood Street Locos gang, and identified all three defendants (Banchon, Hernandez, and German) as admitted members of that gang. He also identified photographs of all three defendants and noted that each of them had Rockwood gang tattoos. He described the history of the Rockwood gang, the kinds of crimes the gang commits, and how the gang holds on to its territories by committing violent crimes and instilling fear in the community.

The prosecutor presented Tamparong with a “hypothetical,” asking him to assume that: a homeless person is asleep in his tent in Rockwood gang territory when three gang members start tearing up the tent; the homeless man gets hit in the head by one of the gang members and stabs one of them; the homeless man runs across the street to a building, yelling for help; two of the gang members chase after him and continue to beat him, while the third gang member, who was stabbed, follows them and yells that “this guy just stabbed me, this guy just robbed me”; the gang members then drag the homeless man out of the building and continue to beat him until the police arrive; the stabbed gang member runs from a police officer who is trying to help him, while the other two gang members run into the building, remove their bloody clothing, and hide. The prosecutor asked Tamparong whether, in his opinion, the attack as described was committed for the benefit of a criminal street gang. Tamparong responded that it was. He explained that an unprovoked attack on a homeless person sleeping in the gang’s stronghold shows other transients and the community that the gang can commit crimes at any time, and creates an atmosphere of fear and intimidation.

Banchon contends that this testimony was insufficient to support the jury’s finding on the gang allegation because creating fear in the community is not a crime, and Tamparong “did not offer any concrete evidence that [Banchon’s] assault furthered any other criminal activity by the Rockwood gang.” Banchon relies upon a Ninth Circuit case, *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, in

which that court held that, to support a gang enhancement under section 186.22, subdivision (b)(1), the prosecution was required to show that the defendant had the specific intent to promote, further, or assist in gang-related criminal conduct *other than the crime for which the defendant is on trial*. (*Garcia v. Carey, supra*, 395 F.3d at p. 1103.)

As we recently explained in *People v. Romero* (2006) 140 Cal.App.4th 15, 19, the *Garcia* court's interpretation of section 186.22, subdivision (b)(1) is contrary the statute's plain language, and we decline to follow it. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 882 [federal authority is not binding in matters involving state law]; *Oxborrow v. Eikenberry* (9th Cir. 1989) 877 F.2d 1395, 1399 [state court's interpretation of state statute is binding on federal court]; see also *People v. Hill* (2006) 142 Cal.App.4th 770, 774 [following *Romero*].) The statute requires that the prosecution prove that the defendant had the specific intent to promote, further, or assist in *any* criminal conduct by gang members, which may include the conduct at issue at trial.

In the instant case, the prosecution presented evidence that Banchon, Hernandez, and German, all of whom were admitted gang members, joined together to commit an unprovoked attack on Burst. From this evidence, it can reasonably be inferred that Banchon intended to assist criminal conduct by gang members. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

D. Great Bodily Injury Enhancement

The jury found that Banchon personally inflicted great bodily injury upon Burst. Based on this finding, the trial court imposed a three year sentence enhancement under section 12022.7, subdivision (a). That same jury finding also made Banchon's conviction for assault a violent felony under section 667.5, subdivision (c)(8). And because his conviction was for a violent felony, which the

jury found was committed for the benefit of a criminal street gang, the court also imposed a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C), rather than a two, three, or four-year enhancement under section 186.22, subdivision (b)(1)(A).

Banchon contends the imposition of the sentence enhancements under both section 186.22, subdivision (b)(1)(C), and section 12022.7, subdivision (a) was improper under *People v. Briceno* (2004) 34 Cal.4th 451 as impermissible bootstrapping, or under section 654, which provides that an act or omission may not be punished under more than one provision of law.

Banchon's reliance on *People v. Briceno* is misplaced. In that case, the Supreme Court explained that a finding that a defendant committed a non-serious felony for the benefit of a criminal street gang, which finding makes defendant subject to a maximum four year sentence enhancement under section 186.22, subdivision (b)(1)(A), cannot be used in the same proceeding to elevate the non-serious felony into a serious felony under section 1192.7, subdivision (c)(28), for the purpose of imposing a five year sentence enhancement under section 186.22, subdivision (b)(1)(B). (*People v. Briceno, supra*, 34 Cal.4th at pp. 464-465.) That did not happen in the present case. Instead, in this case a single finding -- that Banchon personally inflicted great bodily injury -- was used to impose two different sentence enhancements. Thus, *Briceno* does not apply here.

In his alternative argument, Banchon contends that, under section 654, both sentence enhancements cannot be imposed because the great bodily injury finding was based upon a single act or indivisible course of conduct. The People do not dispute Banchon's contention that the great bodily injury finding was used to impose both enhancements, and that the finding was based upon a single act. Instead, the People contend that section 654 does not apply to enhancements, and therefore the imposition of both enhancements was proper.

As the People acknowledge, there is a split of authority as to whether section 654 applies to statutory sentence enhancements. This issue currently is pending before the California Supreme Court in *People v. Sloan*, review granted June 8, 2005, S132605, and *People v. Izaguirre*, review granted June 8, 2005, S132980. Without adding to the debate, we align ourselves with those courts that have held that section 654 applies to sentence enhancements. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 55-56, and cases therein cited.) Therefore, we order the three-year enhancement under section 12022.7, subdivision (a) stayed pursuant to section 654.

DISPOSITION

The three-year enhancement imposed against Banchon under section 12022.7, subdivision (a), is stayed pursuant to section 654. The trial court is ordered to prepare an amended abstract of judgment reflecting this modification. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.