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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DAULPHIN MAXWELL ,

Defendant and Appellant.

D064552

(Super. Ct. No. SCD240629)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth K. So, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Christopher Daulphin Maxwell guilty of attempted robbery (Pen. Code, §§ 211, 664)¹ and made true findings on firearm allegations (§§ 12022, subd. (a)(1), 12022.53, subds. (b), (e)(1)) and a gang enhancement (§ 186.22, subd. (b)). After Maxwell admitted a prior serious felony (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a prior strike (§§ 667, subds. (b)-(i), 668, 1170.12), the trial court sentenced Maxwell to 19 years in prison.

Maxwell contends that (1) insufficient evidence supports the true finding on the gang enhancement, and (2) the trial court abused its discretion in denying his motion to strike his prior serious or violent felony for the purposes of the "Three Strikes" law. We conclude that Maxwell's contentions are without merit, and we accordingly affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Deon Scott entered a Mexican fast food restaurant (the restaurant) in San Diego shortly before 9:00 p.m. on March 16, 2012, brandishing a gun.² Scott ordered the only customer in the restaurant to get down on the floor, and he then pointed the gun at the

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

² Even though Maxwell took the position at trial that the evidence did not establish that he participated in the attempted robbery, on appeal he does not challenge the portion of the jury's verdict finding that he was a principal in the robbery. Instead, he focuses on a challenge to the sufficiency of the evidence to support the gang enhancement. We recite the facts of the crime in the manner most favorable to the jury's verdict. (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1432 ["We view the record in the light most favorable to the People, as we are bound to do after a guilty verdict."].)

restaurant manager, demanding money. The manager took out his own gun and shot at Scott at least twice. Scott fled the restaurant, with the manager in pursuit. As he was fleeing, Scott pointed his gun at the manager again, and the manager fired additional shots at Scott.

Maxwell acted as the getaway driver for Scott, waiting near the restaurant in a red convertible Mustang. A witness saw Scott get into the passenger seat of the car immediately after the robbery.

Minutes later, Scott was dropped off near the home of one of Maxwell's friends, with a bullet hole through his chest. Paramedics arrived, and Scott was pronounced dead at 10:11 p.m.

Police identified Maxwell as the getaway driver for the attempted robbery based on an anonymous tip connecting Maxwell and his red convertible Mustang to the crime. Cell phone records of Maxwell and Scott provide circumstantial evidence connecting Maxwell to the crime, as the records placed both men near the scene of the attempted robbery during the relevant timeframe and show Maxwell travelling to the location where Scott was dropped off after being shot.

An information charged Maxwell with attempted robbery (§§ 211, 664) and further alleged that Maxwell (1) was a principal in the commission of an offense in which a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)); (2) was a principal in the commission of the offense in which a principal was armed with a firearm (§ 12022, subd. (a)(1)); and (3) committed the offense for the benefit of, at the direction of, or in

association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members. (See § 186.22, subd. (b)(1).)³

The jury heard testimony from several witnesses that both Scott and Maxwell were associated with the Lincoln Park street gang, including from an expert witness who opined, based on specific evidence, that both Scott and Maxwell were active Lincoln Park gang members at the time of the attempted robbery.

The jury found Maxwell guilty of attempted robbery and made true findings on the gang and firearm enhancements. Maxwell admitted a prior serious felony (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a prior strike (§§ 667, subds. (b)-(i), 668, 1170.12).

The trial court denied Maxwell's motion to strike his prior strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and sentenced Maxwell to a total of 19 years in prison. As relevant here, the sentence included a 10-year prison term pursuant to section 12022.53, subdivisions (b) and (e)(1), which is a gun-use enhancement that applies when (1) another principal, not the defendant, personally used a firearm and (2) a true finding is made that the defendant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)).

³ The information identified section 186.22, subdivision (b)(4) as the basis for the gang enhancement. The parties agree that the correct statutory citation for the gang enhancement applicable in an attempted robbery charge is section 186.22, subdivision (b)(1).

II

DISCUSSION

A. *Substantial Evidence Supports the True Finding on the Gang Enhancement*

Maxwell first argues that insufficient evidence supports the jury's true finding on the gang enhancement (§ 186.22. subd. (b)(1)).⁴

1. *Standard of Review*

In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' "

(*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*), citations omitted.)

