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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.H., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.H.,

Defendant and Appellant.

E058077

(Super.Ct.No. J246278)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed.

Caroline R. Hahn, 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, Eric A. Swenson and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court found that D.H. (minor) vandalized property with graffiti and caused \$400 or more in damage, in violation of Penal Code¹ section 594, subdivision (b)(1). The court declined to reduce the charge to a misdemeanor and declared minor a ward of the court pursuant to Welfare and Institutions Code section 602.

In this appeal, minor contends: (1) there is insufficient evidence in the record to support the juvenile court's finding that he committed felony vandalism; (2) the juvenile court erred by aggregating separate acts of misdemeanor graffiti to establish felony vandalism; (3) the juvenile court abused its discretion by permitting a police officer to testify as an expert witness about the costs of removing graffiti; and (4) the juvenile court abused its discretion by declining to reduce the charge to misdemeanor vandalism. We find no error and affirm the judgment.

I.

FACTS

An officer with the City of Colton Police Department testified he was assigned to a gang unit during which he acquired experience in differentiating between gang graffiti and tagging graffiti. The officer attended an eight-hour course on how to investigate graffiti crimes, how to track graffiti vandals, and how to gather evidence for vandalism prosecutions. The officer testified that he conducted more than 300 graffiti investigations during which he identified and tracked specific graffiti vandals, including making contact with and interviewing more than 200 graffiti vandals. The officer also said he "testified

¹ All undesignated statutory references are to the Penal Code.

as an expert in graffiti cases before.” When asked by the prosecutor how many times he had testified as a graffiti expert, the officer answered, “I’ve testified as a graffiti expert one time in this court.”

To remain up to date as a gang expert, the officer continuously looked at new graffiti and interviewed graffiti vandals to stay current with their patterns. The officer testified that gang graffiti and tagger graffiti differ in purpose. Members of a gang will graffiti their gang names or monikers to designate a location as being within the gang’s geographic territory. Taggers, in contrast, do not claim specific territory and graffiti their unique moniker or monikers wherever possible, to gain notoriety. Taggers do not share monikers because they seek personal recognition.

The officer testified that he was on patrol in Colton around midnight when he was dispatched to investigate a report about four minors, one of whom was seen carrying a can of spray paint. When he arrived at the 1600 block of Pennsylvania Avenue, the officer saw three Hispanics, including minor, walking down the street. Minor was holding a can of black spray paint in his right hand. The three Hispanics turned and started to walk away when the officer exited his patrol vehicle and approached them. The officer told the three Hispanics to stop, and told minor to drop the spray paint can. After detaining minor, the officer searched minor’s person and found a red paint marker in his pocket. The officer also saw that minor had the remnants of black spray paint on his right index finger.

Nearby on the 1600 block of Pennsylvania Avenue, the officer observed the moniker “INDO,” and the number 26 with the letter T, graffitied in black paint on a low wall. About 50 feet away on the same wall, the officer saw the number 26 with an arrow pointed upward graffitied in black paint. According to the officer, the arrow represents the letter “T.” The officer testified that all three instances of graffiti on the 1600 block of Pennsylvania Avenue appeared to be wet and omitted the odor of spray paint, which meant they were freshly painted. On the 1700 block of Pennsylvania Avenue, the officer discovered “26T” freshly graffitied in black spray paint. He also observed the monikers “SKEPT” and “DELOE” freshly graffitied in black spray paint on the same block. On the 1800 block of Pennsylvania, the officer saw the moniker “ENDOE” graffitied on the curb in black spray paint, but it did not appear to be freshly painted. Further north on Pennsylvania Avenue the officer observed the tag “26T” graffitied in black spray paint, the moniker “ENDOE” with the tag “26T” graffitied in pink spray paint, and the tag “26 T-K” graffitied on the curb in black spray paint. The pink graffiti was not fresh. Finally, the officer observed the monikers “SKEPT” and “DELOE” graffitied in other places in the area.

