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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

IRVIN S. ROJAS,

Defendant and Appellant.

D060871

(Super. Ct. No. SCD230168)

APPEAL from an order of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

Irvin S. Rojas appeals an order revoking his probation. He contends that there was no evidence that his probation conditions required him to abstain from drinking alcohol; that he was not given written notice of a violation of any alcohol condition; and that the evidence was insufficient to support a finding that he violated a probation condition proscribing association with gang members. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 2010, Rojas entered a negotiated guilty plea to transporting more than 28.5 grams of marijuana (Health & Saf. Code, § 11360, subd. (a)), not for personal use (Pen. Code, § 1210, subd. (a)),¹ and possessing concentrated cannabis (Health & Saf. Code, § 11357, subd. (a)), a misdemeanor (Pen. Code, § 17b). On November 23, the court suspended imposition of sentence and placed Rojas on three years' probation. The two probation conditions at issue here are conditions 8.b. and 12.b. Condition 8.b. provides: "Do not use or possess alcohol if directed by the [probation officer]." Condition 12.b. provides: "Do not associate with any known gang member or persons who are associated with the ___ gang." Condition 12.b. is one of seven "gang conditions" that the court imposed. Condition 12.i., the only gang condition that identified a gang, referred to the Varrio Chula Vista (VCV) gang. Rojas is a documented member of VCV.

On February 6, 2011, Rojas was arrested for violating probation condition 12.b.² On February 8, he was mistakenly released from custody. On March 2, police officers stopped the vehicle that Rojas was driving. Alfredo Perez and Janette Allen, members of the VCV gang, were passengers. The officers found 10.21 grams of marijuana in Rojas's

¹ Further statutory references are to the Penal Code unless otherwise specified.

² The record does not contain any other information about this violation.

possession. Rojas's probation officer, Bobby Burns, filed a notice to show cause declaring that Rojas had violated probation by associating with gang members and possessing a controlled substance. On March 8, 2011, Rojas admitted having violated probation. The court revoked, reinstated and modified the terms of Rojas's probation.³

On August 27, 2011, Rojas tested positive for amphetamine and THC, a violation of probation. He was arrested and jailed. On September 2, Rojas admitted having violated probation. The court revoked and reinstated probation, and imposed, but stayed execution of, a 365-day jail commitment. Rojas was released from custody at around 9:00 p.m. on September 2.

At 9:47 p.m. on September 2, 2011, Chula Vista Police Officers Maddox and Lemus, members of the gang unit, went to Rojas's apartment complex for a probation compliance check. The officers stood outside Rojas's second-story apartment for at least 15 minutes. During that time, Maddox heard a conversation that was taking place inside the apartment. Maddox recognized two of the voices as those of Rojas and Raul Ramirez.⁴ Ramirez was on parole at the time, and is a documented member of VCV, a documented gang. His gang moniker is "Boogie."

Maddox and Lemus walked to the front door of the apartment and Maddox knocked on the door. After five or 10 seconds, the door opened about halfway. Maddox

³ The record does not disclose whether Rojas admitted having violated one or both of the probation conditions, or whether the court found that he had violated one or both of the conditions.

⁴ Maddox testified, "[O]bviously, [Ramirez] wasn't talking for 15 minutes straight, but we did hear his voice sporadically throughout the conversation, along with [Rojas]."

and Lemus entered the apartment. Rojas was in the living room with his sister, Kedy Rojas, one other female and Pedro Carbajal. Carbajal associated with the VCV gang, but did not claim to be a member. Rojas was holding or drinking a beer. The officers detained Rojas and the other persons in the living room and handcuffed Rojas.

A couple of seconds after entering the apartment, Maddox heard the sound of window blinds swaying in a bedroom. He entered the bedroom and saw that the window blinds were open and that they were swinging back and forth. The window screen, which was damaged, was on the bedroom floor. It appeared to Maddox as if someone had jumped out the window. Maddox looked out the window and saw a man landing on the ground about 20 feet below and stumbling backward. Maddox saw the man's face and recognized him as Ramirez.

Ramirez ran through the apartment complex and disappeared from view. Maddox went back to the living room and asked Rojas, "[W]hy is Raul jumping out your window?" Rojas replied, "That wasn't Raul."

Maddox and Lemus did not have the authority to arrest Rojas for a probation violation.⁵ Maddox and Lemus attempted to contact Burns or another member of the gang probation unit. The attempt was unsuccessful, so Maddox and Lemus released Rojas and left the apartment.

⁵ Maddox testified that although he conducted probation compliance checks, he was not authorized to arrest a probationer for violating probation without the permission of a member of the probation department. The record contains no explanation as to why Maddox did not have that authority on the night of September 2.

