



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

Petition for rehearing denied April 14, 2006

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 977.

Appellants Mauricio Mungia and David Lice Camarena were convicted, following a jury trial, of one count of second degree robbery in violation of Penal Code section 211. Mungia was also convicted of one count of being a felon in possession of a firearm within the meaning of section 12021. The jury found true the allegations that a principal was armed in the commission of the offense within the meaning of section 12022.53, subdivisions (b) and (e)(1) and the offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A). The jury also found true the allegation that Mungia personally used a firearm within the meaning of section 12022.53, subdivision (b).

The trial court sentenced Mungia to the upper term of five years in prison for the robbery, plus a ten-year enhancement term for the firearm use and a ten-year enhancement term for the gang allegation. A three-year term for the section 12021 conviction was imposed concurrently. The trial court sentenced Camarena to the upper term of five years for the robbery conviction plus a ten-year enhancement term for the firearm allegation.

Appellants appeal from the judgment of conviction, contending that there is insufficient evidence to support the true finding on the gang allegation, the trial court erred in denying their motion to bifurcate the trial of the gang allegation, and in admitting evidence of threats to the victim. Appellants also contend that the imposition of the upper term by the trial court violated their federal constitutional right to a jury trial. Mungia contends that he received ineffective assistance of counsel. Camarena contends that the trial court erred in limiting the testimony of the eyewitness identification expert.

### Facts

On July 14, 2004, at about 5:40 p.m., Hector Melendez was walking home along Union Pacific Avenue near its intersection with Ferris Avenue when he was approached from behind by two men. One of



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

the men asked Melendez about a restaurant in the area, then asked if Melendez had any money. When Melendez replied that he had no money, the second man took out a gun and pointed it at Melendez. The unarmed man searched Melendez, took out his wallet, removed money from the wallet and passed the wallet to the armed man. The armed man took Melendez's social security card from the wallet, then returned the wallet to Melendez. One of the men took Melendez's cell phone.

The two men then got into a black pickup truck parked across the street. A third man was in the driver's seat of the truck. The truck drove away, but Melendez was able to memorize part of the truck's license plate number.

Melendez walked to his home, which was nearby, and wrote down the partial license plate number "6F5023." He called the cell phone company to cancel his service. He then called police.

Soon thereafter, Los Angeles County Sheriff's Deputies Angel Fonseca and Oscar Luevano heard a radio broadcast about a pickup truck with a partial license plate number of "6F5023" which had been used in a robbery. Deputy Fonseca determined from computer records that a pickup truck with the license plate number of "6F50023" was registered to Camarena's father. The deputies went to the registered address for the truck, which was in the vicinity of Whittier Boulevard and Alma Street and found the truck. Camarena was in the driver's seat, co-defendant Lenny Casas<sup>1</sup> in the middle and Mungia in the passenger seat. The truck drove away, but was stopped by the deputies on Alma Street and its occupants detained.

Deputy Fonseca found a black revolver on the passenger side floorboard. Deputy Banks arrived to assist in the detention and saw Mungia appear to reach toward his pocket. The deputy found six rounds of ammunition in Mungia's hand. Deputy Luevano searched Mungia and found Melendez's social security card in Mungia's wallet.

Melendez was brought to the scene and identified the truck as the one used in the robbery. He identified Mungia as the man with the gun who took his social security card. Melendez initially identified Casas as the man who took his money, but after viewing Camarena, stated that Casas was the driver and Camarena the second robber.

Melendez identified Mungia and Casas at the preliminary hearing, but not Camarena. At trial, Melendez stated that he could not remember whether Mungia, Camarena and Casas were the perpetrators. Melendez testified that sometime after the preliminary hearing, a friend gave him a message from someone else that he should not testify anymore. Melendez did not want to come to court for the trial because he was afraid that something might happen to him or his family.

Sheriff's Detective Igancio Lugo testified at trial as a gang expert that members of the Laguna Park Vikings gang ("LPV") had committed certain violent crimes in the area. He opined that Camarena, Mungia and Casas were LPV gang members. The area where the robbery occurred was claimed by



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

both the Winter Garden gang and the Mara Villa gang, the latter of which was an enemy of the Sureno network of gangs. LPV was a Sureno gang. Detective Lugo opined that when members of one gang enter rival gang territory and commit a crime, they benefit their own gang by intimidating the local residents and benefit themselves by earning increased status in their gang.