The officer testified he was familiar with a tagging crew active in the City of Colton, which goes by the names “26T” and “Zombie Tribe.” The officer also testified that he was familiar with the tagging moniker “ENDO,” which had been spray painted throughout the City of Colton. He testified that the spelling of that particular moniker varied, and included “I-N-D-O,” “I-N-D-O-E,” “E-N-D-O-E,” and “E-N-D-O-H.” The officer testified that he concluded minor was the tagger who used the moniker “ENDO”

in its various spellings, and attributed to minor that tag and the tags “26T” that the officer discovered graffitied on three blocks of Pennsylvania Avenue. The officer formed this opinion because (1) he observed minor walking away from the wall where the officer saw the moniker “ENDO” and the tag “26T” spray painted in black, (2) minor was holding a can of black spray paint, (3) minor had black spray paint on his right index finger, and (4) minor was the only one of the three suspects who had any paint or graffiti paraphernalia with him. The officer testified that the other two individuals who were with minor were also known to be taggers, but neither of them used the moniker “ENDO.”

The officer also attributed these tags to minor based on the unique style of writing in which they were written and the consistency of the use of a distinctive moniker. According to the officer, each tagger has their own style of writing that is like a handwriting sample. The officer opined that the five instances of the tag “26T” graffitied on Pennsylvania Avenue were identical, because they each had the same “high arch and the drop” to the “6,” and the “T” was painted in the same style each time. The moniker “INDO,” “ENDO,” “ENDOE,” and “ENDOH” were all painted in an identical style as well, according to the officer, especially the way the letter “D” was written. Moreover, the officer testified that, although spelled differently, the moniker came from one person. The officer did not attribute to minor the graffitied monikers “DELOE” and “SKEPT,” and some other tags graffitied in the area, because the writing was not consistent with the graffiti the officer did attribute to minor.

The officer estimated the total size of the graffiti he attributed to minor covered 216 square feet. The officer testified, as foundation for his opinion about what it would cost to remove minor's graffiti, that he previously testified as a graffiti expert about how much it costs to remove graffiti. Based on his conversations with members of the public works department, the officer learned that it costs \$2.50 per square foot to remove graffiti. Therefore, the officer estimated that it would cost \$540 to remove the graffiti he attributed to minor.

On cross-examination, the officer testified that, when he arrived on the scene, he did not see minor actually spray painting graffiti. The can of spray paint that minor was carrying emitted an odor of freshly sprayed paint and had dried paint coming out of the cap. The officer testified that, although the paint on the cap of the spray can was dry, from the odor he concluded it had recently been used. The black paint the officer observed on minor's right index finger was consistent with someone using that finger to depress the tip of a spray paint can, as opposed to paint residue from using a pen or grease. He testified that the Zombie Tribe has at least 10 members, and although each member might graffiti the crew's name "26T," each member will graffiti in a unique writing style.

The juvenile court found true the allegation that minor vandalized property and caused \$400 or more in damage, in violation of section 594, subdivision (b)(1), and declined to reduce the allegation to a misdemeanor pursuant to section 17, subdivision (b). Thereafter, the juvenile court declared minor to be a ward of the court

and placed him in the custody of his mother under terms and conditions of probation. Minor timely appealed.

II.

DISCUSSION

A. *The Juvenile Court Did Not Abuse Its Discretion by Qualifying the Officer As an Expert Witness*

Minor challenges the admissibility of the expert testimony on which the juvenile court relied in finding that minor committed felony vandalism in violation of section 594. We address these issues before addressing the sufficiency of the evidence.

“Evidence Code section 801, subdivision (b) limits expert opinion testimony to an opinion ‘[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates’ ‘[A]ny material that forms the basis of an expert’s opinion testimony must be reliable. [Citation.]’ [Citation.] As long as this threshold requirement of reliability is satisfied, even matter ordinarily inadmissible, such as hearsay, can form the proper basis for an expert’s opinion testimony. [Citation.]” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1121, italics omitted.) “We review the trial court’s admission of expert testimony for abuse of discretion. [Citations.] The trial court’s exercise of discretion will not be reversed on appeal except on a showing that that discretion was exercised ““in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” [Citations.]”

[Citation.] Appellant has the burden of establishing an abuse of discretion and resulting prejudice. [Citation.]” (*Id.* at p. 1122.)

Minor contends the graffiti expert was not a handwriting expert, and because the officer did not personally observe minor’s handwriting, he should not have been permitted to express a lay opinion under Evidence Code section 1416 about similarities in writing to establish it was minor’s doing. We are not persuaded. The officer did not purport to testify as a handwriting expert. He attributed the graffiti to minor based on minor’s presence near freshly painted graffiti, his possession of a can of black spray paint, the presence of black paint residue on minor’s right index finger, and the fact that minor was the only one of the three Hispanics who had graffiti paraphernalia on his person. The officer then testified that all of the graffitied monikers of “INDO” in its various spellings, and all of the graffitied numbers 26 with a T or upward pointed arrow, were painted by the same person based on the similarity of writing.

