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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND JAURE,

Defendant and Appellant.

E055005

(Super.Ct.No. FWV1100456)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Sachs, Judge. Affirmed with directions.

David L. Kelly, 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, and Melissa Mandel, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Raymond Jaure appeals his conviction for extortion and dissuading a victim or witness from reporting a crime. He contends that a unanimity instruction should have been given with respect to extortion. He also contends that there was insufficient evidence to support the allegation that the offenses were committed for the benefit of a criminal street gang and that there was insufficient evidence to support the dissuasion count.

We find no prejudicial error.

STATEMENT OF THE CASE

Defendant was charged with residential burglary (Pen. Code,¹ § 459 – count 1), home invasion robbery (§ 211 – count 2), assault with a firearm (§ 245, subd. (a)(2) – count 3), extortion (§ 520 – count 4), and dissuading a victim or witness from reporting a crime (§ 136.1, subd. (b)(1) – count 5). The information alleged one strike prior (§§ 667, subds. (b)–(i), 1170.12, subd. (a)–(d)), one prior serious felony prior (§ 667, subd. (a)(1)), and seven prison term priors (§ 667.5, subd. (b)). The information also alleged that each of the five charged offenses was committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subds. (b)(1).)

A jury acquitted defendant on counts 1 through 3 and convicted him on counts 4 and 5. The jury found it true that the offenses were committed for the benefit of a criminal street gang. In a separate proceeding, the court found the prior strike allegation

¹ All further statutory citations refer to the Penal Code unless another code is specified.

and one prison prior allegation true. The remaining prior conviction allegation and prison prior allegations were dismissed on motion of the prosecutor, who had determined that they were alleged in error.

The court sentenced defendant to a determinate term of six years in state prison, followed by an indeterminate term of 28 years to life.²

Defendant filed a timely notice of appeal.

FACTS

Cantorbey Cardenas owned a mattress store in Pomona in which he also had a number of illegal slot machines. In 2010, defendant came into the store and told Cardenas that he belonged to 12th Street, a Pomona gang. He said that Cardenas was supposed to pay him “taxes” for doing business in his area. Defendant demanded \$50 a week, which he said would go to his “brothers in jail.” He told Cardenas that with no cameras in the store, it would be easy for him or anyone from the gang to get into the store and take money from Cardenas’s 63-year-old employee, Frank Zermeno.

Cardenas felt forced to pay because he was aware that “when you don’t pay, you face a situation where they can shoot you or take your money from you forcefully.” He had previously heard of 12th Street. He began making weekly payments to defendant. He continued paying for approximately two months. Defendant came to the store to collect the taxes. However, he frequently used the money to play the slot machines. In

² We discuss below several clerical errors pertaining to the sentence.

late 2010 or early 2011, police “raided” the mattress store and issued Cardenas a citation for the illegal slot machines. After that, Cardenas stopped making payments to defendant.

On January 26, 2011, Cardenas, his wife³ Maritza Gomez, their children, and Zermeno were living in an apartment in Ontario, California. Around 8:30 p.m., Gomez heard a knock on the front door and someone asking for “Cantor.” Assuming it was one of Cardenas’s friends, Gomez told him to come in. The door opened and a “real big man” came in. He asked for Cantor and asked Zermeno if he was Antonio. Gomez told him that Cardenas was not home. The man pulled out a gun and said he was from the Mexican Mafia. He told Gomez and Zermeno to sit down.

After the man pulled out his gun, defendant came in wearing a mask. Gomez recognized him as “Ray,” whom she had seen at the mattress store. She also saw him later that evening without a mask. Zermeno also recognized defendant from the store.

Defendant began taking property, going in and out of the house three times. He took a TV set, a shotgun and two computers. The men took Gomez into another room and the man with the gun ordered her to open the “safety box.” When Gomez said she did not know the combination, the man put the gun to her head. He said he would kill her if she didn’t open the safety box. Eventually, defendant had Zermeno and Gomez’s friend who was visiting her that evening take the safe out of the house. A third man who was with defendant came in toward the end of the incident to take the safe.

