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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DANIEL MADRID,

Defendant and Appellant.

A130403

**(San Mateo County
Super. Ct. No. SC069755A)**

Appellant Christopher Daniel Madrid appeals from a judgment entered after a jury convicted him of being a felon in possession of a firearm, (Pen. Code, § 12021, subd. (a)(1))¹ carrying a concealed weapon while an active member of a criminal street gang, (§ 12025, subd. (b)(3)) and being a felon in possession of ammunition (§ 12316, subd. (b)(1)). He contends the judgment must be reversed because (1) the carrying a concealed weapon count is not supported by substantial evidence, (2) the trial court instructed the jurors incorrectly, and (3) the court erred when sentencing him. We agree appellant's conviction for carrying a concealed weapon while an active member of a criminal street gang is not supported by substantial evidence. Accordingly, we will reverse the judgment and remand for a new sentencing hearing.

I. FACTUAL AND PROCEDURAL BACKGROUND

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

On May 23, 2009, near 7:15 p.m., Detective Nick Perna of the Redwood City Police Department and Detectives Ken Clayton and John Sabel of the San Mateo County Sheriff's Office were on patrol in an unincorporated portion of Redwood City when they noticed appellant and three or four others drinking in the area where Dumbarton Street intersects some railroad tracks. The area is known to be the territory of the Little Mexico Gang subset of the Norteño street gang and a second group of two or three individuals was standing nearby at the intersection of Dumbarton and Calvin streets. One of the persons in the smaller group was Jose Cortez, a known Norteño gang member.

As the detectives approached the larger group, appellant complained to Detective Sabel saying, "why are you coming at me all hard[?]" Appellant then said something like "you know who I am, and you need to check my C file" referring to his prison file. Appellant told Sabel he had been in the specialty housing unit (SHU) at Pelican Bay State Prison. It seemed that appellant was "trying to come off as being hard" and that he was trying to relay the fact that "he was someone of importance" Appellant also displayed a "Norte" tattoo on his bicep telling Sabel, "that's who I am." When Sabel saw the tattoo he realized appellant was a Norteño. Appellant then informed Sabel, "I'm Danny boy . . . you need to ask some people in Redwood City what I'm all about."

As they continued to talk, appellant complained to detective Sabel about younger Norteños and how when they go to prison, they go "into protective custody instead of going into . . . general housing." Appellant looked at Cortez when he made the statement.

Shortly thereafter, the detectives left telling appellant and his companions to clean up their beer cans.

Later that evening around 11:30 p.m., Detectives Sabel, Perna, and Clayton were still on patrol when they saw a man dressed completely in black about three blocks from where they had contacted appellant earlier. Suspicious, the detectives stopped their car and identified themselves. The man, appellant, turned around. As soon as appellant saw the detectives, he reached into his pants, withdrew a silver handgun, and dropped it into a nearby flowerbed.

The detectives arrested appellant and searched him. He had five rounds of .357-caliber ammunition in the pocket of his pants. The detectives then located the handgun that appellant had discarded. It was a fully loaded .357-caliber magnum.

Based on these facts, an information was filed charging appellant with the offenses we have set forth above. As is relevant here, the information also alleged that appellant had one prior strike within the meaning of the three strikes law, (§ 1170.12, subd. (c)(1)) and had suffered a prior serious felony conviction. (§ 667, subd. (a)(1).)

The case proceeded to trial where the prosecution presented the evidence we have set forth above. The prosecution then supported its case with testimony from several additional witnesses. Detective Clayton testified that appellant was an active member of the East Side Mara subset of the Norteño street gang. According to Clayton, tension existed between members of the Little Mexico Group and those in the East Side Maras.

Detective Jamie Draper of the Daly City Police Department testified as an expert about the Norteño street gang. He opined that someone who had been to prison, who had been housed in the SHU at Pelican Bay, and who had tattoos similar to those appellant had, would be someone of significance for other Norteños. According to Draper, such a person would have a leadership role and likely be a “shot caller for his home town gang.”

The jurors considering this evidence convicted appellant on all three counts.