2. *The Applicable Statute*

To establish the truth of the gang enhancement allegation under section 186.22, subdivision (b)(1), the People must prove beyond a reasonable doubt that the offense

⁴ As we have explained, the true finding on the gang enhancement (§ 186.22. subd. (b)(1)) resulted in an additional 10 years on Maxwell's sentence based on the fact that Scott personally used a firearm during the attempted robbery. (§ 12022.53, subs. (b), (e)(1).)

charged was "[1] committed for the benefit of, at the direction of, or in association with any criminal street gang, [2] with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

The first portion of section 186.22. subdivision (b)(1) requires a finding that the crime was "gang related" in the sense of being for the benefit of, at the direction of, or in association with a gang. (*Albillar, supra*, 51 Cal.4th at p. 60.) The second portion, describing the defendant's specific intent, requires "only the specific intent to promote, further, or assist criminal conduct by *gang members*" (*id.* at p. 67) and "applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Id.* at p. 66.)⁵ Maxwell contends that insufficient evidence exists to support a true finding under either portion of section 186.22. subdivision (b)(1).

⁵ "In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subds. (e) and (f).)" (*People v. Rios* (2013) 222 Cal.App.4th 542, 564, fn. 10.) Maxwell does not challenge the sufficiency of the evidence establishing these elements, as the gang expert testified at trial that the Lincoln Park gang satisfies the statutory requirements for a criminal street gang.

3. *Substantial Evidence Supports a Finding That the Attempted Robbery Was Committed in Association with or for the Benefit of the Lincoln Park Gang*
 - a. *Substantial Evidence Supports a Finding That the Crime Was Committed "in Association with" a Gang*

We first consider whether the evidence supports a finding that the attempted robbery was gang related in that Maxwell committed it "in association with any criminal street gang." (§ 186.22, subd. (b)(1).)

Much of the relevant evidence on whether the attempted robbery was committed in association with the Lincoln Park gang was presented through the testimony of the People's gang expert, Detective Rudy Castro. Detective Castro testified that, in his expert opinion, both Scott and Maxwell were active members of the Lincoln Park gang during the attempted robbery.

In addition, during testimony from Detective Castro and other police officers, the jury heard extensive evidence about tattoos, photographs, Facebook postings and statements to police, all of which supported a finding that Maxwell and Scott were associated with the Lincoln Park gang. Friends of Scott and Maxwell also testified that both men were associated with the Lincoln Park gang. Indeed, based on all of the evidence of Maxwell and Scott's gang affiliation, Maxwell's appellate briefing acknowledges that "[t]here was no question Scott [was] a member of the Lincoln Park gang[.]" and "it was know[n] that [Maxwell] had been a member," which "shows an association with the gang."

Further, as centrally relevant to the issue of whether the attempted robbery was committed in association with the Lincoln Park gang, Detective Castro testified that robbery is one of the primary activities of the Lincoln Park gang.

Based on all of the above evidence, the record amply supports a finding that Maxwell committed the attempted robbery in association with the Lincoln Park gang. Such a finding follows logically from the fact that Maxwell and Scott were both associated with the Lincoln Park gang and were engaging in one of the gang's primary activities when they attempted to rob the restaurant. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 412-413 (*Miranda*) [commission of crime accompanied by gang members or associates supports inference defendant intended to benefit gang]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [non-gang member's commission of crime in association with known gang member supports inference crime was gang related]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*) [commission of crime with fellow gang members supports inference crime was committed in association with gang].)

Although "[n]ot every crime committed by gang members is related to a gang . . ." (*Albillar, supra*, 51 Cal.4th at p. 60), and " 'it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang' " (*id.* at p. 62), there is no evidence that was the case here. Indeed, because one of the primary activities of the Lincoln Park gang is committing robberies, it is reasonable for a juror to infer that Maxwell was engaged in gang-related activity rather than " 'on a frolic and

detour unrelated to the gang' " (*ibid.*) when he committed the attempted robbery together with Scott.⁶

Maxwell contends that insufficient evidence supports a finding that he committed the attempted robbery in association with the Lincoln Park gang because the evidence established nothing more than that Maxwell "used to claim Lincoln Park — not that he was currently claiming Lincoln Park." To show that he is no longer a gang member, Maxwell points to a number of documented statements that he made to police officers between 2007 and 2012, in which he stated that he "used to" either "claim" or "bang with" Lincoln Park, but was not currently active.

