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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS EDWARD HEATH,

Defendant and Appellant.

2d Crim. No. B239473
(Super. Ct. No. 2010041785)
(Ventura County)

Thomas Edward Heath appeals from the judgment entered after a jury convicted him of attempting to dissuade a person from reporting a crime (count 2 - Pen. Code, § 136.1, subd. (b)(1));¹ threatening to use force or violence upon a witness to a crime (count 3 - § 140, subd. (a)); and actively participating in a criminal street gang (count 4 - § 186.22, subd. (a), hereafter § 186.22(a).) On counts 2 and 3 the jury found *not* true allegations that appellant had committed the offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1), hereafter § 186.22(b)(1).) On count 1 the jury acquitted appellant of threatening to commit a crime that would result in death or great bodily injury. (§ 422, subd. (a).)

The trial court found true allegations of six prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and six prior serious or violent felony

¹ All statutory references are to the Penal Code unless otherwise stated.

convictions within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court sentenced appellant to prison for 35 years to life.

Appellant contends: (1) the evidence is insufficient to support the conviction on count 4, actively participating in a criminal street gang (§ 186.22(a)); (2) the guilty verdict on count 4 is fatally inconsistent with the jury's not true findings on the gang enhancements in counts 2 and 3 (§ 186.22 (b)(1)); and (3) the trial court erroneously admitted gang evidence. We conclude that the evidence is insufficient to support the count 4 conviction. We reverse that conviction and affirm in all other respects.

Facts

Appellant was one of the founders of the Ventura County and Santa Barbara County chapters of the Hells Angels Motorcycle Club. In 1977 he planted a bomb at an auto repair shop owned by a member of the Mongols Motorcycle Club, a rival gang. The bomb exploded and killed two persons. The bombing started a "war" between the Hells Angels and the Mongols that continues today.

A gang expert opined that the Hells Angels is a criminal street gang and that appellant was an active member of the gang in November 2010. The primary activities of the gang "are transportation and sales of controlled substances, assault with deadly weapons, illegal possession of firearms, illegal transfer of firearms, attempt[ed] murder . . . , [and] extortion."

In November 2010 appellant and Debra Gregory were living together in a house rented by Gregory. Gregory knew that appellant was a member of the Hells Angels. Appellant had boasted to her about the 1977 bombing.

On November 22, 2010, Gregory told appellant that she wanted him to move out. Appellant said that Gregory "could go fuck [her]self" and that "he wasn't going to move out." When Gregory insisted that he move out, appellant replied, "[W]hat are you going to do about it, call the cops?" Gregory said she had already called the police.

Appellant got "really mad." He threatened to kill Gregory and her son. Appellant said that he was going to inform other members of the Hells Angels that Gregory was a "cop caller" and a "rat." A gang expert testified that "rat" is "a street term used for a

person [who] gives information to law enforcement." Hells Angels members have committed acts of violence, including murder, against "rats."

A police officer arrived at the house. Gregory told him that appellant had threatened to kill her and her son. Appellant "blurted out, 'You are going to get it.' " Gregory "turned to [the officer] with a pretty shocked look on her face and said, 'Did you just hear that? He just threatened me again.' " Gregory said she was "terrified."

The officer asked appellant if he had threatened to kill Gregory. Appellant replied that "he doesn't threaten to kill people. He just does it." Appellant said he had been arrested five times for murder.

Prosecutor's Closing Argument

During closing argument, the prosecutor specified the acts upon which the counts of the information were based. Count 1 (the count on which appellant was acquitted) was based on appellant's threat to kill Gregory and her son. Counts 2 and 3 were based on appellant's threat in the police officer's presence that Gregory was " 'going to get it.' " The prosecutor argued that "with [this] one statement he committed two crimes, Counts 2 and 3." Count 4, the substantive gang offense (§ 186.22(a)), was based on "the fact that he's a gang member and went out and committed Counts 1, 2 and 3." The prosecutor stated: "[Y]ou all need to agree on which 1, 2, or 3 of those first three counts he committed to convict him of Count 4."

Sufficiency of the Evidence

Pursuant to *People v. Rodriguez* (2012) 55 Cal.4th 1125, appellant contends that the evidence is insufficient to support his conviction of the section 186.22(a) substantive gang offense charged in count 4. *Rodriguez* was decided after appellant had filed his opening brief. Appellant cited it in his reply brief. At our request, the People filed a supplemental letter brief discussing the impact of *Rodriguez* on this case. The People concede that, pursuant to *Rodriguez*, the conviction on count 4 must be reversed.

One of the elements of a violation of section 186.22(a) is the willful commission of "an act that 'promotes, furthers, or assists in any felonious criminal conduct by members of [the] gang.' (§ 186.22(a).)" (*People v. Rodriguez, supra*, 55 Cal.4th at pp.