In a court trial that followed, the court found the prior strike and prior conviction allegations to be true.

Subsequently, the court sentenced appellant to seven years, eight months in prison.

II. DISCUSSION

A. Sufficiency of the Evidence

As we have stated, appellant was convicted in count 2 of carrying a concealed weapon while an active member of a criminal street gang within the meaning of section 12025, subdivision (b)(3). As is relevant here, that section makes it a felony to carry a concealed weapon “[w]here the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22” Our Supreme Court has interpreted section 12025, subdivision (b)(3) to mean that a person commits the crime identified in

that section only when all the requirements of section 186.22, subdivision (a) are satisfied. (*People v. Lamas* (2007) 42 Cal.4th 516, 524-525.) We therefore turn to the latter statute. Section 186.22, subdivision (a) states: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished”

Appellant now contends the evidence was insufficient to support the third element of a section 186.22, subdivision (a) offense because “an individual acting by himself cannot be acting for the benefit of a gang.”

The People concede the error and we agree. Our Supreme Court faced this same issue recently in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*). In *Rodriguez*, the defendant was convicted of active participation in a criminal street gang under section 186.22, subdivision (a) and the issue on appeal was whether the third element of that offense can be satisfied by felonious criminal conduct that is committed by the defendant acting alone. (*Rodriguez*, at p. 1128.) The *Rodriguez* court ruled such evidence was not sufficient. As the court explained, “[M]embers’ is a plural noun Therefore, to satisfy the third element, a defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct. The plain meaning of section 186.22(a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member. (See § 186.22, subd. (i).)” (*Rodriguez*, at p. 1132.)

Here, the undisputed evidence indicates appellant was alone when he was arrested in possession of a firearm and ammunition. Since there was no evidence that appellant was acting in conjunction with any other gang member at the time of his arrest, the third

element of a section 186.22 offense is not satisfied and the section 12025, subdivision (b)(3) offense cannot stand.²

B. Evidence

Several of the witnesses at trial testified about the Norteño gang and about appellant's status as a member and leader of that gang. Appellant objected to that testimony arguing it was based, at least in part, on statements that were not made in court and thus violated his Sixth Amendment right to confront the witnesses against him as described in *Crawford v. Washington* (2004) 541 U.S. 36. The court overruled the objections. Appellant now renews that argument on appeal.

As we recently explained at length, appellant's argument may well have merit. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1127-1131.) But as we also explained, our Supreme Court has a different view on this issue. (*Ibid.*, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 612.) As appellant concedes, we are obligated to follow *Gardeley*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. Sentencing

The jurors convicted appellant in count 1 of being a felon in possession of a firearm (§ 12021, subd. (a)), in count 2 of carrying a concealed weapon while an active member of a criminal street gang (§ 12025, subd. (b)(3)), and in count 3 of being a felon in possession of ammunition. (§ 12316, subd. (b)(1).)

In a subsequent court trial, the court found true allegations that appellant had one prior strike within the meaning of the three strikes law (§ 1170.12, subd. (c)(1)), and that appellant had suffered a prior serious felony conviction. (§ 667, subd. (a).)

At sentencing, the court selected count 2 as the principal term and sentenced appellant to 16 months, doubled to 32 months pursuant to the strike finding, plus 5 years for the prior serious felony conviction, for a total of 7 years 8 months in prison.

The court then imposed identical sentences of 2 years 8 months on counts 1 and 3 and ordered those terms to be served concurrently to the term imposed on count 2.

² Having reached this conclusion, we need not decide whether the trial court instructed the jurors on the section 12025, subdivision (b)(3) offense correctly.

Appellant now contends the trial court violated section 654³ when it ordered concurrent sentences on counts 1 and 3.

We need not address this argument because the sentence imposed on count 2 was an essential component of the court's overall sentencing decision and as we have discussed, the evidence is insufficient to support count 2. The matter must be remanded for resentencing. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1257-1259.)

III. DISPOSITION

Appellant's conviction on count 2 of violating section 12025, subdivision (b)(3) is reversed and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.

³ As is relevant here, section 654 states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."