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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ABRAHAM R., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ABRAHAM R.,

Defendant and Appellant.

D060753

(Super. Ct. No. J229413)

APPEAL from a judgment of the Superior Court of San Diego County, Carlos O. Armour, Judge. Affirmed as modified.

I.

INTRODUCTION

Abraham R. appeals from a disposition order declaring him a ward of the juvenile court pursuant to Welfare and Institutions Code section 602. Abraham argues that the evidence is insufficient to establish his identity as one of the perpetrators of the offenses

charged, or, alternatively, that the evidence was insufficient to prove that the conduct in which he engaged was gang related, such that the court could have found him guilty of committing street terrorism or have found true the gang enhancement allegation.

Abraham also argues that the probation condition that the court imposed pertaining to his possession of weapons and ammunition failed to include an express knowledge requirement, and must therefore be stricken or modified.

We agree that the probation condition must be modified to include a scienter element. We disagree with Abraham's other contentions on appeal. We therefore modify the trial court's probation order with respect to the challenged probation condition, and otherwise affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

At approximately 4:00 p.m. on May 16, 2011, Natalie Lohrey was walking down the street in Escondido with her boyfriend, Brandon Phoenix, and a friend, Robert Perry. As the group walked around the corner of a building, they nearly ran into two Hispanic men. The men wore long, plain-colored shirts, "Dickies" brand pants, and hats with the letter "D" on them. Lohrey thought the two men looked like "gangsters."

The men in the hats asked the group, "Do you guys bang?" Perry responded, "No." The men then said, "D Boys, D Boys. Fuck weak shit." One of the men displayed a wooden bat, while the other pulled out a machete. As the men moved closer to Lohrey, Phoenix and Perry one of them asked, "'Are you guys trying to get crazy or what?' "

Perry replied, " 'No, we don't bang, but if you want to get crazy, we can handle it.' "

Perry took a step toward the two men. At that time, a black Nissan Altima suddenly pulled up to the curb across the street. Four or five men, including Abraham, jumped out of the car and headed toward Lohrey, Phoenix and Perry. The men appeared to be Hispanic, in their early 20s, and were dressed "pretty much the same" as the two men who initiated the confrontation. Abraham and another man were carrying small wooden bats.

Perry reached for his cell phone and began dialing a number. All of the men, including the first two, got into the car and the car drove off. Lohrey, Phoenix and Perry went to Lohrey's house, which was nearby. Someone had called the police, who arrived at Lohrey's house within a matter of minutes.

Escondido Police Department Gang Unit Officer Omar Mondragon was one of the officers who responded to Lohrey's house. Mondragon broadcasted a notice for officers to be on the lookout for a black Nissan Altima.

Within an hour, Officer Marco Fuentes noticed a black Nissan Altima in the parking lot of an apartment complex located in territory claimed by a gang called "Diablos." Officer Fuentes saw Abraham and a group of six or seven young Hispanic men congregating a few parking spaces away from the car. Officer Fuentes recognized Abraham and knew his name. The car was registered to an individual with the same last name as Abraham, at the same address where Abraham lived. Officer Fuentes detained the young men, including Abraham, and radioed Officer Mondragon.

Officer Mondragon was interviewing Lohrey when he received Officer Fuentes's radio call. Mondragon and his partner took Lohrey, Phoenix and Perry to the apartment complex where Fuentes was detaining the group of men, in order to conduct a curbside lineup.