Maxwell's argument is not persuasive. Based on the evidence at trial, a juror could reasonably disbelieve Maxwell's claim to be an inactive gang member. As Detective Castro explained, to avoid increased legal penalties, a gang member will often tell the police that he is no longer an active gang member. Here, Detective Castro described recent gang-related activity by Maxwell, including Facebook postings from 2011 and recent tattoos, which suggested that Maxwell claimed to be an inactive gang member for the purpose of avoiding increased penalties, not because he was actually inactive.

Further, as Maxwell was engaging in one of Lincoln Park's primary activities when he participated in the attempted robbery, a juror could reasonably infer that Maxwell was not

⁶ Indeed, in contrast to *People v. Martinez* (2004) 116 Cal.App.4th 753, cited by Maxwell, in which there was no evidence connecting the defendant's crime to the gang's activities and the defendant's accomplice was not a gang member (*id.* at p. 757), here the evidence showed both that Maxwell committed a crime that is one of the primary activities of the Lincoln Park gang and that his accomplice was a Lincoln Park gang member.

truthful when he told police that he was no longer an active member of the Lincoln Park gang, and that the attempted robbery was, in fact, committed as part of his association with the Lincoln Park gang.

b. *Substantial Evidence Supports a Finding That the Attempted Robbery Was Committed "for the Benefit of" a Gang*

As an alternative approach to establishing that the crime was gang-related, substantial evidence also supports a finding that the attempted robbery was "committed for the benefit of" the Lincoln Park gang. (§ 186.22, subd. (b)(1).)

Detective Castro's testimony provided ample support for a finding that the attempted robbery was for the benefit of the Lincoln Park gang. Specifically, Detective Castro testified that the robbery, if successful, would have benefited the Lincoln Park gang by (1) promoting the gang's reputation; and (2) raising money for the gang, which would make the gang more attractive to new recruits and would allow the gang to buy weapons.

This case is very similar to *People v. Hunt* (2011) 196 Cal.App.4th 811 (*Hunt*), which held that a robbery of a fast food restaurant committed by two gang members was for the benefit of the gang. As here, the evidence in *Hunt* supported the finding that the robbery was for the benefit of the gang because the expert testified that robbery was one of the gang's the primary activities and that the commission of the crime enhanced the gang's reputation. (*Id.* at pp. 820-821.)⁷

⁷ Maxwell cites other cases in which the court relied on facts very different from those in the instant case to conclude that the crimes at issue were committed for the

Citing a statement in *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657, that "[a] gang expert's testimony alone is insufficient to find an offense gang related[.]" Maxwell contends that Detective Castro's testimony is insufficient to support the a finding that the attempted robbery was committed for the benefit of the Lincoln Park gang. Maxwell's argument is not persuasive because subsequent decisions by our Supreme Court reject *Ochoa's* view that expert testimony alone is insufficient to establish a crime was gang related.

As our Supreme Court stated in *People v. Vang* (2011) 52 Cal.4th 1038, 1048, "[e]xpert opinion that particular criminal conduct benefited a gang' is not only permissible but *can be sufficient* to support the . . . section 186.22, subdivision (b)(1), gang enhancement." (Italics added.) Moreover, *Vang* cited *Albillar*, decided in 2010, in which our Supreme Court stated that "[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the

benefit of a gang. For example, in *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382-1383, substantial evidence supported a finding that the shooting was gang related because it took place after the victim disrespected the gang by painting over the gang's graffiti. In *Albillar*, a gang rape benefited the gang, in part because the victim knew the rapists' gang affiliation. (*Albillar, supra*, 51 Cal.4th at p. 63.) However, the specific details that those cases relied on to conclude that a crime was committed for the benefit of the gang does not establish that the very different type of crime committed here cannot also have been committed for the benefit of the gang. (See, e.g., *Hunt, supra*, 196 Cal.App.4th at p. 821 [fast-food restaurant robbery committed for the benefit of a gang].) Maxwell also argues that the attempted robbery was not for the benefit of the gang because Scott did not give any indication during the robbery that it was being committed by the Lincoln Park gang. We reject that argument, as Detective Castro's explanation of how the attempted robbery benefited the gang's reputation does not require that the victims of the robbery know during the commission of the crime that it is being committed by the Lincoln Park gang. As Detective Castro explained, the gang's reputation is bolstered when the gang members committing the crime later brag about it to their associates.

inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22[, subdivision](b)(1)." (*Albillar, supra*, 51 Cal.4th at p. 63.) Thus, based on *Vang* and *Albillar*, there is no need to look beyond Detective Castro's expert opinion for substantial evidence that Maxwell committed the attempted robbery for the benefit of the Lincoln Park gang.

