

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR DUARTE et al.,

Defendants and Appellants.

B232095

(Los Angeles County
Super. Ct. No. BA343624)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Sam Ohta, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant, Hector Duarte.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant, Johnny J. Serbantez.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant, Armando Jordan.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Following a joint jury trial, defendants and appellants Hector Duarte, Armando Jordan and Johnny Serbantez were each convicted of two counts of robbery and one count of burglary. On appeal, defendants contend that there was insufficient evidence to support the gang enhancement. Duarte further contends the firearm use enhancement must be stricken. And Serbantez contends denial of his motion to strike two Three Strikes law prior convictions was an abuse of discretion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Trial Proceedings

Defendants were jointly charged by amended information with the home invasion robbery of Jubencio Hernandez and Maria Velazquez (counts 1 and 2) and burglary of Maria Velasquez (count 3) (a fourth burglary charge was dismissed). Enhancements for personal firearm use (Pen. Code, § 12022.53) and committing the crime for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)) were also alleged.¹ As to Serbantez, two Three Strikes prior convictions (§§ 1170.12, subd. (a)-(d), 667, subd. (b) - (i)) were alleged. A jury convicted defendants as charged and found true the enhancements. On the burglary count, without objection at sentencing, the trial court substituted a section 12022.5, subdivision (a) gun use enhancement for the section 12022.53, subdivision (b) enhancement found true by the jury because section 12022.53 does not apply to burglary. Serbantez admitted the Three Strikes priors and was sentenced to an aggregate of 57 years to life in prison. Duarte and Jordan were each sentenced to an aggregate of 19 years to life in prison. Defendants filed timely notices of appeal.

¹ All further undesignated statutory references are to the Penal Code.

B. *Factual Overview*

Because defendants do not challenge the sufficiency of the evidence to support the substantive offenses, we need not relate the details of those offenses. It is sufficient to state that, viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that at about 10:00 a.m. on July 15, 2008, Duarte, Jordan and Serbantez forced their way into the Hernandez home at gunpoint and demanded money. Jubencio Hernandez, his son Guillermo Hernandez and two neighbors who had been doing some construction work at the house were forced to lie on the floor with their hands tied behind their backs with zip ties and their faces covered with pillows. Jubencio's wallet containing \$311, cell phone and keys were taken out of his pocket. Maria gave all of the money in her pocket to Jordan. Defendants fled from the home when they realized that the police had arrived. All three defendants were apprehended later that day. Police found two guns that matched the description of the guns the victims saw defendants holding, but neither fingerprints nor DNA evidence connected the guns to defendants.

C. *Gang Evidence*

After they were arrested, Jordan and Serbantez admitted membership in the criminal street gang known as the Moeriya Maravilla; Duarte claimed he was a former member of that gang. All three defendants had multiple Moeriya Maravilla-related tattoos on various body parts. On the MySpace website, Detective Stacey Szymkowiak found a photograph of Jordan throwing a gang sign associated with the Moeriya Maravilla gang.

Deputy Sheriff Carlos Lopez testified as a gang expert. Lopez explained that the Moeriya Maravilla gang is one of many smaller gangs associated with the larger Marianna Maravilla gang. He estimated that Moeriya Maravilla had about 34 members. He had personally talked to about 10 of them. He had investigated crimes in which Moeriya Maravilla members were suspects and victims. Lopez had authored and

executed search warrants on the homes of members of the gang. He had also read reports about Moeriya Maravilla-related crimes written by other officers, including the police report in this case, and had discussed the gang with other officers. Lopez identified the gang's graffiti and hand sign in photographs.

In Lopez's opinion, Duarte, Jordan, and Serbantez were active members of the Moeriya Maravilla gang. Lopez's opinion was based on the fact that they each admitted current or former membership, they had multiple tattoos associated with the gang and they committed the charged offense together.