On September 3, 2011, Maddox told Burns what had happened the previous evening at the apartment. Burns gave Maddox permission to arrest Rojas. Maddox arrested Rojas on September 10. Burns filed a probation report and a notice to show cause. In the probation report, Burns referred to Ramirez as "Raul Martinez . . . , a documented VCV gang member who goes by the moniker of "Boogie."⁶ In the notice, Burns declared that Rojas had violated a condition of his probation by "[associating] with [a] documented VCV gang member."

Two defense witnesses testified at the probation revocation hearing—Kedy Rojas and Ferreira. Kedy Rojas lived in the apartment with Rojas. When Rojas went to jail, Carbajal and Mercedes Castillo moved in. Ferreira and Castillo picked up Rojas from jail on the night of September 2, 2011, and took him home. They arrived at the apartment between 9:00 and 10:00 p.m. and began celebrating and drinking beer. Kedy Rojas, Ferreira, Castillo and Rojas were in the apartment when the police arrived. According to Kedy Rojas, Ramirez was not in the apartment that night.

The court expressly found that Maddox was credible, and concluded that Rojas had violated probation condition 12.b. by associating with a documented VCV gang member. The court also stated, "[E]ven though it's not an alleged violation, the Court will also note parenthetically that Condition [8.b.], not to use or possess alcohol, was also

⁶ Burns testified that he did not know Raul Martinez. At the time Burns wrote his report, he did not have a written police report from Maddox. Burns believed that Ramirez's surname was Martinez or Hernandez, rather than Ramirez, but confirmed that Ramirez's gang moniker is "Boogie." Maddox, Kedy Rojas and Rojas's cousin Jacqueline Ferreira also testified that Ramirez's gang moniker is "Boogie." Kedy Rojas and Ferreira testified that they were aware that Rojas is a gang member.

testified to as having been violated in this case, that [Rojas] was drinking a beer at the time." The court revoked and reinstated probation; extended the term of probation to November 2, 2014; executed the 365-day jail commitment; and gave Rojas credit for 356 days spent in custody.

II

The Court Did Not Err in Finding That Rojas Violated the Gang Condition

The trial court may revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation . . . officer or otherwise that the [defendant] has violated any of the conditions of his or her [probation]" (§ 1203.2, subd. (a).) The facts justifying a probation revocation must be proved by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.) The court has "great discretion in determining whether to revoke probation." (*Id.* at p. 445.) We review an order revoking probation for substantial evidence. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848; *People v. Urke* (2011) 197 Cal.App.4th 766, 773.) We accord "great deference [to] the trial court's decision, bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]' [Citation.]" (*Urke*, at p. 773.)

Applying this deferential standard of review, we conclude that the court did not err in finding that Rojas violated probation condition 12.b., which prohibits "[associating] with any known gang member" The evidence showed that Rojas and Ramirez were

members of the same gang. Maddox, a member of the Chula Vista Police Department gang unit, overheard Rojas and Ramirez talking in a small gathering of friends and recognized both of their voices. When Maddox later asked Rojas why Ramirez had jumped out the window, Rojas's response, "That wasn't Raul," demonstrated that he knew Ramirez. Based on this evidence, it would be reasonable to infer both that Rojas knew that Ramirez was a gang member, and that Rojas had been associating with Ramirez before the police officers arrived at the apartment. Further, Maddox testified that prior to knocking on the door of the apartment, he stood outside the apartment for at least 15 minutes, and during that time, he heard Rojas and Ramirez participating in the conversation taking place in the apartment. Based on this testimony, it would be reasonable to infer that Rojas's association with Ramirez that evening was willful (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983), and not a "chance social encounter," as Rojas maintains.

Rojas asserts that there is no substantial evidence that VCV falls within the statutory definition of a " 'criminal street gang.' " ⁷ (§ 186.22, subd. (f).) Maddox

⁷ Section 186.22, subdivision (f) defines " '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 of [specified] 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." When a probation condition forbids the defendant "to 'associate with any gang members' " (*In re Justin S.* (2001) 93 Cal.App.4th 811, 813), "the statutory definition of 'gang[]' . . . is . . . fairly implied in the condition." (*Id.* at p. 816, fn. 3, citing § 186.22, subd. (f), citations omitted.) To avoid constitutional infirmity, the word " 'gang' " must be construed conforming to the definition in section 186.22, subdivision (f). (*People v. Lopez* (1998) 66 Cal.App.4th 615, 634; *In re Justin S.*, at p. 816, fn. 3.)

testified that he is "qualified as an expert in the [VCV] criminal street gang," and further testified that VCV is "a documented gang," that is, "a group of three or more people with a common name, sign, or symbol who individually or collectively engage in criminal activity." Although Maddox did not expressly testify that committing the statutorily specified crimes is one of VCV's "primary activities," or that VCV's "members . . . engage[d] in . . . a pattern of criminal gang activity"⁸ (*ibid.*), his testimony that VCV is a "criminal street gang" and "a documented gang" constitutes sufficient evidence to support an implied finding that VCV is a criminal street gang for purposes of a probation revocation hearing. (Cf. *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348 [observing that the "limited nature of [the] inquiry [at a probation revocation hearing] may not involve or invoke presentation of all evidence bearing on the underlying factual allegations"].)