Minor interposed no objection to the testimony about similarities in the graffiti on any ground, let alone on the ground of improper expert or lay handwriting opinion testimony, so he has forfeited his challenge on appeal. (Evid. Code, § 353, subd. (a); *People v. Dowl* (2013) 57 Cal.4th 1079, 1087-1088.) In any event, minor cites no authority for the proposition that an otherwise qualified graffiti expert may not testify about similarity in style and painting without also qualifying as a handwriting expert or satisfying Evidence Code section 1416. In the absence of such authority, we decline to so hold. (But see *In re Trinidad V.* (1989) 212 Cal.App.3d 1077, 1080 [court held police officer did not need to be a handwriting expert to describe similarities in writing of

graffiti for purposes of establishing probable cause for an arrest, but in dicta implied such expert testimony might be needed to prove “two writings were in fact made by the same person”].)

Minor also contends the People did not lay a proper foundation for the expert’s testimony about the costs of removing the graffiti because the expert did not say how many times he had previously testified about the costs of removing graffiti, and that in fact the expert said he had only once before testified as a graffiti expert. The expert said that he had “testified as an expert in graffiti *cases* before,” and that he “testified as a graffiti expert one time *in this court*.” (Italics added.) The implication is that the expert testified more than once before in graffiti cases, but only testified once before in front of that particular judge or in juvenile court. With respect to the cost of removing graffiti, the expert said he had previously testified as a graffiti expert, and that he previously testified about removal costs. Again, the implication is that the expert testified about removal costs more than once before.

Even if the officer had never before testified as an expert, lack of prior judicial qualification as an expert witness is only one factor to be considered when determining the witness’s qualifications as an expert. (*McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059, 1066.) If the witness is otherwise qualified, his lack of prior experience testifying should only go to the weight to be given to his testimony. (See *People v. Jones* (2013) 57 Cal.4th 899, 949-950 [“When a preliminary showing is made that the proposed witness has sufficient knowledge to qualify as an expert under the Evidence Code, questions about the depth or scope of his or her knowledge or experience

go to the weight, not the admissibility, of the witness’s testimony”].) The officer testified about his extensive experience and training in investigating graffiti vandalism and, on this record, we conclude the juvenile court did not abuse its discretion by qualifying him as an expert witness.

Nor are we persuaded by minor’s challenge to the matter on which the expert relied for his figures for removal costs and the square footage of minor’s graffiti. The expert testified that he obtained the figure of \$2.50 per square feet for graffiti removal from his conversations with employees of “our public works department.” Information and figures from the Public Works Department for the City of Colton—an agency that undoubtedly removes graffiti from public property on a regular basis—is certainly matter that an expert might reasonably rely upon when forming an opinion about the costs of graffiti removal. (Evid. Code, § 801, subd. (b).) Finally, that the expert did not testify about how he came up with the total square footage of the graffiti attributable to minor (and was not asked how by either counsel) goes to the weight and credibility to be given to that testimony. The juvenile court reviewed the photographs of the graffiti introduced as exhibits, and we cannot second-guess the court’s implicit acceptance of the officer’s testimony on that point. We find no error.

B. *The Judgment Is Supported by Substantial Evidence*

“Our review of [a minor’s] substantial evidence claim is governed by the same standard applicable to adult criminal cases. [Citation.] ‘In reviewing the sufficiency of the evidence, we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt.” [Citation.]’ [Citation.] “[O]ur role on appeal is a limited one.” [Citation.] Under the substantial evidence rule, we must presume in support of the judgment the existence of every fact that the trier of fact could reasonably have deduced from the evidence. [Citation.] Thus, if the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.]’ [Citation.]” (*In re V.V.* (2011) 51 Cal.4th 1020, 1026 (V.V.)) “The standard of review is the same where the prosecution relies primarily on circumstantial evidence. [Citation.]” (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610.)

““““ Although it is the duty of the [trier of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [trier of fact], not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt.”””” (*In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1496.) ““Before the judgment of the trial court can be set aside for insufficiency of the evidence . . . , it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]’ [Citations.]” (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1372.)