³ Gomez testified that they were not married, but referred to Cardenas as her husband.

Gomez identified one of the robbers as “Oso.” She did not say whether Oso was the man with the gun or the third man. The robbers also took Gomez’s and Zermeno’s cell phones, \$300 in cash, Gomez’s Mexican consulate identification card, her Medi-Cal card and her daughters’ Medi-Cal cards, and two slot machines. The safe contained money, jewelry, some old coins, a DVD player and about 100 DVDs, the pink slip to Cardenas’s truck, and immigration paperwork.

After the men left, Gomez called Cardenas and told him, “[T]he cholo that was taxing you” took all their things. Later that evening, Oso—whom Cardenas referred to as defendant’s friend—called Cardenas and put defendant on the phone. Cardenas asked defendant why he took all of their belongings. Defendant replied, “Because you owe me money.”

During that conversation, Oso demanded \$500 or the delivery of two slot machines he was not able to take with him during the robbery, in exchange for the immigration documents that were in the safe. Oso also told Cardenas, “Now you know that I know where you and your family live,” and “If you don’t want anything to happened to your family, then you need to do what I’m asking you to do.” He also told him not to call the police, for his safety and that of his family. Two days later, however, Cardenas did report the robbery to the police.

Jaime Martinez, a gang expert assigned to Pomona Hispanic gangs, testified the 12th Street gang is the largest gang in Pomona. 12th Street is also called the “Sharkies” and uses sharks as its symbol. Members were permitted to have shark tattoos only if they earned that privilege by putting in work for the gang, i.e., committing crimes. 12th Street

is the only Southern California gang that uses sharks as its symbol, and the Sharkies do not permit anyone who has not earned the right to do so to have a shark tattoo. Nor do they allow people who are not members to claim that they are. Having an unauthorized tattoo or falsely claiming to be a member of 12th Street would result in a brutal beating or death.

Defendant had identified himself to law enforcement as a member of 12th Street on a number of occasions, and a January 2011 search of his home, which was located in 12th Street's territory, revealed a substantial number of shark-themed items, including a gold shark trophy or statuette which defendant said had been given to him by the gang to commemorate his 50 years in the gang. There was other memorabilia related to 12th Street as well. Defendant also had several shark tattoos.

Martinez also testified that 12th Street was a criminal street gang and that robbery, extortion and intimidation were among its principal criminal activities. Based on all of those facts, as well as defendant's apparent association with 12 Street, Martinez held the opinion that 12th Street was involved in and benefitted from the crimes charged in this case.

DISCUSSION

1.

UNANIMITY INSTRUCTION

Defendant contends that there were two different acts, either of which the jury could have relied upon to find him guilty of extortion: the taxing at the store and the telephone call after the home invasion robbery. The prosecutor did not make an explicit

election as to which of the acts he relied upon. Accordingly, defendant contends, the court had a sua sponte duty to give a unanimity instruction.

The Attorney General counters that the prosecutor treated the demands made by Oso and defendant after the robbery as part of a continuous course of conduct. The prosecutor argued that extortion is one of the principal criminal activities of defendant's gang, and that the demands for more payment after the robbery were simply a continuation of the extortion which began at the store. Accordingly, the Attorney General contends that the continuous-course-of-conduct exception to the unanimity requirement applies. She also contends that the demands made after the robbery could not form the basis for the conviction because an element of extortion is that the victim actually gave the defendant money or property as a result of the threat.

We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law. (*People v. Lueth* (2012) 206 Cal.App.4th 189, 195 [Fourth Dist., Div. Two].)

