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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS D. LOZANO,

Defendant and Appellant.

B240270

(Los Angeles County
Super. Ct. No. KA090145)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Robert M. Martinez, Judge. Affirmed.

Kimberly Howland Meyer, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb
and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesus Lozano was convicted, following a jury trial, of one count of second degree robbery in violation of Penal Code section 211.¹ The jury found true the allegation that appellant committed the robbery for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). The jury also found true the allegations that a principal personally used a firearm during the commission of the offense within the meaning of section 12022.53, subdivisions (b) and (e)(1). The trial court found true the allegation that appellant had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a) and the "Three Strikes" law (§§ 667, subds. (b)-(i) & 1170.12) and served a prison term for that conviction within the meaning of section 667.5, subdivision (b). The trial court sentenced appellant to a total term of 25 years in state prison, consisting of the upper term of 5 years for the robbery conviction, doubled to 10 years pursuant to the Three Strikes law, plus 10 years for the gun enhancement plus 5 years for the prior conviction and strike allegation. Since the court imposed section 12022.53, subdivision (e)(1) gun enhancement, the court did not impose sentence on the gang enhancement.²

Appellant appeals from the judgment of conviction, contending that the gang allegation and the firearm allegation are not supported by substantial evidence. We affirm the judgment of conviction.

Facts

On September 6, 2009, Kyung Kun Kim was working in a jewelry booth she owned at an indoor swap meet in La Puente. She heard the sound of shattering glass, thought it was a robbery and crouched down behind the counter. After the shattering noise stopped, Kim looked around and saw that several glass display cases had been broken into and the jewelry displayed inside the cases was missing. She estimated that over \$100,000 in gold and diamond jewelry had been stolen.

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

² *People v. Brookfield* (2009) 47 Cal.4th 583, 590.

Los Angeles Sheriff's Department Deputy Hugo Barajas responded to the scene of the robbery. He saw a booth with a glass display case that had been shattered. There was shattered glass and blood stains on the floor. There were also blood stains on the display case where the glass had been shattered.

Video surveillance footage obtained from the swap meet showed three people in hooded tops enter and walk over to the jewelry booth. Two of them started breaking the glass in the display case and taking out the jewelry inside. The third individual pointed a handgun in multiple directions. They started to leave, returned and shattered another display case and took more jewelry, then left.

Los Angeles County Sheriff's Department Criminalist Kristina Fritz also came to the crime scene on the day of the robbery. Among other things, Fritz collected samples of blood stains from the glass display case and from the floor.

Anselmo Casas, a senior criminalist with the Los Angeles County Sheriff's Department Crime Lab, performed a DNA analysis on the four separate blood stains recovered from the crime scene by Criminalist Fritz. All blood stains were found to be from the same person: appellant.

Los Angeles Police Department Detective Hugo Ayon worked in the Rampart Division Gang Unit and assisted in the investigation of the Kim robbery. He testified at trial as a gang expert. Prior to being a detective, Detective Ayon worked for five years as a uniformed gang enforcement officer. Detective Ayon had extensive experience and training in gang enforcement.

During the five years that Detective Ayon worked in the gang enforcement detail, he was assigned to monitor the Temple Street gang. He became familiar with the gang members, the community, and the area it controlled. He had been in contact with Temple Street gang members on hundreds of occasions and had participated in hundreds of gang investigations. The Temple Street gang had 150 to 200 members and claimed the area within Rampart as part of their territory. The primary activities of the Temple Street gang included vandalism, burglary, robbery, assault and murder. Assaults, shootings and stabbings were common.

Detective Ayon testified that members of the Temple Street gang were "very adept" at robberies. Specifically, Temple Street gang members participated in a string of jewelry store heists where they engaged in the "same kind of M.O." They targeted small jewelry stores and engaged in "smash-and-grab robberies." One member of the Temple Street gang held up the owner with a handgun while the other member shattered the glass display case and stole jewelry.

Detective Ayon testified that it was important for gangs to commit robberies and burglaries because these crimes generated money. Money was important as it enabled the gang to purchase drugs and guns on the black market. The sale of drugs made more money for the gang while guns were important for use in other activities such as robbery, crimes against rival gangs, and extortion of community members. Gang members committed crimes together because it gave them courage to commit the crimes, they could back each other up during the crimes, and trust one another to keep quiet afterward.

Detective Ayon was familiar with Herson Gaytan, a member of the Temple Street gang. Detective Ayon testified as a gang expert against Gaytan and he was subsequently convicted of first degree murder with gun and gang allegations.

Detective Ayon was also familiar with Marvin Rafael Solano, a self-admitted member of Temple Street, who was involved in a "smash-and-grab robbery" with Gary Lopez, another member of Temple Street. The robbery occurred a few months before the robbery in this case, at the same swap meet. In this earlier robbery, one individual held up the store owner with a handgun while the other smashed the glass display case and removed the jewelry. Detective Ayon was the arresting officer. Solano was subsequently convicted of armed robbery.