Lopez testified that the primary activities of the Moeriya Maravilla gang include murder, drug sales, illegal firearm possession, assaults, shootings, arson and robberies. He could not state how many of each of those crimes had been committed by gang members. Lopez was aware of one murder conviction and one arson conviction of a Moeriya Maravilla gang member, but had been told by other officers that members of the gang were responsible for other killings. Lopez had seen about 20 instances of Moeriya Maravilla graffiti. Lopez testified to a 2007 conviction of a Moeriya Maravilla gang member for carrying a concealed weapon, and a 2008 conviction of another member for possession of a controlled substance.

Based on a hypothetical that mirrored the facts of this case, Lopez opined that the charged crimes were committed for the benefit of or in association with a criminal street gang, and with the intent to promote, further or assist in criminal conduct by gang members. Lopez explained that the crimes in the hypothetical were committed in association with a criminal street gang because three active gang members committed the crimes together. Gang members commit crimes together to rely on each other for strength. The hypothetical crimes were committed for the benefit of the gang because violent crimes like the ones described in the hypothetical instill fear of the gang in rival gangs; as a result, those rivals will be less likely to challenge the gang. The crimes also benefit the gang by instilling fear of the gang among law-abiding citizens who will then be afraid to report crimes committed by the gang. In addition, such crimes benefit the gang because the proceeds of the crime are used to buy guns which will be used to

commit other crimes. Commission of violent crimes also helps the gang with recruitment. Although the Hernandez home is not within the five square blocks of East Los Angeles claimed by the gang as their territory, Lopez explained that gang members often commit crimes outside their own territory because it reduces the chance they will be identified and enhances the gang's reputation for violence.

DISCUSSION

A. Substantial Evidence Supported the Gang Enhancement

Defendants contend insufficient evidence supported the section 186.22, subdivision (b) gang enhancement. Each challenges the sufficiency of the evidence that the crimes were committed for the benefit of and to promote the gang. Jordan and Serbantez also challenge the sufficiency of the evidence that the Moeriya Maravilla was a criminal street gang. We find no error.

1. The Standard of Review

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.’ [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).

2. Sufficiency of the Evidence That Moeriya Maravilla Was a Criminal Street Gang

Section 186.22, subdivision (b)(1) provides an enhanced sentence for “any person who is convicted of a felony 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” Section 186.22, subdivision (f) defines a “criminal street gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having 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.” Section 186.22, subdivision (e) defines “pattern of criminal gang activity” as, among other things, conviction of two or more enumerated offenses, committed on separate occasions, or by two or more persons. The enumerated offenses include sale of a controlled substance and possession of a concealed firearm. (§ 186.22, subd.(e)(4) & (23).)

A gang’s primary activities may be shown through expert evidence. (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 945.) The expert’s opinion must have an adequate foundation. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 612.) A gang expert’s opinion about the primary activities of a gang may properly be based on conversations with members of that gang, the expert’s own investigations of crimes committed by members of that gang, as well as information received from the expert’s colleagues and other law enforcement agencies. (*Id.* at p. 613, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 620.)

Lopez’s expert testimony that the Moeriya Maravilla gang had 34 members was substantial evidence that the gang was an “organization, association or group of three or more people.” His testimony about the gang’s name, hand sign and writing was sufficient to establish the common name or common-identifying-sign-or-symbol element of the enhancement. That members of the gang individually or collectively engage in or have engaged in a pattern of criminal gang activity was supported by Lopez’s testimony

that Oswaldo Humberto Cisneros and Nathan O'Neill Gonzalez were members of the Moeryia Maravilla gang, that Cisneros was convicted of possession of a controlled substance in 2008, and that Gonzalez was convicted of carrying a concealed weapon in 2007. That the gang's primary activities include commission of one or more of the enumerated crimes was supported by Lopez's expert opinion to this effect. That Lopez could not state how many of each of those crimes had been committed by members of the gang does not compel a contrary result. From Lopez's testimony that he had spoken to members of the Moeryia Maravilla, had investigated crimes committed by members of that gang and had discussed crimes committed by members of that gang with other officers, it can reasonably be inferred that this was the basis of his opinion. This was a sufficient foundation for Lopez's opinion, and the opinion was substantial evidence that the Moeryia Maravilla was a criminal street gang. (*In re Alexander L.*, *supra*, 49 Cal.App.4th at p. 613.)