“In a criminal case, a jury verdict must be unanimous. [Citations.] Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was

committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*Ibid.*)

The continuous-course-of-conduct exception asserted by the Attorney General applies when (1) the acts are so closely connected in time as to form part of one transaction, (2) the defendant tenders the same defense or defenses to each act, and (3) there is no reasonable basis for the jury to distinguish between them. (*People v. Lueth, supra*, 206 Cal.App.4th at p. 196.) This exception applies "not to all crimes occurring during a single transaction but only to those where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim's testimony in toto. [Citations.]" (*Ibid.*, internal quotation marks omitted for clarity.) It may also apply to a continuous course of conduct taking place over an extended period with a single intent or objective, if the case is tried on that theory. In *People v. Daniel* (1983) 145 Cal.App.3d 168, for example, the court held that a unanimity instruction was not required, despite the fact that the evidence showed multiple acts of embezzlement taking place over a five-month period, cumulatively amounting to a sum in excess of \$25,000. The information alleged a single count of embezzlement in an amount exceeding \$25,000, committed in a continuous course of conduct over a five-month period. The court held that the issue before the jury was whether the defendant was guilty of a continuous course of conduct pursuant to a single criminal objective, not whether he committed a particular act on a particular day. Moreover, because none of the

individual acts involved an amount in excess of \$25,000, the court held that the jury must have concluded that the defendant engaged in a continuous course of conduct. Therefore, the court held, the instruction was not required. (*Id.* at pp. 174-175.)

If the evidence were limited to the taxing as the basis for count 4, the continuous-course-of-conduct exception would apply. However, the telephone demand, which occurred after Cardenas had ceased paying the tax, was not only separated in time from the taxing, the demands were not the same—that is, in the telephone call, neither Oso nor defendant demanded that Cardenas resume paying his \$50 weekly tax; rather, Oso demanded additional money and/or property. Consequently, the evidence presented a reasonable basis for distinguishing between the two demands, and in theory, at least, some jurors could reasonably have believed that defendant committed one act but not the other. It is therefore not the case that jurors must have reasonably accepted or rejected Cardenas’s testimony entirely with respect to extortion.

Even if a unanimity instruction was required, however, the omission was harmless. An element of extortion by force or fear is that the defendant actually obtained money or property from the victim. (§§ 518, 519, 520.) The jury was so instructed. There was no evidence that defendant obtained any additional money or property as a result of the threats made during the telephone call. Cardenas testified that Oso demanded \$500 or the delivery of two slot machines that he had been unable to remove from the apartment during the robbery. When Cardenas refused to comply, Oso asked instead for the combination to the safe. Feeling he had no choice, Cardenas gave him the combination. The combination to the safe was not additional property, however; rather, it was merely a

means of gaining easier access to property that Oso had already stolen.⁴ Accordingly, the telephone demand for additional property did not, as a matter of law, constitute extortion. Because count 4 could not have been based on the telephone demand, there was no need to instruct the jury explicitly that it could find defendant guilty of extortion only on the basis of the \$50 weekly tax obtained through defendant's threats.

Moreover, the court instructed the jury on attempted extortion as a lesser included offense. The only demand for money which did not result in payment being made was Oso's demand on the telephone. Because the jury did not return a verdict on the lesser included offense of attempted extortion, and because the jury was either unpersuaded that the home invasion robbery took place or unpersuaded that defendant was one of the robbers, we are convinced beyond a reasonable doubt that the verdict on count 4 was based on the jury's unanimous determination that defendant committed the mattress store taxing. Consequently, the omission of a unanimity instruction was harmless beyond a

⁴ We recognize that the combination to a safe can be the subject of extortion. In *People v. Turville* (1959) 51 Cal.2d 620 (disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 638), the court upheld a first degree murder conviction based on evidence that the victim was killed in the perpetration of robbery and in an effort to extort from him the combination to his safe. (*People v. Turville*, at pp. 631-632.) In that case, however, unlike the case before us, the safe itself had not previously been stolen. Rather, the defendants tortured the victim to cause him to disclose the combination so they could open the safe and steal its contents. In this case, even though the robbers might have had difficulty opening the safe without the combination, they nevertheless had the safe and its contents in their possession before Oso demanded the combination from Cardenas.

reasonable doubt. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 187-188 [Fourth Dist., Div. Two] [harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 applies to erroneous omission of unanimity instruction].)

2.

