Filed 10/20/09 P.v Stapleton CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. AARON EDWARD STAPLETON, Defendant and Appellant.	B211268 (Los Angeles County Super. Ct. No. PA055362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed with modification.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Aaron Edward Stapleton, appeals from a first degree murder conviction (Pen. Code,[1] § 187, subd. (a)) and the jury's handgun use finding. (§ 12022.53, subd. (d).) Defendant argues that the trial court improperly admitted evidence of his gang status and awarded too few days of presentence custody credits. We affirm with modifications.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Twenty-one-year old Rodolfo Orozco lived at times with his parents and began moving around prior to his May 22, 2006 death. Mr. Orozco worked sporadically in the construction industry. Mr. Orozco's brother was Alejandro Orozco.[2] On three occasions Alejandro went to the Tujunga area to pay money for his rent. On those occasions, Mr. Orozco was with defendant. Mr. Orozco paid rent to Alejandro. Mr. Orozco had a drug problem.

Lucero Flores lived in an apartment at 10205 Samoa Street in Tujunga. Ms. Flores had known defendant for a few months prior to May 2006. Shane Rayment lived in an apartment building next door to Ms. Flores. At the time of trial, Mr. Rayment was in prison for methamphetamine sales and firearm theft. Ms. Flores sometimes used drugs with Mr. Rayment.

At some time in the early morning hours of May 22, 2006, Mr. Rayment telephoned Ms. Flores asking her to come to his apartment. Mr. Rayment testified that he asked Ms. Flores if she knew of anyone who wanted to buy drugs from him. Ms. Flores brought defendant and an unidentified friend to Mr. Rayment's apartment. Defendant had a .32 caliber semiautomatic handgun in his waistband. Defendant placed the gun on the table. In an effort to get the gun away from defendant, Mr. Rayment asked if defendant oiled the gun. When defendant said, "No," Mr. Rayment took the gun,

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] For purposes of clarity and out of no disrespect, Alejandro Orozco will be referred to as "Alejandro."

removed the bullets and began to oil it. Ms. Flores testified that Mr. Rayment asked her to take defendant's friend to Hill Haven to pick up some food. Ms. Flores drove Mr. Rayment's car when she took defendant's unidentified friend for food. When she returned to Mr. Rayment's apartment, he was cleaning a semiautomatic gun. Ms. Flores heard defendant speak to Mr. Rayment. In that conversation, Mr. Rayment was told that "he didn't have to do this if" he did not want to do so. Mr. Rayment responded, "I gave you my word." Ms. Flores also heard Mr. Rayment say that he was not going to back down. Ms. Flores saw Mr. Rayment and defendant move the slide on the gun. Ms. Flores departed for her own apartment soon thereafter.

Mr. Rayment testified Ms. Flores told defendant that Mr. Orozco was in the laundry room next door. Mr. Rayment asked defendant, "Well, hey, what are you going to do?" Defendant said, "We had some problems with [Mr. Orozco], and he was talking a lot about a murder that was done up on Pinewood." Mr. Rayment testified: "[H]e wanted to take care of him, you know. He wanted to shut him up and take care of him. I took that as killing him." When asked why defendant wanted to kill Mr. Orozco, Mr. Rayment testified, "He said he was running his mouth, talking about the murder on Pinewood, and then there was some things about his being rough with a girl named Mercedes." According to Mr. Rayment, the woman identified only as Mercedes had used drugs with both defendant and Mr. Orozco. Mr. Rayment testified: "[Mr. Orozco] wouldn't leave Mercedes alone because he was in love with her. And she would always go to [defendant], ask [defendant] for help, and he was telling me he was pissed off about [Mr. Orozco] being in contact with her." Mr. Rayment cautioned defendant: "Don't do that, you know. If you are going to do anything, just beat him up or something, don't kill him." Defendant asked Mr. Rayment for some brass knuckles. Mr. Rayment refused to give the brass knuckles to defendant. Thereupon defendant said, "Well, if anything, I will pistol-whip him." Defendant then asked for the gun back. Defendant put the gun, which had been disassembled while it was being cleaned, back together, armed it, cocked it, and put it in his belt. Defendant traded hats with Mr. Rayment. Defendant then left the apartment. Defendant's unidentified friend remained at Mr. Rayment's apartment.

