THE PEOPLE v. ANGEL RIVERA

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Court of Appeal, Second District, California.

THE PEOPLE, Plaintiff and Respondent, v. ANGEL RIVERA et al., Defendant and Appellant.

B222926

Decided: June 08, 2011

Richard C. Neuhoff, under appointment by the Court of Appeal, for Defendant and Appellant Angel Rivera. Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant Jose Chavez. Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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Appellants Angel Rivera and Jose Chavez were convicted by a jury of the murder of Travion Johnson and the attempted willful, deliberate and premeditated murder of Michael Abrams;  they were also found guilty of two firearm enhancements.   The jury found that the offenses were committed for the benefit of a criminal street gang.   Both appellants were sentenced to a total term of 85 years.   We affirm.

FACTS

In view of the circumstance that the contentions on appeal do not implicate the details of the shootings, we state those facts only in summary form.

The genesis of these shootings was an altercation between Kevin Kirkwood and appellant Rivera in a liquor store in Los Angeles around 4:00 p.m. on April 11, 2009.   It started with an argument about the Carver Park Crips gang, to which Kirkwood belonged, and the Compton Varrio 117 gang, also known as CV 117, to which Rivera belonged.   The argument escalated into a fistfight in the parking lot of the liquor store between Kirkwood and Rivera.   As the fight was being broken up, Kirkwood's brother Jerry heard someone say, “I'm gon' shoot that n––––r.”

The two victims, Abrams and Johnson, were walking on 120th Street in Compton about 4:20 p.m. when they encountered appellants.   According to Abrams,[1](https://caselaw.findlaw.com/ca-court-of-appeal/1570127.html%22%20%5Cl%20%22footnote_1) Rivera [2](https://caselaw.findlaw.com/ca-court-of-appeal/1570127.html%22%20%5Cl%20%22footnote_2) ran past them and pulled out a gun.   He called out to the victims, using a pejorative, that he thought they were from the Carver Parker Crips gang.   Appellant Chavez now appeared on the scene.   Rivera began firing and the victims started to run away.   Abrams got away but Johnson was shot nine times;  he expired on the scene.

Donald Moffat was driving on 120th Street when he saw two African–Americans, Abrams and Johnson, standing in the street with two Hispanics, i.e., appellants.   He witnessed the shooting but his memory failed him at trial.   Accordingly, recordings of his statements made to the police that he made on the evening of the shootings were played to the jury.   It was Moffat who identified Rivera as the shooter.

Appellants were arrested later that day at the home of Chavez's aunt in Compton.   After their arrest, gunshot residue was found on both Rivera and Chavez.

One of the contentions on appeal is that the evidence does not support the jury's finding that the crimes were committed for the benefit of a gang.   We will summarize the evidence on this issue in the next part in which we discuss this contention.

DISCUSSION

1. Substantial Evidence Was Presented to Support the Gang Enhancements

Gang investigator Julius Gomez has specialized training in gangs, has worked in the specialized unit dealing with gangs, has interviewed thousands of inmates at the county jail and has arrested hundreds of gang members.

Gomez testified that he is familiar with CV 117 as a result of working since 2002 in the Century Station patrol area.   Gomez stated that he is also familiar with CV 117 “from the gang enforcement side and the gang information side, investigating cases involving gang members of C.V. 1–1–7, contacting them in the field, and the like.”   This gang has 27 members.   According to Gomez, this gang's primary activities include murder, assaults with deadly weapons, vandalism, narcotics sales, vehicle thefts, illegal firearm possessions and other crimes related to guns.

The Carver Park Crips gang claims an area that is also claimed by CV 117.   The liquor store where the fight between Kirkwood and Rivera took place is in that area.   According to Gomez, the liquor store is in a high traffic area for gang members from both gangs.   If anything happens at that store, word travels quickly among the gangs.   Abrams [3](https://caselaw.findlaw.com/ca-court-of-appeal/1570127.html%22%20%5Cl%20%22footnote_3) is a member of the Carver Park Crips gang;  Johnson was not known to have a gang affiliation.

Gomez related the predicate crimes committed by CV 117.   They were when Martin Ramos shot at a moving car on August 13, 2008, which resulted in a sustained juvenile petition.   The other crime was an assault with a firearm by Everado Navarro on December 19, 2008, with the same result.

According to Gomez, both appellants belonged to CV 117.