SUBSTANTIAL EVIDENCE SUPPORTS THE GANG ENHANCEMENT⁵

The jury found that defendant violated section 186.22, subdivision (b)(1), which provides: “[A]ny 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished” A criminal offense is subject to enhancement under that section only if the crime is gang-related, i.e., not committed by a gang member solely for personal reasons. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

In considering a challenge to the sufficiency of the evidence to support an enhancement, 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

⁵ The caption to this argument in defendant’s opening brief states that the evidence was insufficient to support the gang enhancement on counts 4 and 5. Defendant does not, however, actually argue that the enhancement was not supported by the evidence with respect to count 5. Accordingly, we will limit our discussion to count 4.

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, supra*, 51 Cal.4th at pp. 59-60.)

Defendant contends that the evidence is insufficient to support the gang enhancement with respect to count 4 because there was “no” evidence that he extorted “taxes” from Cardenas for gang-related purposes and “no” evidence that he was not simply committing a crime of opportunity for his own benefit.⁶ He bases this contention primarily on the assertion that the evidence showed that he used all of the money he extorted from Cardenas to gamble on the slot machines in the mattress store, and that none of the money was shown to have been turned over to the gang. Cardenas testified, however, that defendant did not always take the tax money and put it into the slot machines; he said that defendant did so most of the time. He also testified that defendant came to the store daily to say “hi,” and that every time defendant came over, he would

⁶ Defendant first states that the prosecution produced evidence that defendant “said” he was a member of 12th Street, implying that the evidence does not support the conclusion that he was a member of that gang. He does not elaborate. We, of course, are not required to address a contention that is not supported by legal analysis. (*People v. Weaver* (2001) 26 Cal.4th 876, 986-987.) In any event, as set out in the Facts section above, there was overwhelming evidence that defendant was a member of the gang. Moreover, defendant admitted, in closing argument, that he was a member of 12th Street, although he claimed to be an inactive one.

ask for some money to play with. His testimony was not entirely clear, but it supports the inference that defendant asked for money for the slot machines in addition to the \$50 tax and that he did not use all of the tax money for his own gambling.

Moreover, even if the money did not go to the gang, there is substantial evidence which rationally supports the inference that the extortion was nevertheless committed with the specific intent to benefit the gang. Expert testimony on gang culture and habits is substantial evidence on which jurors may rely in determining whether a particular crime comes within the meaning of section 186.22, subdivision (b). (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931.) Here, the gang expert testified that “taxing” and intimidation within its territory are “absolutely crucial to a gang’s success.” He went on to say, “Anybody committing any illegal crimes [*sic*] within the 12th Street gang territory that doesn’t involve specifically 12th Streeters, they’re going to have their hands in it. The gang is going to control that. If you’re running an illegal casino in the city of Pomona within the 12th Street gang area, they’re going to have a hand in that. They’re not going to let you do anything illegal in that area without their say-so.” Although the expert testified that the money obtained through taxing was used to support the gang’s “business” activities, to support gang members in prison and to pay the Mexican Mafia for protection, he also testified that threats of force against business owners would coerce other business owners in the area to comply with the gang’s demands and would also dissuade witnesses from testifying about the gang’s criminal activities. His testimony

was therefore substantial evidence that defendant's threats and extortion of Cardenas served the gang's purposes independently of the question of whether the proceeds of the extortion were paid over to the gang.

Defendant asserts that there was no evidence that he had ever committed any other crimes for the benefit of 12th Street, and that the gang expert had never come in contact with defendant before 2011. He contends that this undermines the contention that he was an active gang member or committed the crimes on the gang's behalf. It is true that defendant's rap sheet does not reflect any prior convictions with a sustained gang allegation and that the gang expert had come into contact with defendant only once, in 2010, despite defendant's assertion that he had been in the gang for 50 years. However, in determining whether substantial evidence supports a finding or conviction, we do not weigh the evidence or resolve conflicts in the evidence or questions of witness credibility. (*People v. Albillar, supra*, 51 Cal.4th at p. 60.) That is solely the province of the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

3.