As Ms. Flores was going upstairs to her apartment, her boyfriend, John Rodriguez appeared. Ms. Flores argued with Mr. Rodriguez because she did not want him to visit her so late. Ms. Flores did not want any problems in her building. Ms. Flores told Mr. Rodriguez that he had to leave. Both Ms. Flores and Mr. Rodriguez heard Mr. Orozco talking to a woman in the laundry room two doors away from Ms. Flores's apartment. Ms. Flores told Mr. Rodriguez to tell Mr. Orozco to leave as well. Mr. Rodriguez went into the laundry room. Mr. Rodriguez saw Mr. Orozco and a woman. Mr. Rodriguez had never before seen the woman. Mr. Orozco and the woman were talking and laughing. Mr. Rodriguez spoke to Mr. Orozco. Mr. Orozco was told Ms. Flores said he had to leave because he was making too much noise. Mr. Orozco agreed to leave.

Mr. Rodriguez walked downstairs. There Mr. Rodriguez saw Ms. Flores drive away with an unidentified man. Mr. Rodriguez then saw defendant. Mr. Rodriguez was asked what he was doing there. Mr. Rodriguez said that he was waiting for Ms. Flores. Defendant told Mr. Rodriguez to go home. As Mr. Rodriguez walked toward his apartment, he saw Ms. Flores return. Mr. Rodriguez walked back toward Ms. Flores's apartment building. Ms. Flores began to argue with Mr. Rodriguez. Ms. Flores saw Mr. Rayment hand something to defendant. Mr. Rodriguez saw defendant walk into the building and up the stairs.

Mr. Rodriguez and Ms. Flores heard defendant and Mr. Orozco speaking in "firm" aggressive voices. Mr. Rayment saw defendant go upstairs and turn toward the laundry room. Mr. Rayment saw two silhouettes through a window and heard the sounds of a confrontation. Thereafter, Mr. Rayment approached Mr. Rodriguez and Ms. Flores and asked them to leave. Mr. Rodriguez, Mr. Rayment, and Ms. Flores heard a gunshot. Mr. Rayment told Ms. Flores and Mr. Rodriguez to run. They ran to Mr. Rayment's nearby apartment. When Mr. Rodriguez, Ms. Flores and Mr. Rayment entered the apartment, defendant's friend was waiting inside. Mr. Rodriguez and Ms. Flores left shortly thereafter. Mr. Rayment went to the back door of his apartment. Mr. Rayment saw a man running down the alleyway. The man was wearing a baseball cap, similar to the one defendant had worn. Mr. Rayment went to Ms. Lucero's apartment with her, where he

spent the night. Mr. Rayment decided to enter the laundry room. Mr. Rayment testified: "I pushed the door open, slide in my foot. He was a friend, and it kept egging on me to go in there and see if he was alright or whatnot." Mr. Rayment opened the door to the laundry room and Mr. Orozco was leaning dead over a washing machine. Mr. Rayment panicked, fled and did not notify the authorities.

At approximately 6:30 a.m., Fortino Quintero, the apartment manager at 10205 Somoa, went into the laundry room. Mr. Quintero saw Mr. Orozco hanging from a faucet next to the washing machine. Mr. Orozco's shirt was pulled over his head. The shirt was attached to a faucet. Mr. Orozco's body was resting on the washing machine.

Mr. Quintero did not see anyone else in the laundry room or immediate area. Mr. Quintero did not notice any guns or other weapons in the laundry room. Mr. Quintero called the police. Mr. Quintero had seen Mr. Orozco on prior occasions on the street and in the building's garage.