4. *Substantial Evidence Supports a Finding That Maxwell Committed the Attempted Robbery with the Specific Intent to Promote, Further, or Assist in Any Criminal Conduct by Gang Members*

Substantial evidence also supports the jury's finding on the second portion of the gang enhancement, namely that Maxwell committed the attempted robbery "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

As our Supreme Court has explained, " 'the specific intent to promote, further, or assist in any criminal conduct by gang members' . . . applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar, supra*, 51 Cal.4th at p. 66.) Thus, "if substantial evidence establishes that the defendant intended to and did commit the charged felony 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." (*Id.* at p. 68.) Under this approach, " '[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.' " (*Miranda, supra*, 192 Cal.App.4th at p. 412.)

Because Maxwell participated in the attempted robbery by acting as the getaway driver for Scott, an active gang member, Maxwell plainly assisted a gang member in committing a crime. Specifically, by driving Scott to the robbery, waiting while the robbery took place, and then speeding away with Scott afterwards, Maxwell engaged in intentional conduct that obviously assisted a gang member in attempting to carry out a robbery. Maxwell's "intentional acts, when combined with his knowledge that those acts would assist crimes by [a] fellow gang member[], afford[s] sufficient evidence of the requisite specific intent." (*Morales, supra*, 112 Cal.App.4th at pp. 1198-1199.)

In sum, we conclude that substantial evidence supports the jury's true finding on both portions of the gang enhancement under section 186.22, subdivision (b)(1).

B. *The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Strike the Prior Strike*

The final issue is whether the trial court erred in denying Maxwell's motion to strike his prior strike pursuant to *Romero, supra*, 13 Cal.4th 497.

A trial court may strike a finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony (i.e., a strike) on its "own motion or upon the application of the prosecuting attorney . . . in furtherance of justice." (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*).) In determining whether to strike a strike, the court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part,

and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161.)

The trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)). "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Maxwell's prior strike was a 1992 conviction for robbery. Maxwell argued that the trial court should have exercised its discretion to strike the prior strike because the 1992 robbery was remote in time and because he had made efforts to rehabilitate himself in recent years. Specifically, Maxwell pointed out that he is "on his way" to becoming a productive member of society in that he graduated from an educational program for medical billing and is looking for employment in his field.

The trial court denied the motion to strike the strike, explaining that Maxwell has had numerous convictions and served numerous prison terms since his 1992 robbery conviction, and he has shown through his conduct that he cannot remain law abiding and cannot rehabilitate himself. Indeed, Maxwell's criminal history shows that he incurred several subsequent convictions for a variety of offenses since 1992 and had his parole revoked many times. As the prosecutor observed in opposing the *Romero* motion, since incurring his prior strike, Maxwell has not spent more than 18 months out of custody

without a new violation or a new conviction, and he has never successfully completed a probation or parole term.

We conclude the trial court acted well within its discretion to deny Maxwell's motion to strike his prior strike. The trial court applied the proper legal criteria, and it understood and exercised its discretion to reasonably conclude that Maxwell did not fall outside of the spirit of the Three Strikes law. Because of Maxwell's criminal history, which shows a continuing course of criminal conduct throughout Maxwell's life, Maxwell was not wholly "outside the scheme's spirit." (*Williams, supra*, 17 Cal.4th at p. 161.) We cannot conclude that the trial court's refusal to strike Maxwell's prior strike was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377; see also *People v. Philpot* (2004) 122 Cal.App.4th 893, 906 [no abuse of discretion in declining to strike a strike where the "defendant consistently committed criminal offenses for the past 20 years," and "[h]is conduct as a whole was a strong indication of unwillingness or inability to comply with the law"].)⁸

⁸ Maxwell makes a cursory and undeveloped argument that the imposition of the Three Strikes law in this case constituted cruel and unusual punishment and violated his constitutional right to due process. We do not address this argument because it was not raised below. (*People v. Pecci* (1999) 72 Cal.App.4th 1500, 1503.)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.