SUBSTANTIAL EVIDENCE SUPPORTS COUNT 5

Defendant also contends that there is insufficient evidence to support his conviction for witness intimidation. He points out that although Cardenas testified that Oso and defendant called him on his cell phone on January 26, 2011, at approximately 9:30 p.m., his cell phone records reflected that although there was one call from Oso's phone number on January 26, 2011, the call was not answered. However, as defendant also points out, there was a call from Oso's phone number on January 27, 2011, which

was answered and which lasted for almost nine minutes. The discrepancy between Cardenas's phone records and his testimony does not, however, mandate the conclusion that the phone conversation in which Cardenas was threatened with retribution if he went to the police did not occur, simply because it apparently did not occur on the date and at the time Cardenas testified. At most, this constitutes a conflict in the evidence. The resolution of conflicts in the evidence is solely within the purview of the jury; a reviewing court does not resolve such conflicts in determining whether substantial evidence exists which supports a conviction or finding. (*People v. Albillar, supra*, 51 Cal.4th at p. 60; *People v. Lindberg* (2008) 45 Cal.4th 1, 27; *People v. Young, supra*, 34 Cal.4th at p. 1181.)

4.

CLERICAL ERRORS PERTAINING TO THE SENTENCE MUST BE CORRECTED

At sentencing, the court imposed indeterminate terms of 14 years to life on counts 4 and 5, and imposed and stayed a three-year determinate term on each count for the gang enhancement found true pursuant to section 186.22, subdivision (b)(1). The court imposed a determinate term of five years for the enhancement pursuant to section 667, subdivision (a)(1) and a consecutive determinate term of one year for the single enhancement pursuant to section 667.5, subdivision (b) that the court had found true. The court did not stay that portion of the determinate term. The sentencing minutes, however, incorrectly state that the determinate sentence was stayed. We note that the record on appeal does not include an abstract of judgment for the determinate term, and we have ascertained that no determinate term abstract of judgment was issued by the

superior court.⁷ We infer that the omission may be the result of error contained in the sentencing minutes. Further, the abstract of judgment for the indeterminate term incorrectly states that two enhancements pursuant to section 667.5, subdivision (b) were stayed. In fact, only one such enhancement was found true.

Clerical errors in the sentencing minutes and the abstract of judgment may be corrected at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188; *In re Candelario* (1970) 3 Cal.3d 702, 704-705.) We will direct the superior court to issue an abstract of judgment for the determinate term, a corrected abstract of judgment for the indeterminate term, and corrected sentencing minutes, and to provide a copy of those documents to the parties and to the Department of Corrections and Rehabilitation.

DISPOSITION

The judgment is affirmed.

The superior court is directed to correct the following clerical errors:

1. Correct the sentencing minutes to reflect the sentence as orally imposed by the court with respect to the determinate term, as follows:

As to count 4, one-third the middle term, or three years, for the enhancement for participation in a criminal street gang pursuant to Penal Code section 186.22, subdivision (b), is imposed and stayed;

⁷ We take judicial notice the superior court record in this case does not include a determinate term abstract of judgment. (Evid. Code, § 452, subd. (d).)

As to count 5, one-third the middle term, or three years, for the enhancement for participation in a criminal street gang pursuant to Penal Code section 186.22, subdivision (b), is imposed and stayed;

A determinate term of one year is imposed pursuant to Penal Code section 667.5, subdivision (b), and a determinate term of five years is imposed pursuant to Penal Code section 667, subdivision (a)(1), for a total unstayed determinate term of six years;

2. Issue an abstract of judgment for the determinate term;
3. Issue a corrected abstract of judgment for the indeterminate term, deleting the notation that two enhancements pursuant to Penal Code section 667.5, subdivision (b), were stayed.

The superior court is directed to provide a copy of the corrected sentencing minutes, the determinate term abstract of judgment and the corrected indeterminate term abstract of judgment to the parties and to the Department of Corrections and Rehabilitation within 30 days following the finality of this opinion.

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McKINSTER
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.