Los Angeles Police Officer Frank Hernandez arrived at the laundry room. Officer Hernandez found Mr. Orozco's body slumped over the washing machine. Officer Hernandez did not observe any guns or other weapons in the laundry room. Detectives Charles Lenane and Mario Santana were assigned to investigate the shooting. When Detective Lenane examined the laundry room for evidence, he found a .32 caliber semiautomatic shell casing behind the washing machine. No weapons were found in the laundry room.

An autopsy performed on Mr. Orozco's body revealed that he died as the result of a gunshot wound to his head. The bullet lodged in Mr. Orozco's shoulder. The bullet recovered from Mr. Orozco's shoulder was subsequently determined to be a .32 caliber, which fit into the shell casing recovered at the scene.

Samantha Smith had been dating defendant since January 2006. Defendant was the father of her child. Ms. Smith saw defendant three to four times a week during April or May 2006. On either June 11 or 12, 2006, defendant called Ms. Smith to ask her to drive to Arizona to pick him up. Ms. Smith drove to Arizona, where she met defendant at a friend's home in a remote area. Defendant told Ms. Smith that he wanted to return to

Los Angeles. Defendant wanted to speak to an attorney and the police. Defendant claimed the shooting was an accident. Ms. Smith testified, "He said he was fighting him and somehow a gun went off." Defendant never said a fight was going on when the shot was fired or there had been an argument. Ms. Smith dropped defendant off at dawn at Ginamarie Davidson's home in Arleta. Ms. Smith and Ms. Davidson were friends. Ms. Davidson's husband, Jimmy Sims, may have been at home when Ms. Smith returned later that afternoon. Mr. Sims had numerous tattoos on his body. Defendant was writing in a notebook (exhibit No. 21) at the time. Ms. Smith described defendant's writing, "[T]hat is [*sic*] the letters of the gang he is from." Defendant's tattoos were similar to lettering in the notebook.

First, defendant argues that the trial court improperly admitted evidence of his gang status. We initially view defendant's state law contention and then his constitutional argument. Prior to trial, the prosecutor sought to introduce a spiral notebook, exhibit No. 21, recovered from the house where defendant was arrested. Although the notebook belonged to Ms. Davidson, two adjoining pages consisted of a note to Ms. Smith and, in the same type of writing, a gang acronym on the opposing page. The note stated: "Samantha, what's up beautiful. Just dropping a few lines your way to let you know what a Nigga's feeling. My mind is a mess, stressed, confused, lost, scared, trustless. This time I have done it. Can't call if I'm going to come out of this one, so I thought I would let you know what you mean to me and how much I love you. You just showed up. I will cut it short. [Defendant's gang moniker]."

The prosecutor argued that although this was not a gang case, the note to Ms. Smith appeared to be a confession by defendant. The prosecutor, Brook White, stated: "[T]here seems to be some writing with a gang acronym. . . . Now I have always said this is not a gang case. The issue is who wrote this. The letter is actually, according to Ms. Smith, a confession letter. We showed it to her. 'Yes, that is his writing,' meaning the defendant's. 'He is admitting to this crime.' [¶] So I think it is probative. The issue is who wrote it. I have offered to defense counsel, since I don't want to bring gangs into this, if he will stipulate that his client wrote this during the relevant time period, the left-

hand [gang acronym] will not be introduced. [¶] We don't need it. It is not relevant. However, if he denies he wrote it - - [¶] The issue is who wrote it. In the same pen, in the same type writing the [gang] acronym."

Defense counsel argued that the note did not reference gangs and was on a separate page from the gang acronym. Defense counsel further argued that because it was not a gang case, gang information would prejudice defendant significantly more than any probative value it might have.