Casas presented evidence showing that he was in a drug rehabilitation class at the Plaza Community Center from 3:00 to 5:00 p.m. on July 14. Casas's friend Christina DeLeon testified that she saw Casas at about 5:00 p.m. on July 14 outside the center and spoke with him until his parents arrived to pick him up. At about 5:10 or 5:15 p.m., she called Casas at home and spoke with him for 30 to 45 minutes. Casas's mother testified that she and her husband picked Casas up at the center at 5:00 p.m. on July 14, and drove him home. Casas ironed some clothes and left the house at about 5:40 p.m. Casas's cousin, Louie Mercado, testified that he was driving along Whittier Boulevard when he saw Casas in Salazar Park sometime between 5:00 and 6:00 p.m. on July 14, and that Casas went with him to a donut shop and waited while Mercado ordered food. After 30 to 60 minutes, Mercado started to drive Casas home, but stopped at Alma and Whittier so that Casas could join some friends in the park. As Mercado drove away, he saw several police cars driving toward the park.

Casas also presented the testimony of forensic psychologist Robert Shomer, who testified as an eyewitness identification expert.

Mungia presented the testimony of Kimi Scudder, a gang intervention worker. Scudder opined that if a gang member did not state his gang name or affiliation or flash a gang sign during a crime, the crime was personal, not gang-related. On cross-examination, Scudder testified that if a gang member obtained a loaded gun, traveled into rival gang territory with fellow gang members, robbed someone on the street and returned to his own gang territory in a getaway car, she would say that the crime was committed for the benefit of the gang.

In rebuttal, Detective Lugo testified that the community center was 1.6 miles from Casas's house and was a six to seven minute drive in moderate traffic and that the location of the robbery was about 1.7 miles from Casas's house and was a four to five minute drive.

### Discussion

#### 1. Sufficiency of the Evidence - Gang Allegation

Mungia contends that there is insufficient evidence to support the true finding on the gang allegation. We see sufficient evidence.

"[T]o subject a defendant to the penal consequences of [a gang enhancement], the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subs. (e) and (f).)" (People v. Gardeley (1996) 14 Cal.4th 605, 616-617.)

Here, Mungia contends that the evidence is insufficient to show that the crime was committed for the benefit of a criminal street gang because no reference to a specific gang was made before, during, or after the commission of the crime. No such reference was required.

Both Detective Lugo and Mungia's own witness, Scudder, opined that a crime which involved a group of gang members driving into rival gang territory with a loaded gun, robbing someone and returning to their own gang territory would be for the benefit of the gang. In responding to the hypothetical posed by the People, Detective Lugo assumed that the men in the hypothetical "appear[ed] to be gang members." He opined that the gang would benefit because the crime would instill fear and intimidation in the community. He explained that it was not important that the gang members establish their specific gang membership, because the gang would benefit from the community's general fear of any gang member. As the victim testified, appellants and Casas were dressed like gang members.<sup>2</sup>

To the extent that Mungia contends that a specific intent to benefit the gang is an element of the gang enhancement, he is mistaken. "[S]pecific intent to benefit the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members.'" (People v. Morales (2003) 112 Cal.App.4th 1176, 1198.) A defendant's intentional acts, combined with his knowledge that those acts would assist crimes by fellow gang members, is sufficient to prove this specific intent. (Id. at pp. 1198-1199.) Here, the evidence showed that Mungia intended to commit a robbery with men he knew were gang members. That is sufficient evidence to show that he had the specific intent to further or assist criminal conduct by gang members.

Mungia also cites Garcia v. Carey (9th Cir. 2005) 395 F.3d 1099 as authority that the gang enhancement applies only if the charged offense was committed with the specific intent to assist other criminal conduct by gang members. It is true that, in Garcia, the court affirmed the district court's granting of habeas relief as to the gang enhancement because the record did not "'support an inference that [the defendant] robbed [the victim] in order to facilitate other gang related criminal operations within [the community].'" (Id. at p. 1103.)