“Section 594 provides in pertinent part that ‘[e]very person who maliciously commits any of the following acts with respect to any real or personal property not his or her own . . . is guilty of vandalism: [¶] (1) Defaces with graffiti or other inscribed materials. [¶] (2) Damages. [¶] (3) Destroys.’ It further provides that if the damages

from the vandalism are \$400 or more, the crime is punishable as a felony. If the damages are less than \$400, the crime is punishable as a misdemeanor. (§ 594, subd. (b); [citation].)” (*People v. Carrasco* (2012) 209 Cal.App.4th 715, 719, fn. omitted (*Carrasco*)).

Minor’s argument about the sufficiency of the evidence is premised on the challenges to the expert testimony that we have already rejected, and on the facts that (1) the case against him was based on circumstantial evidence, and (2) the evidence was supposedly speculative. For instance, minor contends the expert’s testimony attributing all of the tags to him was not worthy of belief because “there were significant differences” in how the tags were written. But that argument goes to the weight to be given to the expert’s testimony. The juvenile court reviewed the exhibits, and as the trier of fact implicitly made its own determination that the tags were more similar than dissimilar. “We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 638.)

Minor also contends the expert’s testimony about tagging culture and tagging crews was consistent with a finding that someone else was the culprit. That the evidence supports a different conclusion than the one reached by the juvenile court is not a ground on which we may reverse, as long as the juvenile court’s conclusion is supported by substantial evidence. (*V.V., supra*, 51 Cal.4th at p. 1026.) The expert’s testimony attributing the graffiti to minor, as set forth *ante* in the context of minor’s challenge to admissibility of expert testimony, constitutes substantial evidence and supports the judgment.

C. *The Juvenile Court Did Not Err by Aggregating the Multiple Acts of Vandalism for Purposes of Finding That Minor Committed Felony Vandalism*

Minor contends that, even if the juvenile court correctly found that he committed separate acts of vandalism, it erred by aggregating those acts for purposes of felony vandalism. We disagree.

Multiple acts of vandalism by one person, which each cause less than \$400 in damage, may be aggregated to support a felony offense “‘unless ‘the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan.’”” (*Carrasco, supra*, 209 Cal.App.4th at p. 719, quoting *In re Arthur V.* (2008) 166 Cal.App.4th 61, 69.) Aggregation into one felony offense is permissible even if the vandal causes less than \$400 in damage to property belonging to more than one victim, as long as each act of vandalism is committed according to the same intention, impulse, and plan. (*Carrasco*, at pp. 720-721; *In re Arthur V.*, at pp. 68-69, fn. 4.)

“[T]he question of ‘[w]hether a series of wrongful acts constitutes a single offense or multiple offenses’ requires a fact-specific inquiry that depends on an evaluation of the defendant’s intent. [Citation.] Such an inquiry is appropriately left to the fact finder in the first instance.” (*In re Arthur V., supra*, 166 Cal.App.4th at p. 69.) “As with other such factual questions, reviewing courts will affirm the fact finder’s conclusion that the offenses are not ‘separate and distinct,’ and were ‘committed pursuant to one intention, one general impulse, and one plan’ so long as that conclusion is supported by substantial evidence. [Citations.]” (*Ibid.*)

Minor contends the People did not establish that he committed each separate act of vandalism with one unified intent or impulse because the identity of the victims was unclear, the separate acts of vandalism were not all committed at the same time, and the graffiti was found in various locations. According to minor, the expert's testimony "that taggers commit these crimes for notoriety and recognition" is insufficient, because the expert did not identify a single impulse behind the tags he found.

With respect to the identity of the victim, the petition alleged that minor vandalized property belonging to the City of Colton, to wit, the curb line and a light pole. The expert did not testify whether the walls on Pennsylvania Avenue also belonged to the City, but failure to identify the specific victims is irrelevant. Aggregation is permitted no matter how many victims are involved, as long as the minor harbors the same intent or impulse when he vandalizes each victim's property. (*Carrasco, supra*, 209 Cal.App.4th at pp. 720-721; *In re Arthur V., supra*, 166 Cal.App.4th at pp. 68-69, fn. 4.) Likewise, minor makes too much of the fact that each tag was not painted in the same place. The expert testified that the tags he attributed to minor were almost all located on three contiguous blocks of Pennsylvania Avenue, and some further north on the same street. The placement of the tags on various blocks of the same street is consistent with the expert's testimony that taggers want personal recognition, and paint their monikers wherever possible. Moreover, the fact that minor may have spray painted some of the graffiti days before his arrest is not dispositive. A significant gap in time between criminal acts might tend to show a defendant had separate intents for each act, but when

the evidence shows a defendant had a single purpose and intent, those acts may still be aggregated. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 363.)