3. Sufficiency of the Evidence That Defendants Committed the Crimes For the Benefit of or In Association With A Criminal Street Gang, and With the Intent to Assist In Criminal Conduct By Gang Members

For the enhancement to apply, two prongs must be satisfied: (1) the underlying crime must have been committed for the benefit of, at the direction of *or* in association with any criminal street gang; and (2) it must have been committed with the specific intent to promote, further *or* assist in any criminal conduct by gang members. Although both prongs must be met, each can be satisfied in alternate ways. In *Albillar*, *supra*, 51 Cal.4th 47, our Supreme Court explained that the first prong requires that the crime be gang-related. (*Id.* at p. 60.) Not every crime committed by a gang member is gang-related. (*Ibid.*) But when several gang members commit a crime together, it is reasonable for a jury to infer they are committing the crime in association with the gang. (*Id.* at p. 62 [affirming enhancement imposed on rape committed by three gang members together].) Expert testimony that a gang's reputation for viciousness is enhanced by the

criminal conduct is sufficient to raise the inference that the conduct was committed for the benefit of the gang. (*Id.* at p. 63.)

The second prong of the enhancement is satisfied by evidence that the defendant intended to promote, further or assist other gang members in committing the charged offense. (*Albillar, supra*, 51 Cal.App.4th at pp. 65-66.) In *People v. Miranda* (2011) 192 Cal.App.4th 398, 411-413, we recently held, “ ‘Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.’ [Citations.]” (See also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [“very fact that defendant committed the charged crimes in association with fellow gang members” supports the enhancement].)

Here, that Duarte, Jordan and Serbantez were members of the Moeriya Maravilla gang and that they committed the charged crimes together was sufficient to establish that they committed the crimes for the benefit of and in association with that gang and with the intent to assist in criminal conduct by gang members.² It matters not that there was no evidence the victims knew their assailants were gang members.

The cases cited by defendants for a contrary result are inapposite in that they involve crimes committed by a single gang member, not multiple gang members. (See e.g. *In re Daniel C.* (2011) 195 Cal.App.4th 1350; *People v. Galvez* (2011) 195 Cal.App.4th 1253; *People v. Ochoa* (2009) 179 Cal.App.4th 650.)

B. Imposition of Section 12022.5, Subdivision (a) Firearm Enhancement on Count 3 (Burglary) Was Not Error

Duarte contends the enhancement for personal use of a firearm imposed on count 3 pursuant to section 12022.5, subdivision (a) (§ 12022.5) must be reversed. He argues that the trial court had no authority to replace a section 12022.53, subdivision (b)

² Duarte told police that he was a former gang member. The evidence adduced from expert witness Lopez was sufficient to allow the jury to find Duarte’s membership was current.

(§ 12022.53) enhancement that was charged and found true by the jury, but which is inapplicable to burglary, with a section 12022.5 enhancement that was neither charged nor found true.³ He is incorrect.

Where there is insufficient evidence that a defendant committed the crime of which he was convicted, but overwhelming evidence that he committed a lesser included offense, the trial court can reduce the conviction to the lesser offense. (§ 1181, subd. (6).) An offense is a lesser included offense (1) if under the statutory definition of the two crimes, the greater crime cannot be committed without also committing the lesser crime; or (2) if the charging allegations of the accusatory pleading include language describing the greater offense in such a way that if it was committed as specified the lesser offense was necessarily committed. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1034 (*Lagunas*); *People v. Babaali* (2009) 171 Cal.App.4th 982, 994.) These are known as the “elements” test and the “accusatory pleading” test. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

An enhancement cannot be a lesser included offense within another enhancement because enhancements do not define crimes, they relate to the penalty to be imposed under certain circumstances. (*People v. Strickland* (1974) 11 Cal.3d 946, 961 (*Strickland*)). But when one enhancement is essentially a limited application of another enhancement but with a greater penalty, the enhancement with the lesser penalty can be substituted for the greater enhancement under certain circumstances. In *Strickland*, at trial a former section 12022.5 gun use enhancement was found true as to a manslaughter conviction at a time when section 12022.5 did not apply to manslaughter. Our Supreme Court substituted a section 12022 principal armed enhancement for the inapplicable section 12022.5 enhancement. The court reasoned that section 12022.5 was basically a limited application of section 12022 with a heavier penalty, and that section 12022 would apply in any case in which section 12022.5 applied. The court explained that, because the jury found the defendant was armed with a firearm at the time the offense was