According to Gomez, the crimes in this case benefited CV 117 because “it puts everybody on notice that ․ we're a serious gang;  we're willing to shoot people;  we're willing to inflict a lot of violence if we're messed with.   So the gang is benefitted that way.   It bumps up their status amongst all the other gangs, the surrounding gangs in the area.  [¶] For the individuals who actually did the shooting, their status within the gang rises obviously.   It rises because they are proving that they are active members;  they are willing to do the shooting;  and they are willing to promote their gang and do whatever it takes if ․ they are disrespected by other gang members.”   Gomez went on to explain that because Kirkwood beat up on Rivera, and if there was no retaliation for this, Rivera's status in the gang would have deteriorated;  he would be looked upon as a coward who “is not strong enough to carry the gang's reputation of C.V. 1–1–7.”   And, since Chavez did not do much of anything while Rivera and Kirkwood were fighting, Chavez had to prove himself by the shooting, in order to recover his reputation as a loyal member of the gang.

Citing In re Alexander L. (2007) 149 Cal.App.4th 605 (Alexander ), Rivera contends that the evidence is insufficient to sustain the finding of the gang enhancement.   Specifically, Rivera contends that, just like in Alexander, the testimony about the “primary activities” of the CV 117 gang was inadequate.

Rivera misperceives Alexander 's rationale.   In that case, gang expert Lang testified, referring to the gang in question, that “ ‘I know they've committed quite a few assaults with a deadly weapon, several assaults.   I know they've been involved in murders.  [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.’ ”   (Alexander, supra, 149 Cal.App.4th at p. 611.)   The appellate court concluded:  “We cannot know whether the basis of Lang's testimony on this point was reliable, because information establishing reliability was never elicited from him at trial.   It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay.”  (Id. at p. 612.)   In other words, there was no evidence about Lang's sources, which the court concluded rendered his testimony unreliable.

In this case, Gomez provided the bases for his knowledge of CV 117.   They are:  (1) working patrol in the Century Station (2) in the “gang enforcement side” and (3) the “gang information side”;  (4) investigating cases involving members of CV 117;  and (5) field contacts.   Thus, it is incorrect to claim, as Rivera does, that Gomez's testimony has the same shortcomings as Lang's.

We also reject Rivera's suggestions that Gomez misunderstood the question about primary activities and that he equated primary activities with a “pattern of criminal gang activity.”   He was asked directly about the gang's primary activities, and, equally directly, he listed them;  there is nothing to show that he misunderstood what was asked or that he referred to the “pattern” of gang activity.

The claim advanced by Rivera that one cannot possibly know what a gang's primary activities are without also knowing the gang's entire field of activity is not persuasive.   It is without a doubt possible to know—and state, as Gomez did—what the gang's primary activities are without also reciting the entire inventory of the gang's activities.

Gomez's testimony about CV 117's primary activities was clear and was also shown to rest on reliable bases.   It was, in a word, substantial evidence.

2. The Prosecution Did Not Have to Prove That Rivera Knew That CV 117's Primary Activities Were the Commission of Crimes

Rivera contends that it was not shown that he was aware (or knew) that CV 117 was a criminal street gang.

The California Supreme Court has squarely rejected this contention in People v. Loeun (1997) 17 Cal.4th 1, 11 (“We do not understand the due process clause to impose requirements of knowledge or specific intent”).   We are required to follow this holding (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 456) and therefore reject Rivera's contention;  the prosecution was not required to prove that Rivera knew that CV 117 was a criminal street gang.

3. Substantial Evidence Was Presented That Showed That Appellants Committed the Charged Offenses for the Benefit of the CV 117 Gang

Citing People v. Killebrew (2002) 103 Cal.App.4th 644, 658, Chavez contends that Gomez's testimony was speculative.   In Killebrew, the gang expert “testified that each of the individuals in the three cars (1) knew there was a gun in the Chevrolet and a gun in the Mazda, and (2) jointly possessed the gun with every other person in all three cars for their mutual protection.   In other words, Darbee [the gang expert] testified to the subjective knowledge and intent of each occupant in each vehicle.   Such testimony is much different from the expectations of gang members in general when confronted with a specific action.”  (Ibid., original italics.)

It is evident that Gomez did not testify about appellants' subjective knowledge and intent.   Rather, Gomez testified generally about gangs and also generally about CV 117.   In substance, his testimony was that the shooting increased the status of the individuals, i.e., appellants, and of the gang itself.   In any event, as respondent correctly points out, Chavez did not object to Gomez's testimony, which forfeits the issue that Chavez is now raising.  (Evid.Code, § 353.) [4](https://caselaw.findlaw.com/ca-court-of-appeal/1570127.html%22%20%5Cl%20%22footnote_4)

Even though the issue has been forfeited, we note that Chavez seeks to rely on Garcia v. Carey (9th Cir.2005) 395 F.2d 1099, 1103–1104, a decision in which the federal court rejected a gang expert's testimony as insubstantial that a robbery had been committed with the specific intent to aid the gang.   It has been held that this federal decision misinterprets California law and the California Court of Appeal has declined to follow it.  (E.g., People v. Hill (2006) 142 Cal.App.4th 770, 774.)