After the curbside lineup,¹ officers arrested Abraham and Felix Castaneda and placed them in the back of a patrol car for between 10 and 15 minutes while officers searched the Nissan Altima. The patrol car was equipped with an audio recorder that recorded the conversation between Abraham and Castaneda. The young men "plann[ed] out what they were going to say [when] questioned by the police." Abraham initially suggested that they deny knowing one another. However, they realized that this would not be plausible because they had been arrested together. Abraham then indicated that he would tell officers that he had been at home all day. As the young men watched the officers search the car, Castaneda said, " 'They are probably looking for fingerprints. I told you that's what they would be doing.' " Abraham responded, " 'Well, I didn't touch the car, so I'm okay.' " As the officers appeared to be concluding their search, Abraham laughed and said, " 'They didn't find anything. That thing I took out is still under the car.' "

¹ The trial court sustained defense counsel's objection to Officer Fuentes's response to the prosecutor's question regarding what he did after conducting the curbside lineup because Fuentes had started to state which of the young men had been identified during the curbside lineup. As a result, Fuentes did not testify about Abraham's identification at the curbside lineup. However, at the adjudication hearing, Lohrey testified that Abraham was one of the men who had gotten out of the car on the day of the incident.

Officer Jay Norris of the Escondido Police Department Gang Unit testified as a gang expert. As a Gang Enforcement Officer, Norris came into contact with Escondido gang members on a daily basis and had extensive experience with gangs. Norris testified that there are two main criminal street gangs in Escondido—Westside and Diablos. The two gangs fight over territory in the city. Gang members will confront people whom they encounter in their territory and challenge them by asking questions like, " 'Where are you from,' " or, " 'Do you bang?' " If the person does not respond with what the gang member believes to be the proper gang name, the gang member will often respond in a violent manner. According to Norris, "[I]t could be as simple as a fight, or it could be to the extreme[] [of] a homicide."

Gang members want their gang to be feared because to them fear translates to respect. Fear also discourages neighbors and other citizens from reporting gang members to the police and/or testifying against them. For this reason, gang members will sometimes attack, rob, or even kill individuals who do not respond properly to a gang challenge, even if the individual is not a member of a rival gang. The escalation of violence works to increase the status of both the gang, in general, as well as that of particular gang members who engage in more violent acts. In addition, gang members know each other and tend to back each other up, so if one gang member sees another member about to get in a fight, the previously uninvolved gang member will join in the fight.

Officer Norris explained that the Diablos tend to wear baggy "Dickies" brand pants, baggy shirts, and long white socks. He said that they also often wear some article

of clothing with the letter "D" on it. Diablos members also often carry small bats as weapons and refer to themselves as "D Boys."

Officer Norris knew Abraham, and had met him "on occasion." Norris had investigated Abraham's "prior contacts with police and the circumstances of those contacts." Abraham was not a documented member of the Diablos gang as of May 16, 2011. However, he had been contacted by law enforcement officers in Diablos territory and in areas particularly known to be frequented by Diablos members. In addition, Abraham had been in "close association" with known Diablos members during some of those contacts. Castaneda was an active Diablos gang member who had previously been prosecuted for gang-related crimes. On the day of this incident, Castaneda was wearing a black-and-white checkered jacket and Abraham was wearing black-and-white checkered shorts.

Officer Norris believed that Abraham knew of the Diablos gang members' pattern of criminal activity, that Abraham was an active gang member, and that he had acted on behalf of and in association with the Diablos gang when he jumped out of the car to aid the two Diablos gang members who accosted Lohrey and her friends. In Norris's opinion, in jumping out of the car to help the other Diablos members, Abraham was promoting the gang and his own status within the gang.

The parties stipulated that Diablos is a criminal street gang as defined in Penal Code² section 186.22; subdivision (f); that members of Diablos have engaged in a pattern

² Further statutory references are to the Penal Code unless otherwise indicated.

of criminal activity; that among the gang's primary activities are attempted murder, robbery, assault with a deadly weapon, and vandalism; and that the gang has a common name or identifying sign or symbol.

B. *Procedural background*

The San Diego County District Attorney filed a juvenile wardship petition (Welf. & Inst. Code, § 602) against Abraham, alleging that Abraham was an active participant in a criminal street gang (§ 186.22, subd. (a); count 1) and that he had fought and challenged another person to fight in a public place (§ 415, subd. (1); count 2). The petition alleged that count 2 was committed in association with a criminal street gang (§ 186.22, subd. (b)).