The trial court disagreed: "I would certainly feel strongly that a limiting instruction should be in order. But if there is a question as to who wrote the note, which from some standpoint may be characterized as a confession, I think the proximity of the pages one to the other and the - - what appears to a layperson to be similar ink and similar writing - - one of them, as you describe it, gang graffiti - - makes it probative that if [defendant] has a gang affiliation, I think that it is a [sic]fair to connect that, connect up one to the other. Especially because, as I am understanding it, a layperson, whose credibility may be subject to attack from various reasons is going to be the person who is going to try to establish the handwriting of the note. [¶] So I might feel a little bit differently if we had an expert who was not going to be subject to some of the same credibility arguments as the layperson would be; that it is more probative than prejudicial with a limiting instruction to allow the jury to look at and consider the graffiti and allow testimony that in fact [defendant] is a gang member." When defense counsel inquired of the relevance of the gang graffiti, the trial court responded: "I think it makes the statement that the note on the right was written by the defendant more likely true than not true. As I said, because of the proximity. Perhaps if it was many pages separated or if it was completely disassociated with this notebook, I would agree with you. But because they are one right next to each other, creating the argument that the graffiti was written and followed by the note or vice-versa, I think that makes one relevant to the other." After further argument, the trial court reiterated: "So as I am going to stick with my initial ruling that absent a stipulation that [the prosecutor] may prove up the graffiti part. [¶] . . . [¶] The court will allow testimony and introduction of the graffiti portion of the

note with a limiting instruction advising the jurors that the prosecution is not claiming that this crime is related to any gang or gang motivation, and that the jurors should only consider the note for purposes of determining whether or not the defendant is the author of the note."

At the time the evidence was introduced through Ms. Smith's testimony, the trial court instructed the jurors: "There was a mention, ladies and gentlemen, that on one of these pages there are some letters,[] and that the witness understands that has something to do with a gang. [¶] This information, this notebook and the specific pages, are being admitted to you and discussed only for the purposes of determining or providing some evidence which you will judge as to whether or not the defendant[] wrote this information. [¶] So there is no allegation in this case that any of the events in this case are gang related. There are no charges or allegations brought regarding a gang. You will only be considering the testimony, brief as it was, related to a gang, and these letters which you will see on the page for purposes of making your determination as to who wrote the material in the book, particularly the letter on the facing page, which has some information you will learn more about."

The prosecutor, Mr. White, read the note allegedly written to Ms. Smith in his closing argument. Mr. White argued that Ms. Smith testified that the note was in defendant's handwriting and, "That is the one form of the, in a sense, confession to this murder." Defense counsel, James Goldstein, responded by reiterating that this was not a gang case. Mr. Goldstein argued: "Even the prosecution is not alleging this is a gang case. The only purpose of it was saying, well, this [gang graffiti] is right next to the note in the book. So since he is [a member of that gang], that means it must have been [defendant]. [¶] It doesn't mean it must have been [defendant]. Who else hangs out at Ginamarie's house? How many of [Ms. Smith's] boyfriends who are up and down doing meth, huh? And when was that not written?" Thereafter, defense counsel sought to discredit not only Ms. Smith, who identified defendant's writing, but the other prosecution witnesses as well.

Trial courts have broad discretion concerning the admission of evidence. (*People v. Anderson* (2001) 25 Cal.4th 543, 591; *People v. Smithey* (1999) 20 Cal.4th 936, 973-974.) Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Our Supreme Court has repeatedly held, "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) The undue prejudice related to the admission of evidence must substantially outweigh its relevance to constitute error. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, Evid. Code § 352.)

Our Supreme Court has held: "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see, e.g., *People v. Carter, supra,* 30 Cal.4th at pp. 1194-1196 [identity]; *People v. Mendoza* (2000) 24 Cal.4th 130, 178 [element of fear]; *People v. Williams* (1997) 16 Cal.4th 153, 193 [motive and identity]; *People v. Champion* (1995) 9 Cal.4th 879, 922-923 [identity]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 223-227 [motive and intent]; see also Evid. Code, § 1101, subd. (b).)