³ Without providing any additional argument, Jordan and Serbantez join in Duarte’s contention.

committed, the defendant had notice that his conduct could also be a violation of section 12022. (See also *People v. Allen* (1985) 165 Cal.App.3d 616, 627 [§ 12022.5 gun use enhancement reduced to § 12022, subd. (a) principal armed enhancement].)

In our case, section 12022.53 provides a 10-year sentence enhancement for any person “who personally uses a firearm” in the commission of any enumerated felony. Burglary is not one of the enumerated felonies. Section 12022.5 provides a 3, 4 or 10 year enhancement for any person who “personally uses a firearm” in the commission of any felony, unless use of a firearm is an element of the felony. As in *Strickland*, section 12022.53 is essentially a limited application of section 12022.5, with a potentially greater penalty for certain felonies. Under such circumstances, the trial court may substitute a proper section 12022.5 enhancement for an inapplicable section 12022.53 enhancement. That is exactly what happened here. During sentencing, the trial court realized that burglary was not a 12022.53 enumerated felony. With the consent of both counsel, the trial court reduced the section 12022.53 enhancement on count 3 to a section 12022.5 enhancement, but selected the 10-year high term. Sentence on count 3 was stayed pursuant to section 654.

Apart from whether defendants waived the issue by expressly agreeing to the modification, we find no error. Under *Strickland*, having been charged with personal use of a firearm under section 12022.53, defendants had notice that their conduct could also be a violation of section 12022.5. It was therefore within the trial court’s power to substitute the later for the former.

C. Denial of Serbantez’s Motion to Strike Two Priors Was Not Error

Serbantez contends it was an abuse of discretion to deny his motion to strike two Three Strikes priors. He argues that the priors were committed in 1993 and 2004 and therefore so remote as to place him outside the Three Strikes scheme. We disagree.

“A trial court abuses its discretion when it refuses to dismiss [a Three Strikes prior] because of personal antipathy for the defendant while ignoring her background, the nature of her present offenses, and other individualized considerations. When

determining whether to dismiss a Three Strikes allegation, the trial court must consider whether, in light of the nature and circumstances of her present felonies and prior serious or violent felony convictions, along with the particulars of her character, background, and prospects, the defendant may be deemed to be outside the Three Strikes scheme in whole or in part. [Citation.]” (*People v. Vargas* (2012) 206 Cal.App.4th 971, 977-978.)

Nothing in the record suggests the trial court had any personal antipathy toward Serbantez. Far from demonstrating that he should be deemed outside the Three Strikes scheme, the particulars of Serbantez’s character, background and prospects demonstrate that he is exactly the kind of recidivist to whom the statute is intended to apply. Serbantez was 31 years old and on parole when he committed the charged offenses. His probation report shows that his criminal history began with three sustained juvenile petitions between the ages of 15 and 18. He was released from Community Camp in December 1992. As an adult, Serbantez was convicted of burglary and misdemeanor tampering with a vehicle and placed on 36 months’ probation with 440 days in jail of which 365 were suspended (June 1993); minor in possession of alcohol and sentenced to 5 days in jail (December 1993); misdemeanor vandalism and placed on 24 months probation (September 1994); misdemeanor under the influence of a controlled substance (sentence unknown) (December 1994); robbery and placed on 36 months’ probation with 180 days in jail (January 1995); illegal possession of a firearm and sentenced to 32 months in prison (May 1995); probation violation and sentenced to prison (August 1995); parole violation and returned to prison (October 1997); parole violation (August 1998); possession of a firearm and sentenced to 32 months in prison (October 1998); second degree robbery and sentenced to 7 years in prison (June 2001). Under these circumstances, it was not an abuse of discretion to deny Serbantez’s motion to dismiss his Three Strikes priors.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.