"Federal decisional authority is neither binding nor controlling in matters involving state law." (Nagel v. Twin Laboratories, Inc. (2003) 109 Cal.App.4th 39, 55.) Further, we do not find the reasoning



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

in Garcia persuasive. There is no requirement in section 186.22, subdivision (b), that the defendant's intent to assist criminal endeavors by gang members must relate to criminal activity apart from the offense being committed. To the contrary, the specific intent required by the statute is "to promote, further, or assist in any criminal conduct by gang members." (Pen. Code, § 186.22, subd. (b), *italics added.*)

### 2. Motion to Bifurcate

Mungia and Camarena contend that the trial court erred in denying their motion to bifurcate the trial of the gang allegation from the trial of the charged offense of robbery. We see no abuse of discretion.

A trial court has discretion to bifurcate the trial of a gang enhancement from the trial of the charged offense. (People v. Hernandez (2004) 33 Cal.4th 1040, 1048.) However, unlike a prior conviction allegation, a "criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (Ibid., *emphasis added.*) The burden is on the defendant to show that there is a substantial danger of undue prejudice from the evidence. (Id. at pp. 1050-1051.)

The general rule is that gang evidence is admissible to show motive, intent or identity, so long as the probative value is not substantially outweighed by its prejudicial effect. (People v. Williams (1997) 16 Cal.4th 153, 193.) Similarly, it is well established that gang evidence is admissible when the very reason for the crime is gang related. (People v. Champion (1995) 9 Cal.4th 879, 922; People v. Tuilaepa (1992) 4 Cal.4th 569, 588; People v. Frausto (1982) 135 Cal.App.3d 129, 140; People v. Beyea (1974) 38 Cal.App.3d 176, 194.)

Here, the trial court expressly found that the probative value of the evidence was not substantially outweighed by the probability that admission would create a substantial danger of undue prejudice. The court also found that the gang evidence went to the issue of guilt. We agree.

Appellants' gang membership provided a motive for the highly risky daylight armed robbery of a young man who was afoot and unlikely to have much of value on his person: to intimidate the neighborhood and to earn boasting rights.

Appellants are correct that evidence of the crimes committed by the LPV gang members who were not involved in the robbery was relevant only to the gang enhancement, specifically to show that the LPV gang was a criminal street gang. However, "[e]ven if some of the expert testimony would not have been admitted at a trial limited to guilt, the countervailing considerations that apply when the [gang] enhancement is charged permitted a unitary trial." (People v. Hernandez, *supra*, 33 Cal.4th at p. 1051.)



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

Appellants further contend that the crimes of other gang members in this case were more serious than the unlawful driving of a vehicle convictions at issue in Hernandez. Perhaps so. Nevertheless, we do not find the convictions here, for robbery, conspiracy to commit assault, possession of a firearm, and manslaughter, to be highly inflammatory. Further, as our Supreme Court has explained, when evidence of convictions of other gang members is offered to prove a gang enhancement, this evidence does not pose a risk of confusing the jury with collateral matters, and the convictions are "not evidence of offenses for which a defendant might have escaped punishment." (People v. Hernandez, supra, 33 Cal.4th at pp. 1051.) Thus, the possibility of prejudice will normally be minimal, not substantial.

### 3. Witness Intimidation

Mungia contends that evidence of threats to a witness is relevant and admissible only if the witness intends to or does contradict prior testimony or statements. He contends that the trial court erred in admitting evidence of threats to Melendez because Melendez did not contradict any prior statements or testimony. He further contends that since the threats were not admissible to show credibility, they were improper hearsay, and that the admission of such hearsay violated his Sixth Amendment right to confrontation. We do not agree.

Mungia relies on People v. Brooks (1979) 88 Cal.App.3d 180 to support his contentions. He is correct that this Court held in Brooks that evidence of threats to a witness was not relevant because "[n]o inconsistent testimony had preceded the prosecutor's questioning [of the witness]; there was no issue of credibility (or 'state of mind' as the trial court termed it)." (Id. at p. 187.)

In Brooks, we noted that the better practice would be to defer questioning about threats to a witness until after the witness had given inconsistent testimony. Such a practice eliminates the possibility of erroneous admission of threat evidence. (People v. Brooks, supra, 88 Cal.App.3d at p. 187.) As appellant acknowledges, a hearing pursuant to Evidence Code section 402 to determine whether the witness is going to offer inconsistent testimony also eliminates the possibility of such error.