On September 26, 2011, the juvenile court made true findings on counts 1 and 2, as well as the allegation attached to count 2, and sustained the petition in its entirety. On October 18, 2011, the court declared Abraham a ward of the court, and placed him on probation in the custody of his parents.

Abraham filed a timely notice of appeal.

III.

DISCUSSION

A. *The evidence is sufficient to support the trial court's finding that Abraham was one of the perpetrators of the crime against Lohrey, Phoenix and Perry*

Abraham contends that this court should reverse the trial court's findings against him because the evidence is insufficient to support the finding that he was one of the participants in the confrontation.

In determining the sufficiency of the evidence to support a guilty verdict, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 (*Jackson*)). "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.] [Citation.] We ' ' presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.] [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

Abraham contends that the record does not disclose evidence that is reasonable, credible and of solid value to establish that he was one of the persons who arrived in the vehicle prepared to fight. He acknowledges, however, that Lohrey identified him in court as one of the people who got out of the car that day. "Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) Moreover, "[i]dentification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) Lohrey's testimony in this case, in which she

identified Abraham as one of the perpetrators despite admitting that she was scared to do so out of fear of retaliation, was strong evidence of Abraham's role in the crimes charged.

Abraham suggests that Lohrey's testimony at trial identifying him as one of the perpetrators of the crime is simply not sufficient. He maintains that she did not identify him at the curbside lineup. Abraham appears to *assume* that Lohrey failed to identify him at the curbside lineup, based on what was perhaps inelegant examination by the prosecutor in failing to directly ask Lohrey whether she had in fact identified Abraham at the curbside lineup. However, a reasonable reading of the testimony at trial, including that of Lohrey and Officers Fuentes and Mondragon, indicates that Lohrey did indeed identify both Abraham and Castaneda during the lineup. For example, Officer Mondragon acknowledged that neither Perry nor Phoenix was able to identify any of the men in the curbside lineup to a degree sufficient to warrant any arrests. However, Officer Fuentes testified that Abraham and Castaneda were arrested after someone positively identified them. The only reasonable inference from this testimony is that Lohrey positively identified Abraham prior to trial, since there were three victims and neither of the other two was able to identify the perpetrators from the lineup to a degree sufficient to warrant any arrests. Lohrey's identification of Abraham, both at trial and prior to trial, constitutes more than sufficient evidence to support the trial court's findings that Abraham was one of the young men who aided and abetted the other men who challenged Lohrey's group to fight that day. Further, even if Lohrey identified Abraham only at trial and not at the curbside lineup, that would still be sufficient to support a true finding.

B. *The evidence is sufficient to support the trial court's true finding on the substantive gang offense alleged in count 1 and the gang enhancement allegation attached to count 2*

Abraham contends that the evidence is insufficient to support the trial court's true finding that he committed the substantive offense of street terrorism under section 186.22, subdivision (a), as well as the true finding with respect to the gang enhancement allegation under section 186.22, subdivision (d). According to Abraham, there was no evidence showing that he knew that the Diablos gang members regularly engage in criminal behavior, or that he willfully promoted, furthered, or assisted his fellow gang members' felonious conduct.

We apply the same standards outlined in section III.A., *ante*, to Abraham's sufficiency of the evidence argument with respect to the gang offense and the gang enhancement.

1. *The substantive offense*

The trial court found true the allegation that Abraham was an active participant in a criminal street gang under subdivision (a) of section 186.22. That provision states in pertinent part: "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 by imprisonment in a county jail . . . or . . . state prison" (§ 186.22, subd. (a).)

