

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES SANTANA,

Defendant and Appellant.

2d Crim. No. B167415
(Super. Ct. No. TA063973)
(Los Angeles County)

Andres Santana appeals his convictions for two counts of murder (Pen. Code, § 187, subd. (a))¹ and robbery (§ 211). He contends that there was insufficient evidence to support the convictions and the finding of a gang enhancement. He also contends that the trial court erred in refusing to hear a section 995 motion orally made on the first day of trial, and in failing to adequately investigate alleged jury misconduct. He also claims ineffective assistance of counsel. We will strike the 10-year gang enhancement on the murder convictions, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

In the late evening, victims Reynaldo Aguilar and Tony Esquer were sitting in a parked SUV with Raul Mata. The three men had smoked crack cocaine earlier that day and were drinking beer in the SUV.

¹ All statutory references are to the Penal Code unless otherwise stated.

Mata saw Santana and a man named Eric walk by. Mata recognized Santana as a man he had seen in the neighborhood from time to time over the past few years. Mata knew that Santana and Eric were members of the Lynnwood Dukes street gang.

Mata left the SUV to buy more beer while Aguilar and Esquer remained in the vehicle. While Mata was on the street, Santana and Eric approached him and demanded money. Eric took \$10 out of Mata's pocket.

Santana and Eric began walking towards the SUV. Mata followed. As Santana and Eric reached the SUV, Mata saw a third person hiding behind the vehicle. Either Santana or Eric opened the door. They demanded money and started beating Aguilar. Mata hid for a few minutes and then fled and called 911. It was later determined that Aguilar and Esquer suffered multiple bruises and more serious wounds to the head. Both died from skull fractures caused by a blunt instrument.

A few minutes after Mata's 911 call, police officers arrived at the scene and discovered the bodies outside but near the SUV. Mata approached the police and immediately identified the assailants as Santana and Eric. An officer testified that Mata described Santana as a five-foot-ten-inch-tall man with a bald head. But, at trial, Mata testified that Santana was about five feet five or six inches tall. Mata admitted that he had consumed about eighteen beers during the day, including four within two or three hours prior to the murders.

The following morning, Mata was asked to look at a photographic "six-pack" provided by the police. He stated that he did not want to get involved and at first failed to identify Santana or anyone else. After a break, Mata identified Santana as one of the assailants. Mata also identified Santana in a lineup in June 2002, and at trial in November 2002.

Santana was charged with two counts of murder and two counts of robbery. The information alleged, as special circumstances, that the murders were committed in the commission of a robbery (§ 190.2, subd. (a)(17)), and there were multiple murders (§ 190.2, subd. (a)(3)). The prosecution did not seek the death penalty.

The information also alleged that all 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 jury found Santana guilty as charged. He was sentenced to life imprisonment without possibility of parole for each of the murders. An additional term of 10 years was added to the murder sentences as a gang enhancement. (§ 186.22, subd. (b)(1).) Santana was sentenced to three years in prison on one of the robbery counts, plus three additional years for the gang enhancement. The sentence on the other robbery count was stayed. (§ 654.)

DISCUSSION

Substantial Evidence Supports Convictions

Santana contends that Mata's eyewitness identification of Santana as the perpetrator of the offenses was so unreliable that it failed to constitute substantial evidence of his guilt. We disagree.

As a reviewing court, we interpret the evidence most favorably to the judgment and will affirm a conviction that is supported by substantial evidence. (E.g., *People v. Osband* (1996) 13 Cal.4th 622, 690.) The same standard applies to convictions based on eyewitness identifications, and the testimony of one eyewitness is sufficient to support a conviction. (Evid. Code, § 411; *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Mata's identification was based on observing Santana several times on the night of the offenses and recognizing him as someone he knew from the neighborhood. Mata testified that he saw Santana walk past the SUV in which Mata was sitting with the victims shortly before the offenses, and that Santana confronted Mata a few minutes later and robbed him. Mata also testified that he watched Santana walk up to the SUV, open the door, demand money, and begin beating Aguilar. Later, Mata identified Santana by name when the police responded to his 911 call, and again in a photographic array. Mata's testimony is corroborated by evidence that, after the murders, Santana had swollen

hands and red knuckles, and Aguilar's credit card had been used a few blocks from Santana's residence shortly after the murders.