1130-1131.) In *Rodriguez* our Supreme Court held that this element "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. [Citation.]" (*Id.*, at p. 1132.) The court reasoned that "[t]he Legislature . . . sought to avoid punishing mere gang membership in section 186.22(a) by requiring that a person commit an underlying felony with at least one other gang member." (*Id.*, at p. 1134.) Thus, a gang member does not violate section 186.22(a) if he acts alone in committing an underlying felony. (*Id.*, at p. 1128.)

Here, in closing argument the prosecutor stated that the underlying felonies were those charged in counts 1 through 3. The jury acquitted appellant on count 1. It is undisputed that appellant acted alone in committing the felonies charged in counts 2 and 3. These felonies were based on appellant's threat that Gregory was "'going to get it.'" As a matter of law, therefore, the evidence is insufficient to support the conviction for violating section 186.22(a).²

Inconsistent Verdicts

Appellant contends that the guilty verdict on count 4 is fatally inconsistent with the jury's not true findings on the allegations that the counts 2 and 3 offenses had been committed for the benefit of a criminal street gang. (§ 186.22(b)(1).) This issue is moot since we are reversing the count 4 conviction for insufficiency of the evidence.

Gang Evidence

Appellant argues: "There was simply no probative value to the introduction of the evidence and expert testimony regarding the [Hells Angels]. Accordingly, all such evidence was purely prejudicial" and should have been excluded. Appellant maintains

² In addition to the *Rodriguez* argument, appellant argues that the evidence is insufficient to establish the predicate offenses necessary to show a "'pattern of gang activity.'" (§ 186.22, subd. (e).) Appellant also "avers deprivation of his confrontation rights with respect to the evidence of 'predicate offenses' elicited by the People by and through their expert witness." Since we are reversing the section 186.22(a) conviction on other grounds that preclude a retrial, we need not consider these issues.

that the erroneous admission of the gang evidence deprived him of his constitutional right to a fair trial.

This point is forfeited because appellant did not object to the admission of the gang evidence. (Evid. Code, § 353, subd. (a).) Even if the issue had been preserved for appeal, appellant would not prevail. "It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

People v. Albarran (2007) 149 Cal.App.4th 214, is distinguishable. There, the trial court denied the defendant's pretrial motion to exclude gang evidence. A jury convicted the defendant and made true findings on gang enhancements. On a motion for new trial, the court determined that the gang enhancements were not supported by substantial evidence and dismissed them. The court denied a new trial on the underlying offenses. The appellate court concluded that extremely inflammatory gang evidence "had no legitimate purpose in this trial." (*Id.*, at p. 230.) The evidence "was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of [the defendant's] actual guilt." (*Id.*, at p. 228.) Thus, the case "present[ed] one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Id.*, at p. 232.)

Unlike the defendant in *Alberran*, appellant did not move to exclude gang evidence in the trial court. Furthermore, appellant has not shown that the gang evidence "had no legitimate purpose in this trial." (*People v. Albarran, supra*, 149 Cal.App.4th at p. 230.) Irrespective of whether gang evidence was admissible to prove the section 186.22(b)(1) enhancements or the section 186.22(a) substantive offense, it was admissible to prove the count 1 offense of making a criminal threat. (§ 422, subd. (a).) This offense was based on appellant's threat to kill Gregory and her son. Gang evidence was relevant to show that appellant intended to cause Gregory to fear for her own and her

son's safety and that she reasonably feared for their safety.³ Appellant said that he was going to inform other members of the Hells Angels that Gregory was a "cop caller" and a "rat."

"[E]vidence 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 . . . 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.) "[W]hile admissible [gang] evidence often carries with it a certain amount of prejudice, Evidence Code section 352 is designed for situations in which evidence of little evidentiary impact evokes an emotional bias. [Citation.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) Appellant did not move to exclude gang evidence pursuant to section 352.

Disposition

The conviction on count 4, actively participating in a criminal street gang (§ 186.22(a)), is reversed for insufficiency of the evidence.⁴ In all other respects, the

³ "To prove the crime of criminal threat [in violation of section 422, subdivision (a)], the prosecution must establish the following elements: '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat . . . was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' [Citation.]" (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 229.)

⁴ The reversal does not require resentencing. On count 4 the trial court imposed a prison term but stayed its execution pursuant to section 654. The reversal, therefore, does not affect appellant's aggregate sentence of 35 years to life.

judgment is affirmed. The trial court shall prepare an amended abstract of judgment and transmit a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David M. Hirsch, Judge
Superior Court County of Ventura

Anthony D. Zinnanti, for Defendant and Appellant.

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