As noted, the expert testified that, unlike gang members, graffiti vandals spray paint their personal monikers and the names or logos of their tagging crews for personal notoriety, and not necessarily to delineate their territory. Because the motivation is personal recognition, taggers spray paint their monikers wherever possible. The expert testified that the moniker “ENDO” in its various spellings was found throughout the City of Colton, not merely on Pennsylvania Avenue. The expert could not have testified that minor had the intent or impulse to gain notoriety when he painted the tags (see *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513), but the juvenile court could reasonably have concluded from the evidence that minor did harbor such a unified intent or impulse. We conclude the aggregation of each separate act of vandalism is supported by substantial evidence.

D. *The Juvenile Court Did Not Abuse Its Discretion by Declining to Reduce the Charge to a Misdemeanor*

Finally, minor contends the juvenile court abused its discretion by denying minor’s request to reduce the charge of vandalism to a misdemeanor, pursuant to section 17, subdivision (b). He contends the circumstances of the current offense and his history of minor criminal conduct does not justify the stigma that flows from a felony adjudication, including the requirement that he provide a DNA sample pursuant to section 296, subdivision (a)(1). We find no abuse of discretion.

Vandalism in violation of section 594 is a “wobbler” and is punishable as a felony if the amount of property damage is \$400 or more. (§ 594, subd. (b)(1); *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 906, fn. 14.) A court has broad discretion under section 17, subdivision (b), to reduce a wobbler offense to a misdemeanor. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) The trial court must consider all relevant factors when exercising its discretion, including a defendant’s criminal history and public safety concerns. (*Id.* at pp. 979, 981-982.) The trial court’s exercise of discretion under section 17, subdivision (b), is reviewed for abuse of discretion, and in the absence of a showing that the court acted irrationally or arbitrarily, a reviewing court must presume the trial court acted to achieve the legitimate goals of sentencing. (*Id.* at pp. 977-978.) “Concomitantly, ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]” (*Id.* at p. 977.)

During closing arguments, minor’s counsel argued that, if the juvenile court found true the vandalism allegation, the court should reduce the charge to a misdemeanor because “he has no prior record.” During rebuttal argument, the People responded that “minor does have previous citations for [vandalism in violation of section] 594 that [were] handled through traffic court that are in failure to pay status.” The juvenile court declined to reduce the charge to a misdemeanor at that time, but indicated it would consider doing so upon minor’s successful completion of probation. The juvenile probation report submitted to the juvenile court thereafter indicated that minor had

previously been cited twice for violating a curfew, cited twice for vandalism, and cited once for possessing marijuana. Minor failed to make any payments on the first vandalism citation, and failed to complete 125 hours of community service for the second vandalism citation, which resulted in an additional fine for which no payments had been made.

Minor contends the juvenile court should have reduced the charge to a misdemeanor because he had no serious prior criminal record, he denied spray painting the tags attributed to him by the expert witness, he was apparently taken into custody without incident and acted appropriately during the adjudication proceedings, the offense was not violent and involved only \$540 in property damage, and he did not pose a risk to public safety. Minor's prior citations that were handled in traffic court were not, individually, serious offenses. But they demonstrated a pattern of escalating criminality. Moreover, although minor may not have resisted the officer at the scene and he behaved appropriately during the hearing, the record shows that, despite the fact that prior citations had been sustained and were handled informally, minor failed to appear, failed to pay fines, and failed to complete community service. That minor denied committing the current offense is irrelevant because the record supports the juvenile court's conclusion that he did commit the offense.

Based on minor's criminal history and failure of rehabilitation in informal proceedings, the juvenile court could reasonably have concluded that minor's offense was appropriately treated as a felony at that time, but that minor could nonetheless

request reduction to a misdemeanor after successful completion of probation. We find no abuse of discretion.

III.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

KING
J.