Abraham asserts that the gang expert offered no "facts" in support of his opinion that Abraham was affiliated with the Diablos gang sufficient to support the conclusion

that Abraham "actively participates" in that gang. The record belies Abraham's assertion. Although Abraham was not yet a *documented* Diablos member on the date of the incident, there was plenty of evidence from which a fact finder could conclude that Abraham was indeed participating in the Diablos street gang at that point in time. Abraham had been contacted repeatedly in Diablos gang territory and at known gang hangouts. Many of these contacts occurred while Abraham was in the company of, or in "close association" with, known gang members. Officer Norris, the gang expert who was very familiar with the Diablos gang in Escondido, had personally "documented" Abraham as a member of the Diablos gang and believed him to be a member associating with that gang at the time of the incident. Officer Fuentes also recognized Abraham and knew his name. On the day of the incident, Abraham was arrested with Castaneda, a known Diablos member, just after he and Castaneda had armed themselves and taken part in a confrontation that was initiated by two men wearing Diablos gang attire and who issued a gang challenge. Abraham was dressed similarly and was carrying a weapon of a type that members of that gang typically carry. Based on all of this evidence, it would be reasonable to conclude that Abraham was an active participant of the Diablos street gang.

Abraham also contends that there is insufficient evidence that he knew that Diablos members " 'engage[d] in or have engaged in a pattern of criminal gang activity.' " Abraham complains that there was no testimony that he was either generally or specifically *aware of* the gang's criminal activities, despite the fact that the parties stipulated that the Diablos gang members did engage in a " 'pattern of criminal gang activity.' " However, it is reasonable to infer that since Abraham was actively

participating in the gang, he knew about the gang's criminal activities. The events underlying the charges in this case support this inference. Abraham, Castaneda, and other men appeared suddenly and apparently unbidden at a gang confrontation that started when the first two men challenged Lohrey's group. When it appeared that at least one of the three victims might resist, Abraham and three or four others materialized, armed and ready to fight. It appears that these men were nearby, ready to become involved, and, when it appeared they were needed, they got out of the car armed with weapons and headed straight for the confrontation. Based on these events, it is reasonable to infer that Abraham and the other men with whom he arrived were members of the gang and that they knew what their fellow gangsters were up to. Indeed, one could reasonably infer that they were there, waiting to help out if necessary. One could further infer that Abraham knew what was going on without having to ask because he was very familiar with how the gang conducted this type of criminal activity.

Finally, Abraham challenges the sufficiency of the evidence that he intended to promote, further or assist in *felonious* gang conduct. He notes that challenging a person to fight is "merely a misdemeanor offense," not a felony, and contends that the only evidence on which the prosecution could have relied was evidence of Abraham's involvement in the street confrontation. Although Abraham was charged with and found to have committed only a misdemeanor offense, the evidence presented at his hearing was sufficient to support a finding that he intended to promote or assist in felonious conduct. Specifically, the two gang members who challenged Lohrey and her friends pulled out a machete and a bat and advanced toward the victims. The confrontation

appears to have come to an end only because Perry started to call for help on his cell phone. These facts are sufficient to constitute an assault with a deadly weapon. Further, even if an assault with a deadly weapon was not completed, all of these circumstances are sufficient for a fact finder to reasonably conclude that when Abraham jumped out of the car, armed with a bat, he intended to promote or assist the two men in completing what was clearly a felony assault.

In sum, the evidence is sufficient to support the juvenile court's determination that Abraham was guilty of street terrorism as charged in count 1 of the petition.

2. *The gang enhancement allegation*

The trial court found true the gang enhancement allegation associated with the offense charged in count 2, challenging another person to a fight in a public place. Subdivision (d) of section 186.22 provides in pertinent part: "Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is 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, shall be punished by imprisonment in the county jail . . . , or by imprisonment in the state prison" Subdivision (d) of section 186.22 is an alternative penalty provision that is substantively similar to the gang enhancement provision under subdivision (b) of section 186.22. (Compare § 186.22, subd. (d) with subd. (b)(1).)

In order to prove the enhancement, the prosecution must establish (1) that the defendant committed the underlying offense "for the benefit of, at the direction of, or in association with any criminal street gang," and (2) that the defendant had "the specific

intent to promote, further, or assist in any criminal conduct by gang members."

(§ 186.22, subd. (d).)