To undermine Mata's credibility, Santana relies on published studies and extensive testimony by a noted expert on memory perception and eyewitness identification, Robert Shomer, Ph.D., concluding that eyewitness identification is unreliable. He also relies on evidence that Mata had been consuming alcohol and drugs before the offenses, inaccuracies in Mata's physical description of Santana, and Mata's hesitancy in identifying Santana from a photographic array. Santana also notes conflicting evidence regarding whether Mata initially identified Santana as "Flaco" or by Santana's correct nickname, "Blanco."

Santana is rearguing the evidence and asking us to usurp the function of the jury to determine witness credibility. (*People v. Allen, supra*, 165 Cal.App.3d at p. 623.) A reviewing court is permitted to reject the testimony of a witness that the jury believed if the testimony is factually impossible or inherently improbable on the face of the record without resorting to inferences. (*Ibid.*; *People v. Johnson* (1960) 187 Cal.App.2d 116, 122.) Mata's testimony is far from impossible or inherently incredible. His consumption of alcohol and drugs may undermine his testimony, but Mata's familiarity with Santana coupled with his repeated observations of Santana immediately before and during the commission of the offenses bolster his credibility.

The existence of some evidence that may support the defense does not permit this court to second-guess the jury's evaluation of identification testimony. (*People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372-1373.) Where, as here, "the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M., supra*, 214 Cal.App.3d at p. 1497.)

No Error Regarding Allegation and Proof of Gang Enhancement

Santana challenges the allegation and true finding that the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) He contends that the trial court erroneously refused to consider his section 995 motion to

dismiss the allegation, and that evidence at trial was insufficient to support a true finding. To the extent these issues have been waived on appeal, Santana argues that he received ineffective assistance of counsel. We conclude that there was no trial court error, no evidentiary deficiency, and no ineffective assistance of counsel.

The trial court correctly ruled that Santana's section 995 motion was untimely. Under section 997, a section 995 motion challenging probable cause for a commitment must be brought "prior to trial." (§§ 995, subd. (a)(2)(B), 997; *People v. Waters* (1975) 52 Cal.App.3d 323, 331-332.) It is undisputed that a criminal jury trial commences when jury selection begins and the prospective jurors are first sworn. (*People v. Granderson* (1998) 67 Cal.App.4th 703, 707-708.) Here, Santana made his section 995 motion during jury selection. Although the jury selection was interrupted for the summoning of a second panel of jurors, there was no mistrial. Accordingly, the section 995 motion was not made "prior to trial."

Even if a trial court makes an erroneous ruling on a section 995 motion, reversal is not required if evidence at the preliminary hearing and at trial supports the commitment and a true finding by the jury. (*People v. Crittenden* (1994) 9 Cal.4th 83, 136-137.) A commitment will be upheld if there is some evidence showing each element of the allegation. (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 148-149.) A true finding at trial will be upheld if there is substantial evidence showing each element. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 977, disapproved on another ground in *People v. Gardeley* (1996) 14 Cal.4th 605, 624.) Here, evidence at the preliminary hearing and trial was sufficient under those standards.

A gang enhancement applies to an offense "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." (§ 186.22, subd. (b)(1).) A criminal street gang is an "ongoing organization, association, or group of three or more persons . . . having as one of its primary activities" the commission of specified offenses and which has "a common name or common identifying sign or symbol, and

whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

Santana concedes that evidence establishes his membership in a criminal street gang, but argues that the expert opinion testimony offered to establish the "committed for the benefit of" a gang requirement was inadmissible and should have been excluded by the trial court. We disagree.

Gang experts at the preliminary hearing and trial testified regarding the culture and criminal activity of gangs generally, and Santana's "Lynwood Dukes" gang specifically. Among other things, the expert at trial testified that graffiti, a red arrow, found at the scene of the murders identified the Lynwood Dukes as being involved in the offenses. The experts concluded that, in their opinion, the offenses were committed for the benefit of, or at the direction of, or in association with Santana's gang, the "Lynwood Dukes." The opinions were based on hypothetical facts consisting of a restatement of Mata's testimony and the experts' knowledge of gangs in general.