The relevant question on appeal is not whether the People presented sufficient to establish beyond a reasonable doubt that VCV is a documented gang, as would be required to sustain a criminal conviction premised on the commission of street terrorism (§ 186.22, subd. (a)). Rather, the question is whether there was sufficient evidence presented at the probation revocation hearing to support a finding, by a preponderance of the evidence, that VCV is a documented gang. (*Ibid.*) All of the parties at the revocation hearing understood that the term "documented gang" and "criminal street gang" referred

⁸ A " 'pattern of criminal gang activity' means that gang members have, within a certain time frame, committed or attempted to commit 'two or more' of specified criminal offenses" (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, quoting § 186.22, subd. (e).)

to the statutory definition of a criminal street gang, and Rojas did not contend at the hearing that VCV does not fall within that definition. Under these circumstances, it was not incumbent on the prosecutor to present evidence at the probation revocation hearing that VCV met each part of the definition of a criminal street gang as set forth in section 186.22, subdivision (f).

For the above reasons, the court did not err in finding that Rojas violated probation condition 12.b.

III

There Was No Error Regarding the Alcohol Condition

Because the court properly revoked probation for Rojas's violation of the gang condition, Rojas cannot obtain a reversal by contending that the court erred in revoking probation for a violation of the alcohol condition. Further, it is clear that the court did not rely on Rojas's use of alcohol as a ground for revoking probation. The court's remark "that [Rojas] was drinking a beer" was expressly "parenthetical."

DISPOSITION

The order revoking probation is affirmed.

AARON, J.

I CONCUR:

IRION, J.

McDONALD, J., Dissenting.

The trial court revoked Rojas's probation after finding he violated condition 12.b. of his grant of probation. Condition 12.b. prohibited Rojas from "[association] with any known gang member or persons who are associated with the _____ gang." To avoid constitutional infirmity, the term "gang" must conform with the definition of a criminal street gang set forth in Penal Code section 186.22, subdivision (f). (*People v. Lopez* (1998) 66 Cal.App.4th 615, 634; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816, fn. 3.)

Section 186.22, subdivision (f), provides:

As used in this chapter, 'criminal street gang' means 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 of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), 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."

"[T]he criminal acts enumerated in paragraphs (1) to (25) [and] (31) to (33)" are (1) assault with a deadly weapon or by means of force likely to produce great bodily injury; (2) robbery; (3) unlawful homicide and manslaughter; (4) sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances; (5) shooting at an inhabited dwelling or occupied motor vehicle; (6) discharging or permitting the discharge of a firearm from a motor vehicle; (7) arson; (8) intimidation of witnesses and victims; (9) grand theft; (10) grand theft of a firearm, vehicle, trailer, or vessel; (11) burglary; (12) rape; (13) looting; (14) money laundering; (15) kidnapping; (16) mayhem; (17) aggravated mayhem; (18) torture; (19) felony extortion; (20) felony

vandalism; (21) carjacking; (22) sale, delivery, or transfer of a firearm; (23) possession of a concealable pistol, revolver, or other firearm; (24) threats to commit crimes resulting in death or great bodily injury; (25) theft and unlawful taking or driving of a vehicle; (31) prohibited possession of a firearm; (32) carrying a concealed firearm; and (33) carrying a loaded firearm. (§ 186.22, subd. (e).)

Maddox testified VCV was a documented gang because it was "a group of three or more people with a common name, sign, or symbol who individually or collectively engage in criminal activity." However, there was no evidence that commission of the statutorily specified crimes was one of VCV's "primary activities," or VCV's "members . . . engaged in a pattern of criminal gang activity." A " 'pattern of criminal gang activity' means that gang members have, within a certain time frame, committed or attempted to commit 'two or more' of specified criminal offenses" (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, quoting § 186.22, subd. (e).) Furthermore, to avoid " 'constitutionally fatal overbreadth,' " condition 12.b. must be construed as referring to persons Rojas knew were members or associates of a gang. (*In re Justin S.*, *supra*, 93 Cal.App.4th at p. 816, quoting *People v. Lopez*, *supra*, 66 Cal.App.4th at p. 628.) There is evidence Rojas knew Ramirez, but no evidence Rojas knew Ramirez was a gang member. For these reasons, the court erred by finding Rojas violated probation condition 12.b.

I would reverse the trial court order revoking Rojas's probation.

McDONALD, Acting P. J.