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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.

DANIEL EDWARD FLORES,

Defendant and Appellant.

E055182

(Super.Ct.No. RIF154014)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Paul M. Bryant, Judge.
(Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Christian C. Buckley, 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 James D. Dutton, Michael Murphy, Emily R. Hanks, and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant Daniel Edward Flores was charged by information with two counts: assault by means of force likely to produce great bodily injury (count 1; Pen. Code, § 245, subd. (a)(1));¹ and active participation in a criminal street gang (count 2; § 186.22, subd. (a)).² The assault charge under count 1 was based upon an alleged assault against Matthew Carranza. An element of the active gang participation crime under count 2 is that defendant willfully promoted, furthered, or assisted in felonious criminal conduct by members of a criminal street gang. In this case, the specific felony relied on by the prosecution to establish this element was the assault against Carranza alleged in count 1.

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

² In connection with the assault charge under count 1, the district attorney alleged that defendant committed the assault for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), and further alleged that he inflicted great bodily injury on the assault victim for purposes of section 12022.7, subdivision (a).

A jury acquitted defendant of the assault alleged in count 1 and found the related enhancement allegations not true. The jury found him guilty of active participation in a criminal street gang under count 2. The court sentenced him to one year four months in prison, suspended the sentence, and granted defendant three years' probation.

In this appeal, defendant contends there is insufficient evidence to sustain the conviction on count 2 for the sole reason that the jury acquitted him of the assault charge in count 1. For the reasons expressed below, we conclude that the acquittal on count 1 is not inconsistent with, and does not preclude, the jury's verdict on count 2. We therefore affirm the judgment.

II. FACTUAL SUMMARY

On August 19, 2007, Carranza went to a party at a house in Corona with three female friends, A.J., M.H., and A.E. Carranza did not know any other people at the party.

Defendant was at the party. According to the prosecution's gang expert, defendant is a member of the El Cerrito Boys gang (ECB). The expert described ECB as a "fight crew," or "party crew." Their reputation was not established by dealing drugs, but by "being the big dogs at the parties and being the ones that can fight and beat up other people"

According to Carranza, defendant “all of a sudden . . . started confronting [him], talking trash from a distance.” Defendant asked Carranza in an aggressive manner, “Where are you from?” According to the gang expert, the question is a common manner of inquiring about gang membership. Carranza said he lived in the Woodcrest area of Riverside.

Carranza became uncomfortable and afraid of being assaulted. He wanted to leave immediately, but his friends wanted to stay. About 15 minutes later, they decided to leave.

As Carranza and his friends were leaving, defendant and a friend of his were standing on the front porch. Defendant told Carranza he was sorry for what he had said, and asked, “Are we cool?” Carranza said, “Yeah. We’re fine. Thank you for apologizing.”

Carranza and his friends walked to their car parked down the street. Defendant and another man walked quickly toward them. The two men were yelling, and one of them said something about disrespecting them or their crew. A.J. believed they referred to “El Cerrito or ECB, something with an E.”

Carranza tried to get into the car, but it was locked. He then moved toward the middle of the street to defend himself. He and the two men began fighting. At one point, Carranza was on top of defendant’s friend, punching him, while defendant was punching the back of Carranza’s head. Two or three other men joined in the fight and kicked Carranza in the face and hit him with beer bottles. Carranza lost consciousness.

The fight ended when A.E. yelled out that she had telephoned the police. Defendant and the other assailants got into an older model Cadillac and drove away. According to the prosecution's gang expert, members of ECB are known to drive older model Cadillacs.

Carranza suffered a broken jaw, and bruises and cuts to his face. His mouth was wired shut for six weeks.

III. ANALYSIS

Section 186.22, subdivision (a) imposes punishment for “[a]ny 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” The elements of the offense are: “(1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang.” (*People v. Albillar* (2010) 51 Cal.4th 47, 56.)

Defendant does not challenge the sufficiency of the evidence to support the first two elements—that he actively participated in a criminal street gang and had knowledge that the gang’s members engage in a pattern of criminal gang activity. He challenges only the sufficiency of the evidence to support the third element—that he willfully promoted, furthered, or assisted in felonious criminal conduct by gang members.

In this case, the felonious criminal conduct defendant allegedly promoted, furthered, or assisted was the assault against Carranza. The conviction on count 2, therefore, must be supported by substantial evidence of such an assault.

Defendant does not dispute that the evidence submitted at trial was sufficient to establish the alleged assault if such evidence is viewed independently of the jury's acquittal of the assault charge on count 1. He contends, however, that the evidence cannot be viewed independently. Indeed, he asserts that there was insufficient evidence to support count 2 as a matter of law because "no required felonious conduct existed after the Count 1 verdict was returned." We disagree.

The verdicts on the two counts are not necessarily inconsistent. Under count 1, the jury was instructed as to assault with force likely to produce great bodily injury in accordance with CALCRIM No. 875 as follows: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1A. *The defendant did an act* that by its nature would directly and probably result in the application of force to a person, and [¶] 1B. The force used was likely to produce great bodily injury; [¶] 2. *The defendant did that act willfully*; [¶] 3. When *the defendant acted*, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. *When the defendant*

acted, he had the present ability to apply force likely to produce great bodily injury to a person.”³ (Italics added.)

Although one can be convicted of assault by aiding and abetting another who directly perpetrates an assault, the court did not instruct the jury as to aiding and abetting liability in connection with the charge of assault. (See, e.g., CALCRIM No. 401.) The jury thus could have reasonably understood the instructions regarding count 1 as requiring that they find defendant committed the assaultive act himself. Indeed, in the absence of an aiding and abetting instruction regarding the assault count, it would appear from the instructions that the jury *must* find that defendant was a direct perpetrator.

By contrast, the court’s instructions regarding the gang participation crime included the following instruction as to the third element of the crime: “3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: [¶] a. directly and actively committing a felony offense; [¶] OR [¶] b. *aiding and abetting a felony offense.*” (Italics added.) After instructing the jury that “[f]elonious criminal conduct means committing or attempting to commit . . . [a]ssault by means of force likely to produce great bodily injury,” the court added the following: “To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that: [¶] 1. A member of the gang committed the crime; [¶] 2. The defendant knew that the gang member intended to

³ The jury was also instructed as to the lesser crime of simple assault, which was substantially identical to the instructions on the greater crime except for the requirement that the force applied be likely to produce great bodily injury. (See CALCRIM No. 915.)

commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the commission of the crime." After instructing on the intent required for aiding and abetting liability, the court continued: "If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abetter."

Viewing the instructions as a whole, they strongly suggest that a conviction on count 1 required the jurors to find that defendant directly perpetrated an assault on Carranza, while a conviction on count 2 required the jurors to find that defendant either committed the assault himself or aided and abetted others in committing an assault. The crime of assault required that "the defendant did an act . . ."; while the gang participation crime could be committed if a "member of the gang committed the [felonious criminal conduct]."

Thus, if the jurors found that defendant aided and abetted an assault of Carranza, but did not directly perpetrate the assault, they could have reasonably acquitted defendant on count 1 and convicted him on count 2. Such a result is entirely consistent with the instructions the jurors were given. We therefore reject defendant's premise that the acquittal of the assault charge on count 1 means that there was no felonious conduct on count 2 as a matter of law. Because he does not otherwise challenge the sufficiency of the evidence to support his conviction, we affirm the judgment.

IV. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

RAMIREZ
P. J.

MILLER
J.