Defendant argues that the introduction of evidence of his gang membership in this case had a "highly inflammatory impact" and the trial court's limiting instruction was inadequate. We disagree. As set forth above, the prosecutor sought to introduce the

evidence to establish the identity of the author of the note to Ms. Smith in the notebook. In analyzing this issue, we have reviewed all of the exhibits. Among the exhibits are exhibits 28 and 29 which show defendant's gang tattoos. The gang acronym tattooed on defendant's neck, back and stomach are the precise same letters on the page opposite the statement which the trial court could reasonably find reflected his stress and confusion about an unspecified event and its potential future consequences. Moreover, the cursive writing on two other pages in the book was similar to defendant's tattoos.

The prosecution offered to refrain from introducing the gang evidence if defendant stipulated that he was, in fact, the author of the writing in Ms. Smith's book. However, defendant refused to so stipulate. The trial court could reasonably find that the evidence was not substantially more prejudicial since Ms. Smith drove defendant to Ms. Davidson's home at dawn, where he remained until his arrest later that day. Ms. Smith saw defendant writing in a notebook and later recognized the writing in the notebook as his. The notebook was recovered during a probation search of Ms. Davidson's home. No abuse of discretion occurred.

In addition, any potential prejudice resulting from the admission of the gang evidence was eliminated by the trial court's specific admonition that the jurors not consider the evidence for any other purpose than making their determination as to who wrote the material in the book, particularly the letter on the facing page. The trial court specifically cautioned that this was not a gang case and did not involve gang charges. The California Supreme Court has consistently stated that on appeal: "'"Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."' [Citation.]" (*People v. Carey* (2007) 41 Cal.4th 109, 130, quoting *People v. Lewis* (2001) 26 Cal.4th 334, 390; *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.) We presume they did so here.

Further, defendant's constitutional contentions have no merit. The evidence was not so prejudicial so as to render defendant's trial fundamentally unfair. (See *People v.*

Partida (2005) 37 Cal.4th 428, 439 ["the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *People v. Albarran, supra,* 149 Cal.App.4th at p. 229-231.) In *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, the Ninth Circuit Court of Appeals held: "Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions. Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citation.]" (Fn. omitted, quoting *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1465.) Here the permissible inference was defendant authored the note. We cannot assume that the jury must have used the evidence for an improper purpose and there is no basis for concluding such happened.

In any event, any error in admitting the gang evidence was harmless in light of other overwhelming evidence of defendant's guilt. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Mr. Rayment testified that defendant had a .32-caliber semiautomatic handgun just before the shooting. Defendant spoke to Mr. Rayment about wanting to "take care of" Mr. Orozco. Also, defendant wanted to "shut" Mr. Orozco up. Defendant left Mr. Rayment's apartment. When he did, defendant took his gun, cocked it and put it in his waistband. Mr. Rayment and Mr. Rodriguez saw defendant go upstairs toward the laundry room, where Mr. Orozco was seen earlier. Defendant was then heard arguing with Mr. Orozco. Immediately thereafter, a gunshot was heard by Mr. Rodriguez, Ms. Flores and Mr. Rayment, who were standing outside the apartment building. Mr. Rayment ran to the back of his apartment complex. Mr. Rayment saw a man wearing a baseball cap. Earlier that day Mr. Rayment gave defendant a similar baseball cap. The man in the baseball cap ran down the alleyway. Defendant fled to Arizona for a few weeks immediately after the murder. Ms. Smith drove defendant back to California. During the drive, defendant admitted fighting with Mr. Orozco but claimed the gun fired accidentally. As noted, Mr.

Orozco was shot in the back of the head; an odd place to be shot accidentally. There is no merit to defendant's state law-based evidentiary error contentions.

Second, defendant argues that he was awarded an insufficient number of presentence custody credits. We agree. Defendant was in continuous custody from June 13, 2006, until he was sentenced on September 25, 2008. He was therefore entitled to 836 days of presentence custody credits, rather than the 819 days awarded by the court. The failure to award a proper amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) The trial court is to personally insure the abstract of judgment is corrected to full comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 110, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

The judgment is modified to reflect the award of presentence custody credits of 836 days. Upon remittitur issuance, the superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J. MOSK, J.