The expert opinions were admissible because the culture, habits, and psychology of gangs are matters "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Gardeley, supra*, 14 Cal.4th at p. 617.) In addition, an opinion that certain conduct is gang related may be based on hypothetical facts of the case. (*Gardeley*, at pp. 618-619; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208-1209; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. Valdez* (1997) 58 Cal.App.4th 494, 508-509.)

For the same reason, we also reject Santana's assertion that the opinions were inadmissible because they concerned the existence of the legal elements of the enhancement. Expert testimony on a subject beyond the common experience of jurors may encompass the ultimate issue that the jury must decide. (See *People v. Valdez, supra*, 58 Cal.App.4th at p. 505; *People v. Olguin, supra*, 31 Cal.App.4th at p. 1371.) An expert opinion that specified conduct constitutes a statutory requirement of a gang

enhancement is admissible because the subject of gang behavior cannot be simplified sufficiently for a jury to intelligently determine the matter. (*Valdez*, at pp. 507-509.)

Santana contends that he received ineffective assistance of counsel because counsel failed to bring the 995 motion earlier, failed to object to the opinion of the gang expert at trial, and failed to seek dismissal of the gang allegation after the prosecution completed its case at trial. To prevail on a claim of ineffective assistance of counsel, an appellant must show deficient performance and prejudice from the deficient performance. (E.g., *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Based on the foregoing discussion, Santana does not show prejudice and, with the possible exception of a delay in bringing a section 995 motion, does not show deficient performance by counsel.

No Error Regarding Investigation of Jury Misconduct

Santana contends that the trial court failed to conduct an adequate inquiry after two jurors, on separate occasions, informed the court that they feared for their safety. He contends that, in the absence of such inquiry, it is impossible to determine whether the verdicts were based solely on consideration of the evidence or resulted from improper influences.

The constitutional right to a fair trial requires that the jury decide the case solely on the basis of evidence from witnesses. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) When a trial court is put on notice of the possibility a juror has been improperly influenced, the court must make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether improper influences may have tainted deliberations by other jurors. (*People v. Burgener* (1986) 41 Cal.3d 505, 519-520, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 751-754.) The decision whether to investigate the possibility of juror bias and the extent of any investigation rests within the sound discretion of the trial court. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) There was no abuse of discretion in this case.

During a break before closing arguments, Juror No. 4 informed the court that he feared retaliation because Santana lived near the juror. The trial court questioned

the juror who stated that he could not vote for guilt due to his fear even if the evidence warranted a guilty verdict. The trial court excused Juror No. 4 for cause, but did not question any of the other jurors.

Juror No. 4 stated that he had told one other juror that he lived near Santana, but the trial court reasonably concluded that further investigation was not necessary because there was no indication of any discussion of juror safety among the jurors, and the safety concern of Juror No. 4 was not likely to have created a bias against Santana by any juror. (See *People v. Nesler*, *supra*, 16 Cal.4th at pp. 578-579.) Jurors would not interpret the expression of fear by Juror No. 4 as a belief that Santana was guilty.

During the third day of jury deliberations, the foreperson sent a note to the court covering three matters, including another juror's expression of concern for her safety because she saw Santana's brother at her gym. The jury reached a verdict before the court could respond to the note. When the jury returned to the courtroom with the verdict, the court asked about the note received earlier in the morning and the foreperson indicated that the note did not affect the jury in reaching a verdict. No further action on the juror's safety concern was requested by defense counsel or taken by the court.

Santana contends that the second juror's safety concern increased the need for further investigation. We disagree. The court obtained a representation from the jury foreperson that no action on the juror's safety concern was necessary and defense counsel did not seek any further inquiry by the court. Failure to request further action in the trial court waives the matter on appeal. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1047; *People v. Wisely* (1990) 224 Cal.App.3d 939, 947-948.) Additionally, the court could reasonably conclude that the second juror's safety concern had no effect on jury deliberations. Because the second juror did not express concern until the time a verdict was about to be reached, there is no indication that her concern tainted the deliberations or that the jury as a whole reached its verdict on any basis other than the evidence presented at trial.

Moreover, the standard for reviewing a claim of jury misconduct of this sort must be pragmatic and mindful of influences that typically affect jurors. (See *In re Hamilton* (1999) 20 Cal.4th 273, 296.) It is unsurprising that jurors would entertain some fear for their safety in a gang-related trial. Some fear of retaliation from other gang members in the event of a conviction may be unavoidable, but there is no reasonable possibility that such fear would cause jurors to find Santana guilty for any reason other than that the evidence satisfied the reasonable doubt legal standard.