Detective Ayon had encountered appellant on 15 to 20 occasions. Appellant was a self-admitted member of Temple Street, and had numerous tattoos on his body that indicated membership in Temple Street. In the gang culture, the only way to leave the gang was to get jumped out. Most people do not survive the process. The only viable way to leave the gang would be to move out of the area.

In response to a hypothetical that included the circumstances of the instant crime, Detective Ayon opined that the robbery was committed for the benefit of the Temple Street gang and with the intent to promote gang conduct. He acknowledged that the hypothetical included circumstances that were a little different than a typical street robbery. Generally, when gang members commit a robbery in their neighborhood, it is done to create an atmosphere of fear and intimidation. This fear benefits the gang as the community is reluctant to cooperate with law enforcement during the investigation of crimes committed by the gang. But in this hypothetical, Detective Ayon opined that the benefit to the gang was financial. The proceeds from the robbery directly benefitted the gang because the money would be funneled into the gang to purchase firearms, which would help in the commission of other crimes. The money would also be used to purchase drugs, which the gang would sell for a profit.

Detective Ayon also opined that the robbery was committed in association with the gang in that a gang member would not take a non-gang member to commit this type of crime. A gang member would take a fellow gang member, someone that he could trust and count on to help him follow through with the crime. Further, the robbery was clearly planned given the masks worn by the robbers, the implements used to steal the jewelry, the use of the gun and the quick getaway.

Detective Ayon further opined that it was not unusual that the robbery occurred outside of Temple Street territory. If Temple Street committed a crime within its borders, one would naturally assume that Temple Street was responsible for the crime. However, if a crime was committed outside its borders, it would be beneficial to the gang for it would not be suspected of having committed the crime. It was also not unusual that gang signs or tattoos were not displayed during the commission of the robbery as "encroaching" on the turf of another gang could have serious consequences.

James Shaw, Ph.D., testified as a gang expert for the defense. Dr. Shaw opined that in this case it was unlikely that the robbery was gang-related as the robbery did not occur in Temple Street's turf. Dr. Shaw further opined that it would be unusual for gangs to commit a "silent robbery" as gangs prefer loud outbursts proclaiming their gang. After

speaking with appellant for about 30 minutes, Dr. Shaw concluded that appellant was not an active gang member. He believed that appellant was seeking gainful employment to improve his life rather than engaging in unlawful activities to earn money.

On cross-examination, Dr. Shaw conceded that although gangs generally operate in their own areas, that was not always the case. He also acknowledged that he was not an expert on the Temple Street gang.

Appellant testified on his own behalf. On the day of the robbery, he was at home with his ex-girlfriend, who was pregnant with his child. He further stated he had no idea how his blood was found on the glass display case.

Appellant stated he was no longer a gang member and had not been for the past five years. Appellant had quite a few Temple Street gang tattoos and got them to advertise he was "from the hood."

Appellant admitted that Temple Street gang members commit crimes such as murder and robbery and engaged in shootings and stabbings. He was aware of numerous jewelry store robberies and also knew that Solano and Lopez were convicted of those crimes.

Discussion

1. Gang enhancement

Appellant contends that there is insufficient evidence to support the jury's true finding on the gang enhancement allegation, and that such a conviction violates his state and federal constitutional rights to due process of law.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution

relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

The jury may rely on expert testimony about gang membership, culture, habits and activities to reach a finding on a gang allegation. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-6120; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332.) Gang experts may base their opinions on conversations with gang members, their own personal investigations of gang-related crimes and other information. (*People v. Gardeley, supra*, 14 Cal.4th at p. 620; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463.)

Section 186.22, subdivision (b)(1), applies to "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."

"There is rarely direct evidence that a crime was committed for the benefit of a gang. For this reason, 'we routinely draw inferences about intent from the predictable results of action. We cannot look into people's minds directly to see their purposes. We can discover mental state only from how people act and what they say.'" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 411-412.)

Appellant contends that the prosecution proved only appellant's past gang affiliation and that testimony by the prosecutor's gang expert that the robbery in this case was gang-related was "unsubstantiated." Specifically, appellant contends that there was no evidence that he was an active gang member at the time of the robbery, that the other perpetrators of the robbery were gang members or that they committed the robberies for the financial benefit of the gang.

It was not disputed that appellant had once been a member of the Temple Street gang. Appellant testified that he was no longer a member. Detective Ayon opined that appellant was still an active Temple Street gang member. The detective's opinion was based on appellant's continued residence in Temple Street gang territory and on the lack of any indication that appellant had been beaten out of the gang. Detective Ayon's testimony was substantial evidence that appellant was an active gang member.