Abraham first asserts that there was no evidence that he committed the underlying offense for the benefit of, at the direction of, or in association with the Diablos gang. We disagree.

"Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' [Citations.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 63 (*Albillar*)). The gang expert testified that Diablos members often engage in assaults with deadly weapons and street fighting as a way to increase the gang's reputation and create fear in the community. He also was of the opinion that the confrontation that occurred in this case was initiated for this very reason—to increase the status of the gang as something to be feared. A reasonable fact finder could reach this conclusion based on the other evidence, as well. The two men whom Lohrey and her friends encountered initiated a confrontation without any prompting or provocation, pulled out weapons and issued a gang challenge, all while wearing typical Diablos gang clothing. When at least one of the three intended victims indicated that he would not retreat from a fight, another group of assailants appeared with weapons in their hands, and headed straight for the victims. This was clearly a coordinated, targeted attack, and was unquestionably gang related. Based on these events, one could reasonably infer that all of the perpetrators undertook this attack, at a

minimum, "in association" with the Diablos gang, and that they engaged in this confrontation "for the benefit" of the gang.

Abraham next challenges the sufficiency of the evidence that he specifically intended to promote, further, or assist in criminal conduct by Diablos gang members. "[I]f substantial evidence establishes that the defendant intended to and did commit the charged [offense] with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar, supra*, 51 Cal.4th at p. 68.) There was ample evidence from which a fact finder could reasonably infer that the two men who initially accosted Lohrey's group were members of the Diablos gang. The two men were armed, were wearing Diablos gang colors, and made gang-related statements essentially identifying themselves as Diablos members. In addition, Abraham acted in concert with Castaneda, a known Diablos member, in this unprovoked armed confrontation. One can infer from these circumstances that Abraham had the specific intent to promote or assist Diablos gang members in criminal conduct by participating in the confrontation that day. Substantial evidence therefore supports the trial court's finding that the second prong of the gang enhancement allegation was met.

3. *The gang registration order is valid*

"Section 186.30 provides that 'any person convicted in a criminal court or who has had a petition sustained in a juvenile court' of either participating in a criminal street gang in violation of section 186.22, subdivision (a) or a 'crime that the court finds is gang related,' or where a gang enhancement pursuant to section 186.22, subdivision (b) has

been found to be true, shall 'register' with the local law enforcement agency as a criminal street gang member." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 758-759.)

Abraham argues that the trial court's order that he register as a criminal street gang member should be reversed for lack of sufficient evidence to support a finding that he met the requirements for imposing such an order. Because we have concluded that the evidence is sufficient to support the trial court's true findings that Abraham committed the crime of active participation in a criminal street gang (§ 186.22, subd. (a)) and that he committed the crime of challenging a person to fight in association with a criminal street gang, with the specific intent to promote, further or assist Diablos members (§ 186.22, subd. (d)), the trial court's decision to impose the gang registration order was valid.

C. *The probation condition restricting Abraham from possessing weapons should be modified*

Abraham contends that his probation condition relating to weapons and firearms must be modified to include a knowledge requirement. The People concede that a scienter requirement is necessary, but urge us to adopt the approach of the Third District and "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly." (*People v. Patel* (2011) 196 Cal.App.4th 956, 960-961.)

Rather than declaring that a knowledge requirement shall be read into all probation conditions, we choose instead to modify the challenged probation condition in this case. We reiterate that the superior court should revise its standard probation conditions form to meet constitutional requirements.

IV.

DISPOSITION

The probation condition stating that "[t]he minor shall not use, possess, transport, sell, or have in or under his/her control any firearm, replica, ammunition or other weapon, including a knife, any explosive or any item intended for use as a weapon, including hunting rifles or shotguns" is modified to read: "The minor shall not knowingly use, possess, transport, sell, or have in or under his/her control any firearm, replica, ammunition or other weapon, including a knife, any explosive, or any item intended for use as a weapon, including hunting rifles or shotguns." The trial court is directed to forward a copy of the corrected order to the probation authorities. As so modified, the judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.