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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MARCO G., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO G.,

Defendant and Appellant.

D061049

(Super. Ct. No. J224085)

APPEAL from an order of the Superior Court of San Diego County, Carlos O. Armour and Browder A. Willis III, Judges. Affirmed and remanded with directions.

Following a contested hearing, the juvenile court found true the allegations in a petition filed under Welfare and Institutions Code¹ section 602, that Marco G. (Marco) committed battery with serious bodily injury (Pen. Code, § 243, subd. (d); count 1). In

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

connection with count 1, the court also found true the allegation that the offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)).

Marco was committed to Camp Barrett for a period not to exceed 365 days.

Marco appeals contending the evidence is insufficient to support his conviction for battery with serious bodily injury, that the juvenile court erred in not declaring the offense to be a felony or a misdemeanor as required by section 702 and that the court erred in not calculating the maximum term of potential confinement and the credits to which Marco was entitled. We will find there is sufficient evidence in this record to support the true findings on count 1 and the gang enhancement. We agree with Marco, however, that the court erred in failing to determine whether the offense committed was a felony or a misdemeanor and in failing to calculate the maximum period of confinement. Accordingly, we will affirm the true finding and disposition order, but we will remand the matter to the juvenile court with directions to comply with the requirements of sections 702 and 726. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.)

STATEMENT OF FACTS

On October 14, 2011, the victim, Tony E. and his two friends, Carlos and Andy, attended a swap meet in Escondido. While they were there, they were approached by three men. The three men confronted Tony and friends and asked Tony where he "bang[ed]." Tony responded he did not do that any longer. This resulted in a response from one of the confronting group that Tony was a "Socka," a derogatory name for a South Los Angeles street gang. Tony recalled that one of the men punched him, causing

him to fall down, strike his head and lose consciousness. A group of people intervened in the affray and the three men fled shouting, among other things "Diablos."

Tony later identified Marco as one of the assailants and knew that two of the men were members of the Diablos gang. They used the monikers of "Wolf" and "Drowsy." Later, at trial, Tony acknowledged he was scared to testify with Marco there and then testified that Marco was present, but "didn't do anything."

Andy testified that one of the men asked Tony, "Do you bang?" Andy said that all three of the men hit Tony.

The parties stipulated that Diablos is a criminal street gang. A gang expert testified that the attack on Tony was committed for the benefit of that street gang. A check of Marco's room by probation discovered a CD with "Wolfy" written on it.

Marco offered an alibi defense that he was at the park and the post office with his aunt on the night of the attack. Marco also maintained his moniker was "Little Wolfy" not "Wolfy."

DISCUSSION

I

THE TRUE FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Based on Tony's testimony at trial, Marco contends there is not sufficient evidence to connect him with the attack on Tony. Marco contends the evidence merely shows he was present at the scene.

When we consider a claim of insufficient evidence to support a conviction, or a true finding, we apply the familiar substantial evidence standard of review. Under that

standard we review the entire record, drawing all reasonable inferences in support of the trial court's decision. We do not make credibility decisions, nor do we weigh the evidence. We simply determine whether there is sufficient substantial evidence from which a reasonable person could find the allegations to be true, beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

Applying the proper standard of review, we are satisfied there is sufficient substantial evidence to support the true findings.

First we discuss what is not in dispute. Marco is a member of a criminal street gang as were the other two men with him on this occasion. It is also without dispute that Marco's group approached, and ultimately assaulted Tony because of their belief he was a member of a different street gang. Hence the greeting asking if and where Tony "banged," referring to what gang affiliation Tony claimed. The term "Socka" uttered by one of Marco's group referred to their belief Tony was a member of a South Los Angeles street gang. Plainly, the three Diablos members engaged in the confrontation in order to achieve whatever gang-founded purpose they had in mind.

Marco is correct that Tony's testimony at trial was somewhat exculpatory for Marco. The court could well conclude Tony was frightened about testifying in front a Diablos member, Marco. However, Tony was not the only witness. Andy testified as an eye witness to the affray. He testified that all three men approached, encircled and hit Tony, thus providing evidence which, if believed, would support the trial court's conclusion that all three men were involved in the crime and that Marco was not simply

an "innocent bystander." Indeed, even with the reticence of Tony to testify, it is hard to imagine a clearer case of a gang confrontation and assault on a perceived rival. There is sufficient evidence in this record to support the finding Marco was a principal in battery with serious bodily injury, committed for the benefit of a criminal street gang.

II

THE COURT'S FAILURE TO MAKE REQUIRED FINDINGS

Marco contends the juvenile court failed to determine whether the offense committed was a felony or a misdemeanor and that the court also failed to calculate the maximum confinement potential for the offense.

The People concede the latter point noting that section 726 requires the court to make the custody calculation. We agree and accept their concession.

The People argue, however that although *In re Manzy W.*, *supra*, 14 Cal.4th 1199, 1204, and section 702 require the juvenile court to make the felony/misdemeanor determination, that remand is not required in this case. The People's argument is based on the fact that the juvenile court found true the gang enhancement under Penal Code section 186.22, subdivision (b), which only applies to felonies. While there is some merit to the People's argument, we decline to accept it in this case. First, the case is going to be remanded for findings under section 726, which are dependent on the felony/misdemeanor determination. Perhaps more importantly, the mandate for juvenile courts to make the felony/misdemeanor determination in "wobbler" offenses is plain and of long standing. In this case no purpose would be served by implying on appeal what the juvenile court should have expressly found at the disposition hearing. Such finding is

easily made and serves an important goal in the proper disposition of juvenile delinquency cases. Thus we will also remand the case for compliance with section 702.

DISPOSITION

The true findings on count 1 and the related gang enhancement are affirmed. The case is remanded to the juvenile court with directions to make the findings referred to in this opinion in compliance with sections 702 and 726.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.