Detective Ayon testified that one of the primary activities of the Temple Street gang was robbery. This is well within the scope of expert testimony. Further, appellant acknowledged that the gang committed robberies.

Detective Ayon also testified about the specifics of Temple Street gang robberies. He testified that two Temple Street gang members, Solano and Lopez, committed a smash and grab robbery at the same location as the smash and grab robbery in this case. He further testified that the two robberies were quite similar in execution. Appellant acknowledged that he was aware that the Temple Street gang robbed jewelry stores and was also aware of the earlier smash and grab robbery by Solano and Lopez.³

When asked if there was "some special or certain significance to Temple Street and jewelry store robberies," Detective Ayon replied that "a few years ago, there was a string of jewelry store robberies, same kind of m.o. where you would have a number of individuals go into a -- they were usually, like, your little strip mall businesses, target, a jewelry store inside the strip mall; and you would, basically, do your smash-and-grab robberies where you would break the display. One of the individuals would hold the owner at bay with the handgun and the other individuals would shatter out the display glass or the display cases and then remove the jewelry."⁴ Some of the Temple Street

³ Appellant also testified that Solano was not a member of the Temple Street gang and that he had no knowledge of whether Lopez was a Temple Street gang member.

⁴ To the extent that appellant contends that this testimony does not show that Temple Street gang members committed the string of jewelry store robberies, we do not agree. Taken in context, it is more than reasonable to understand the detective as attributing the robberies to the Temple Street gang.

gang jewelry store robberies occurred in Temple Street territory in Rampart Division and some in Pomona.

Detective Ayon also explained that the benefit of the robberies to the gang was to provide financing of other criminal activity by the gang, particularly the purchase of guns and narcotics. To the extent that appellant contends that there must be proof that the gang actually benefited from the robbery by obtaining cash or stolen property, we do not agree. In many cases, the benefit to the gang is an intangible one to be realized in the future, such as the intimidation of the community to make future crimes easier. Appellant has not cited, and we are not aware of, any cases requiring proof that the community was intimidated and future crimes were easier.

Thus, there was evidence that appellant was a member of the Temple Street gang and committed a crime which was very similar to a series of crimes committed by members of that gang. The most reasonable inference from these facts is that he committed the robbery at the direction of and for the benefit of the gang. Such an inference is strengthened by appellant's awareness of the most recent and similar such robbery, by Solano and Lopez. There would be little benefit to him from copying for personal gain a distinctive crime which was associated with his gang, and much potential harm, including an increased probability of detection and unhappiness on the part of the gang.⁵

Given that the "benefit" to the gang from the robbery was cash to finance other crimes and the purchase of weapons to facilitate other crimes, it is also reasonable to infer that appellant also had the specific intent to promote, further or assist in criminal conduct by the gang.

Appellant relies on *People v. Ochoa* (2009) 179 Cal.App.4th 650, *People v. Ramon* (2009) 175 Cal.App.4th 843, *In re Frank S.* (2006) 141 Cal.App.4th 1192 and

⁵ Given that the smash and grab jewelry store robberies were known to be committed by the Temple Street gang, any investigation would naturally focus first on members of that gang.

People v. Martinez (2004) 116 Cal.App.4th 753 to show insufficiency of the evidence. That reliance is misplaced.

In *Ochoa*, the defendant, a gang member, carjacked a vehicle from the parking lot of a fast food restaurant that was not in gang territory. The gang expert testified that carjacking is a "signature" crime of gangs in general and car theft was a "signature" crime of the defendant's gang, and opined that the carjacking was for the benefit of defendant's gang. (*People v. Ochoa, supra*, 179 Cal.App.4th at p. 654.) On appeal, the Court found the expert's opinion that the crime was committed for the benefit of defendant's gang to be speculative. The Court pointed out that carjacking is a different crime than car theft, there was no evidence that carjacking was a "signature" crime of defendant's gang, and there were no facts showing that defendant's gang "committed car thefts in a manner distinctive from other car thefts and that defendant did so in the current case, as well." (*Id.* at p. 662.) Here, there were facts showing that the Temple Street gang committed robberies in a distinctive manner and that appellant did so in this case as well.

In *Ramon*, the defendant, a gang member, was arrested driving a stolen truck. His passenger was a fellow gang member, the arrest took place in the gang's territory and there was a handgun under the driver's seat. The defendant was convicted of receiving stolen property and illegal possession of a weapon. The gang expert opined that the crimes were committed for the benefit of defendant's gang because possession of the stolen truck and the weapon could be used by defendant's gang to spread fear and intimidation and commit other crimes. (*People v. Ramon, supra*, 175 Cal.App.4th at pp. 847-848.) On appeal, the Court characterized the expert testimony as giving a "possible motive or reason" that the defendant committed the charged crimes, but found a "mere possibility" insufficient to support the verdict. (*Id.* at p. 853.) The Court noted that the "analysis might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang." (*Ibid.*) Here, the expert did testify that robbery was a primary activity of appellant's gang and also testified that the gang was known for committing the distinctive type of robbery at issue in this case.