Chavez cites People v. Ramon (2009) 175 Cal.App.4th 843, 851, to support his claim that, as in Ramon, Gomez's testimony was speculative.   In Ramon, the defendant was arrested and convicted, among other things, for possession of a stolen truck.   The expert in Ramon did not testify that possession of stolen vehicles was one of the activities of the gang;  thus, it was speculation that the crime was convicted for the benefit of the gang.   In this case, by comparison, Gomez testified that CV 117's primary activities include murder and assaults with deadly weapons, which were in fact the crimes inflicted on the victims in this case.

Finally, Chavez cites People v. Ochoa (2009) 179 Cal.App.4th 650, 665, a decision in which the court concluded that the gang expert's testimony that auto theft was a signature crime of the gang lacked evidentiary support.   The carjacking in Ochoa could have been committed for the benefit of the defendant or the gang;  there was nothing to show that it was committed for the benefit of the gang.  (179 Cal.App.4th at pp. 662–663.)   Chavez contends that, as in Ochoa, there is insufficient evidence of specific intent to benefit the gang.   We do not agree.   In this case, the fistfight with a rival gang member required that appellants retaliate or lose face and prestige in the gang.   Appellants, therefore, had every incentive, at least from their point of view, to engage in these shootings.   The setting of these shootings was not merely a “personal confrontation,” as Chavez contends.   It was rife with significance for the gangs and for appellants as gang members.

4. There Was Substantial Evidence That Rivera Personally and Intentionally Discharged a Firearm

Rivera contends that if the gang enhancements are not supported by the evidence, the findings that he personally and intentionally used a firearm must be set aside.

The premise of this argument eliminates it from contention.   This contention might possibly hold merit as to the principal Penal Code section 12022.53 firearm enhancements, but not to the personal discharge allegations. (§ 12022.53, subds.(b)-(e).)   Appellant's argument that even the personal use allegations require proof of the gang enhancement turns section 12022.53 on its head.   If this were true, section 12022.53 would only apply to gang crimes;  its reach is much more broad.

5. The Trial Court Did Not Abuse Its Discretion in Imposing Consecutive Sentences

Both appellants contend that the court abused its discretion in imposing consecutive sentences for the murder of Johnson and the attempted murder of Abrams.

The prosecution sought consecutive sentences because there were two victims.   That is, appellants clearly tried to murder both Johnson and Abrams, succeeding with one but not the other.  “In deciding whether to impose consecutive terms, the trial court may consider aggravating and mitigating factors, but there is no requirement that, in order to justify the imposition of consecutive terms, the court find that an aggravating circumstance exists.  [Citations.]  Factual findings are not required.”  (People v. Black (2007) 41 Cal.4th 799, 822.)   Given the viciousness of these crimes, and that two different victims were involved, consecutive sentences are well within the bounds of reason, which is the test on appeal.  (People v. Sandoval (2007) 41 Cal.4th 825, 847.)   We find no abuse of discretion.

There is no merit to Chavez's contention that his defense counsel was ineffective because she did not object to the consecutive sentence and presented no argument during the sentencing hearing.   Chavez was sentenced weeks after Rivera was sentenced;  during Rivera's sentencing, the trial court stated that the facts warranted a consecutive sentence, referring to the violence of the shooting.   Chavez's counsel was of course aware of Rivera's sentence.

Given the facts, and Rivera's sentence, it is hard to imagine that anything Chavez's counsel might have said during Chavez's sentencing hearing would have made a difference.   A consecutive sentence for Rivera and a concurrent sentence for Chavez was a most unlikely scenario.   There must be a reasonable probability that, but for counsel's alleged professional errors, the result would have been different.  (Strickland v. Washington (1984) 466 U.S. 668, 693–694;  People v. Ledesma (1987) 43 Cal.3d 171, 216–218.)   There is no such probability here.

DISPOSITION

The judgments of conviction are affirmed.

We concur:

FOOTNOTES

FN1. Abrams professed at trial to have forgotten what he told the police at 10:30 p.m. on the night of the shooting.   The following is based on a recording of that interview that was played to the jury..  FN1. Abrams professed at trial to have forgotten what he told the police at 10:30 p.m. on the night of the shooting.   The following is based on a recording of that interview that was played to the jury.

FN2. Abrams did not identify Rivera by name but by a physical description..  FN2. Abrams did not identify Rivera by name but by a physical description.

FN3. At the time of appellants' trial, Abrams was serving a seven-year prison sentence..  FN3. At the time of appellants' trial, Abrams was serving a seven-year prison sentence.

FN4. “A verdict or finding 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 of 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.”   (Evid.Code, § 353, subd. (a).).  FN4. “A verdict or finding 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 of 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.”   (Evid.Code, § 353, subd. (a).)

BIGELOW, P. J. GRIMES, J.