Here, the trial court did not hold a section 402 hearing, but did hold a hearing in which the admissibility of the threat evidence was discussed. In that hearing, the prosecutor represented that Melendez was "going to have some selective memory now" and "is going to be changing his testimony." We find this to be an adequate inquiry by the court. Melendez did indeed have a selective memory. He claimed "not to remember" whether Mungia, Camarena and Casas were the men who robbed him. He also claimed that he did not remember parts of the field show-up and most of the preliminary hearing.

"Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. (People v. Green (1971) 3 Cal.3d 981, 988 [92 Cal.Rptr. 494, 479 P.2d 998].) However, courts do not apply this rule mechanically. 'Inconsistency in





## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' (Ibid.) When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. (Id. at pp. 988-989.) As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. (People v. O'Quinn (1980) 109 Cal.App.3d 219, 225 [167 Cal.Rptr. 141].)" (People v. Johnson (1992) 3 Cal.4th 1183, 1219-1220.)

Appellant contends that Melendez's lack of memory did not amount to inconsistent statements because he affirmed his earlier out-of-court statements. We find Melendez's claims of lack of memory show deliberate attempts at evasion.<sup>3</sup> Melendez did not remember if he identified Mungia, Camarena and Casas at the field show-up, but had no apparent problem recalling non-incriminating details of the show-up, such as the time which elapsed between his 911 call and being taken to the field show-up by deputies, and the facts that he was shown a truck first, then some individuals, that he was shown three men, and that the deputies brought the men out one at a time. Similarly, when Melendez was shown a gun at trial, he recognized it as the one used in the robbery, and remembered that he had identified that same gun at the preliminary hearing. Yet Melendez not only claimed at trial that he did not remember whether Mungia was one of the robbers, he claimed that he did not remember identifying Mungia at the preliminary hearing. He also claimed that he did not remember saying at the preliminary hearing that he was certain of his identifications.

Mungia's second contention, that the threats were inadmissible hearsay, is based on his argument that the threats could only be admitted to show credibility if the witness contradicted prior statements or testimony. It is well settled, however, that threats which are properly admitted to show credibility are non-hearsay. (People v. Brooks, supra, 88 Cal.App.3d 180, 187.) Since we have found that the threats were properly admitted to show credibility, the threats are non-hearsay. As such, they do not violate appellant's Sixth Amendment right to confrontation.

### 4. Ineffective Assistance of Counsel

Mungia contends that he received ineffective assistance of counsel in a number of areas. We do not agree.

An appellant has the burden of proving ineffective assistance of counsel. (People v. Pope (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, the appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (Strickland v. Washington (1984) 466 U.S. 668, 687-688, 694; People v. Ledesma (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Strickland v. Washington, supra, 466 U.S. at p. 694.) "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citations.]" (People v. Thomas (1992) 2 Cal.4th 489, 530-531.)

When an appellant makes an ineffective assistance claim on appeal, we look to see if the record contains any explanation for the challenged aspects of the representation. If the record is silent, then the contention must be rejected "'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation [citation].'" (People v. Haskett (1990) 52 Cal.3d 210, 248.)

Mungia contends that his counsel conducted only minimal cross-examination of the witnesses in this case. He gives no explanation of why he views the cross-examination as minimal, or of what he believes his counsel should have asked those witnesses. He does not explain how such questions would have made a more favorable outcome probable. Thus, he has completely failed to show ineffective assistance of counsel in this area.

Mungia also claims that the prosecutor committed misconduct by eliciting testimony that defense expert Scudder was married to a convicted felon, and by questioning her about the Mexican Mafia, and that his counsel was ineffective in failing to object to that misconduct. The fact that Scudder married a convicted felon tends to show a bias towards criminals. (Evid. Code § 780.) The Mexican Mafia evidence related to the rivalry between appellant's Sureno gang, LPV, and Mara Villa, the gang who claimed the territory where this robbery took place.<sup>4</sup> Counsel are not required to make meritless objections. (People v. Ochoa (1998) 19 Cal.4th 353, 463.)

Appellant further claims that his counsel was ineffective in selecting Scudder to be a defense expert witness because she ended up giving testimony which was more favorable to the prosecution than the defense. Scudder was qualified to testify as an expert, and gave testimony favorable to Mungia on direct examination. The fact that the People succeeded in obtaining favorable testimony from her on cross-examination does not mean that counsel's choice of Scudder as an expert witness was unreasonable.