In *Frank S.*, the minor, a gang associate, was arrested for possession of methamphetamine and a knife. The minor stated that he was carrying the knife for protection because he had earlier been attacked by gang members who believed that the minor was a member of a rival gang. The expert opined that the minor's possession of the knife would benefit the gang because it "helps provide them protection should they be assaulted." (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199.) Thus, the expert was speculating that the minor might use the knife in the future to benefit the gang under certain circumstances which might never come to pass.⁶ Here, appellant actually committed a crime with the identifiable benefit of providing cash to the gang.

In *Martinez*, the defendant, a gang member, pled guilty to one count of auto burglary. He was found to have violated the terms of his probation in an earlier case by associating with a gang member. At the sentencing hearing for the current and earlier cases, the trial court imposed a gang registration requirement pursuant to section 186.30, subdivision (b)(3). (*People v. Martinez*, *supra*, 116 Cal.App.4th at pp. 756-758.) This requirement may only be imposed if a defendant has committed a "gang-related" offense. On appeal, the Court found that the bare facts of the case did not show that the offense was gang-related, the investigating officer and probation officer did not suggest that the auto burglary was gang related and because the case involved a plea, there was no expert testimony in the record "explain[ing] the relationship of the crime to a criminal street gang." (*Id.* at p. 762 & fn. 8.) Here, there was expert testimony on the relationship of the crime to the gang.

To the extent that appellant relies on the recently decided case of *People v. Rodriguez* (2012) 55 Cal.4th 1125, to show insufficiency of the evidence, that reliance is also misplaced. That case involves a gang allegation pursuant to section 186.22, subdivision (a), while this case involves a gang allegation pursuant to section 186.22,

⁶ In order for appellant to use the knife to protect gang members, he would have to be with them at the time they were assaulted, and the assault would have to be of a kind where a knife would be a useful defense. Such a combination of events might never occur.

subdivision (b). We will assume for the sake of argument that the reasoning of *Rodriguez* applies to subdivision (b) enhancements, and means that the phrase "the specific intent to promote, further or assist in any criminal conduct by gang members" requires the criminal conduct to be carried out by at least one gang member other than the charged defendant.⁷ There is no requirement under subdivision (b) that the promoted criminal conduct be the charged criminal conduct at issue in the case. The conduct can be, and often is, future criminal conduct. Commonly, for example, the benefit to the gang is intimidation of the community, which will facilitate future crimes by the gang. Here, the expert's testimony that proceeds from appellant's robbery would be used by the gang to buy guns and drugs clearly refers to future criminal conduct by more than one gang member. Thus, any numeric gang member requirement was satisfied.

Since we have determined that "a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

⁷ The plurality of the Court in *Rodriguez* agreed that the subdivision (a) phrase "criminal conduct by members of that gang" uses a plural noun and requires that the felonious conduct at issue be committed by at least one gang member in addition to the charged defendant. The Court took pains to point out that "[s]ection 186.22(a) and section 186.22(b)(1) strike at different things. The enhancement under section 186.22(b)(1) punishes gang-related conduct, i.e., felonies committed with the specific intent to benefit, further, or promote the gang. (See [*People v.*] *Gardeley* [(1996)] 14 Cal.4th [605,] 622.) However, '[n]ot every crime committed by gang members is related to a gang.' [(*People v.*] *Albillar* [(2010)] 51 Cal.4th [47,] 60.) As such, with section 186.22(a), the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang related. (*Albillar, supra*, at p. 55 [there is nothing absurd in targeting the scourge of gang members committing any crimes together and not merely those that are gang related'.])" (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1138.)

2. Firearm enhancement

The trial court imposed a 10-year firearm enhancement under section 12022.53, subdivision (e)(1). Since there was no evidence that appellant personally used a firearm, the enhancement required a finding that appellant committed the robbery for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), and that a principal in the robbery personally used a firearm. (§ 12022.53, subd. (e)(1); see *People v. Brookfield*, *supra*, 47 Cal.4th at p. 590.) Appellant contends that since there is insufficient evidence that appellant committed the robbery for the benefit of a criminal street gang, the firearm enhancement must be reversed.

As we discuss, *ante*, there is sufficient evidence to support the true finding on the section 186.22, subdivision (b) enhancement. Accordingly, we reject appellant's claim on the firearm enhancement.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

KRIEGLER, J.

O'NEILL, J.*

* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.