No Ineffective Assistance in Failing to Call Witness

Santana contends that he received ineffective assistance of counsel when his trial attorney failed to call Richard Morales as a defense witness during trial.

To prevail on a claim of ineffective assistance, an appellant must show deficient performance under an objective standard of professional reasonableness, and that, but for the deficient performance, it is reasonably probable that appellant would have obtained a more favorable verdict. (E.g., *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 215-218.) Counsel's tactical decisions are seldom second-guessed on appeal, and we will not find deficient representation unless the record affirmatively shows that no rational tactical purpose for the challenged act or omission is possible. (*Strickland*, at pp. 690-691; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Here, a critical element of the defense strategy was to impeach Mata's identification of Santana, and defense counsel sought to do so, in part, by disputing the accuracy of Mata's physical description of Santana to the police. In particular, Mata told the police, and later testified at trial, that Santana was bald. Friends of Santana testified that Santana had hair. Before jury selection, Santana's counsel learned that police officers had stopped a vehicle occupied by Santana and friend Rick Morales two days after the offenses. According to counsel, Morales claimed the police took a photograph of Santana.

Defense counsel demanded that the prosecution produce the photograph in the expectation or hope that it would support the defense position that Santana had hair at

the time of the offenses. The prosecutor stated that Santana was under surveillance at the time and the police only photographed Morales as an unknown associate of a murder suspect. The prosecutor, however, promised to investigate further and produce any photograph of Santana that existed. No photograph was produced and Morales was not called as a witness by the defense.

The record offers no clue as to why counsel elected not to call Morales as a witness for the defense, or even that Morales was available as a witness at the time of trial,² but there were sound tactical reasons that may have influenced counsel's decision. Counsel may have had reason to believe Morales would not testify favorably to the defense. Counsel might have been concerned that Morales might not have seen the police take Santana's photograph, or Morales might testify that Santana was bald, or that the prosecution could have impeached Morales. Also, other witnesses were available to testify that Santana had hair on his head.

10-Year Gang Enhancement Unauthorized

Santana contends that the trial court erred in imposing a 10-year gang enhancement to the life without possibility of parole sentences. He argues that the gang enhancement statute does not authorize a determinate prison term to be added to sentences of imprisonment for life. (§ 186.22, subd. (b)(5).) We agree.

"Section 186.22, subdivision (b) establishes alternative methods for punishing offenders who have committed felonies for the benefit of a criminal street gang. For most felonies punishable by a determinate term, the sentence will be enhanced by a term of years under section 186.22, subdivision (b)(1). But when the defendant has been convicted of a felony that already carries a life sentence, there is no specific enhancement for a term of years. Instead, section 186.22, subdivision (b)(5) requires that the defendant serve a minimum of 15 calendar years before being considered for parole. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) The 15-year minimum parole eligibility period of section 186.22, subdivision (b)(5) applies to all life sentences without

² Five months after trial, Morales made a sworn statement that was filed as part of a new trial motion, which claimed the police took a photograph of Santana.

qualification, and is imposed in lieu of the determinate enhancement under subdivision (b)(1), not in addition to it." (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239.) Although application of the gang enhancement statute appears irrelevant when a sentence of life without possibility of parole is imposed, instances where the statutory scheme may have no practical effect do not allow us to disregard the plain language of the statute and impose an enhancement where none is authorized.

The trial court also imposed a three-year gang enhancement to the sentence for robbery. We reject Santana's assertion that by a "parity of reasoning" this sentence is also unauthorized because the robbery sentence runs concurrently with the murder sentences. Robbery is not an offense punishable by life imprisonment.

DISPOSITION

The sentence is modified to strike the 10-year term added to the murder sentences pursuant to section 186.22, subdivision (b). The superior court shall modify the abstract of judgment accordingly. (See § 186.22, subd. (b)(5).) This modification does not alter the sentence for robbery (count 4). The clerk of the superior court shall forward a copy of the amended abstract of judgment to the Department of Corrections.

As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Gary R. Hahn, Judge
Superior Court County of Los Angeles

Edward H. Schulman, 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, Chung L.
Mar, Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.