### 5. Sentencing Error

Mungia and Camarena contend that the imposition of the upper term by the trial court violated their federal constitutional right to a jury trial as set forth in *Blakely v. Washington* (2004) 542 U.S. 296. The California Supreme Court has held that *Blakely* does not invalidate California's upper-term sentencing procedure. (People v. Black (2005) 35 Cal.4th 1238. Accordingly, appellants' claims must be rejected.

### 6. Exclusion of Testimony





## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

Camarena contends that the trial court erred in excluding some testimony by Dr. Shomer, co-defendant Casas's expert witness on eyewitness identification. Respondent contends that Camarena has waived this claim by failing to object in the trial court. We agree.

Prior to Dr. Shomer's testimony, the court stated: "This should not become a slugfest where Dr. Shomer is offering opinions as to credibility and offering opinions as to the specific issues involved in this case. [¶] He can offer generic opinions which may involve weapon focus, and fear, and retention and memory, and distance and retinal imaging, et cetera but that is what it will be." Casas's counsel responded: "I can make that representation he will not be offering any such opinions." Counsel for the other defendants, including Camarena, were silent.

"No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (People v. Saunders (1993) 5 Cal.4th 580, 590 [internal quotation marks and citations omitted]; see also People v. Mitcham (1992) 1 Cal.4th 1027, 1048 [failure to join in co-defendant's objection waives the issue on appeal].)

We note that Shomer was Casas's witness, and the trial court's ruling permitting the use of the expert appears based on the court's finding that Melendez's eyewitness identification of Casas was not substantially corroborated, and the court's belief that Casas would offer alibi testimony. As our Supreme Court has explained, the use of an eyewitness identification expert is proper when, among other factors, the eyewitness's identification "is not substantially corroborated by evidence giving it independent reliability." (People v. McDonald (1984) 37 Cal.3d 351, 377; accord People v. Sanders (1995) 11 Cal.4th 475, 508.)

We note that it appears that Melendez's eyewitness identification of Camarena was substantially corroborated. Melendez provided a partial license plate number for the truck used in the robbery, which corresponded to the license plate number of a truck owned by Camarena's father. Camarena was driving the truck when it was stopped by police shortly after the robbery. A gun like the one used in the robbery was found in the truck. One of the truck's other occupants, Mungia, had a piece of the victim's property. And unlike Casas, Camarena did not offer an alibi defense. Thus, Camarena does not appear to have been entitled to use an eyewitness identification expert, and so cannot complain of limitations on Casas's expert.

### 7. Joinder

Camarena joins in Mungia's contentions set forth in sections 1, 3 and 4 above concerning the sufficiency of the evidence, to support the gang allegation, admission of evidence of witness intimidation, and ineffective assistance of counsel.

### Disposition



## People v. Mungia

2006 | Cited 0 times | California Court of Appeal | March 21, 2006

The abstract of judgment for appellant Camarena is ordered amended to show the trial court's oral imposition of sentence, as reflected in the reporter's transcript at pages 3012 and 3013. The five-year enhancement term pursuant to section 186.22 is stricken from the abstract of judgment. The term of the section 12022.53(B)(E)(1) enhancement is corrected to 10 years. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these corrections and to deliver a copy to the Department of Corrections. The judgment is affirmed in all other respects.

We concur: TURNER, P.J., MOSK, J.

1. Casas was tried with appellants and was convicted of Melendez's robbery, but is not a party to this appeal.
2. Mungia points out that some people who are not gang members choose to dress like gang members. We do not see the significance of this fact. Here, Mungia and his co-defendants were gang members, and it is reasonable to infer that their choice of gang attire was a way of proclaiming their identity, not an attempt to be fashionable.
3. We note that the trial court instructed the jury with CALJIC No. 2.13, which states, among other things, that "If you disbelieve a witness' testimony that he or she no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him or her describing that event."
4. In his reply brief, Mungia identifies more general questions by the prosecutor about gang activity which he contends was misconduct to which his trial counsel failed to object. As Mungia notes, however, co-counsel occasionally attempted to interject an objection to this line of questioning, which the trial court overruled. Mungia's counsel could reasonably have believed that any objections from her would also be overruled. Counsel is not required to make futile objections. (People v. Price (1991) 1 Cal.4th 324, 386-387.)

