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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re JUAN L., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN L.,

Defendant and Appellant.

F067588

(Super. Ct. No. 13JQ0012)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. James LaPorte, Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Levy, Acting P.J., Kane, J. and Franson, J.

The trial court found true a Welfare and Institutions Code section 602, subdivision (a), allegation that Juan L. (the minor) possessed a box cutter on school grounds (Pen. Code, § 626.10, subd. (a))¹ and that he committed the offense for the benefit of and in association with a criminal street gang (§ 186.22, subd. (d)). The minor was made a ward of the court and placed on probation subject to, among other things, that he serve 30 days in the juvenile center.

On appeal, the minor contends there is insufficient evidence to uphold the true finding on the gang enhancement allegation. We disagree and affirm.

STATEMENT OF FACTS

On September 6, 2012, the minor was referred to Tina Smith, the assistant principal at Avenal High School, for a dress code violation. According to Smith, the minor was wearing a shirt that local law enforcement and the school had classified as “gang affiliated.”

Once in her office, Smith discussed the shirt with the minor and asked him why he “continually” violated the school dress code. The minor had “just recently” come back from suspension for a similar incident. Smith told the minor that he needed to turn the shirt inside out, but she wanted to take a picture of it before he did so. At this point, the minor “refused” and “tried to conceal the shirt by lifting it up. And when he did, that is when [Smith] noticed the weapon on his belt loop.” Smith then had her secretary call the police.

When Police Officer Elsie Ortega arrived at Smith’s office, she was told that one of the students had what she believed to be a knife in his pocket. Ortega approached the minor, who was sitting in a chair. She asked him to keep his hands in front of him so that

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

she could see them. After asking the minor a couple of times to stand up, he finally complied and stood up and turned away from Ortega and put his hands on his head. Ortega searched the minor and found a red box cutter with a sharp blade in his left front pants pocket.

Police Officer Victoria Jones, who is assigned to the Kings County gang task force, testified as a gang expert “dealing with Norteno street gangs.” Jones testified that the predominant Norteno gang in Avenal is the Avenal Vario Lomas or AVL Norteno; their gang color is red; they identify with the number 14; and its members wear clothing such as T-shirts and hats that say “California, Nor Cal, [or] Cali” and have on them “the California bear or a five-point star to represent the northern star for Norteno” According to Jones, the primary activities of the AVL Nortenos include homicide, assault with a deadly weapon, attempted homicide, shooting at a dwelling, and “things of that nature.” Jones described some of the crimes committed by three particular AVL Norteno members.

Jones testified that she reviewed an August 23, 2011, report of a police contact in which the minor was involved in a verbal altercation with another individual. During that contact, the minor admitted to the other officer that he was a Norteno and he wanted to fight the other individual because he was a Sureno gang member. At the time of the incident, the minor was wearing a red and black shirt.

Jones testified that, on December 8, 2011, the minor and another individual were contacted by another officer in Avenal. During that contact, the minor told the officer that he was an AVL Norteno associate. The other individual also admitted that he was a Norteno associate.

On September 10, 2012, Jones and another officer contacted the minor at a park after the minor’s mother reported him as a runaway. When he was seen at the park, he was wearing a black T-shirt with a bear and “Cali” on the front and “California, a bear and two northern stars” on the back.

Based on these contacts, Jones opined that the minor is “an AVL Norteno gang member.” Jones was asked if she had an opinion:

“concerning the purpose that weapon that I previously mentioned was possessed for, what is it about the weapon and the circumstances ... of its possession, including, but not limited to, the [minor’s] gang membership, the shirt he was wearing that day, the color of the handle of the knife, what is it about that that you would consider in determining ... what the purpose of possessing that knife would be?”

In response, Jones opined that

“a weapon would be carried in that manner to assist, further or promote the Norteno street gang. The fact that the handle of the knife was red, Norteno gang members claim the color red. Norteno gang members commonly carry weapons such as knives, box cutters, anything of that sort, for protection against rival gang members or to assault rival gang members.”

DISCUSSION

The minor contends there is insufficient evidence of the specific intent requirement to uphold the section 186.22, subdivision (d) enhancement. We disagree.

Section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act, also known as the STEP Act. (§ 186.20.) Section 186.22, subdivision (d) provides that “[a]ny person who is convicted of a public offense punishable as a felony or a misdemeanor, which is 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 be punished” by an enhanced penalty consecutive to the punishment for the underlying offense.

As with substantive offenses, the standard of review in a claim regarding the sufficiency of the evidence to sustain a gang enhancement is familiar: “““When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence - i.e., evidence that is credible and of solid value - from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.”””

(*People v. Hill* (1998) 17 Cal.4th 800, 848-849; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) This same standard applies in juvenile cases. (*In re Macidon* (1966) 240 Cal.App.2d 600, 607.)

The minor contends that there was no evidence presented that, by having the box cutter in his possession, he had the specific intent to promote or to engage in any criminal conduct for the benefit of the Norteno criminal street gang. The minor argues the present case is indistinguishable from the factual situation before this court in *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*). In *Frank S.*, a police officer detained a minor for failing to stop at a red traffic light while riding a bicycle. The officer found a concealed knife on the minor, who explained he carried the knife for protection against the “southerners,” a local gang. The minor later admitted he was affiliated with a rival gang. The prosecution’s gang expert testified the minor’s possession of the knife benefitted his gang because members would use the knife for protection or to assault rival gangs. (*Id.* at pp. 1195-1996.)

We reversed the true finding on the enhancement in *Frank S.*, explaining the prosecution presented “no evidence other than the expert’s opinion regarding gangs in general and the expert’s improper opinion on the ultimate issue to establish that possession of the weapon was ‘committed for the benefit of, at the direction of, or in association with any criminal street gang’ [Citation.] The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor’s statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. To allow the expert to state the minor’s specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended.” (*Frank S., supra*, 141 Cal.App.4th at p. 1199.) Instead, we found that the evidence showed no more than that the minor had

affiliated with the gang, and “membership alone does not prove a specific intent to use the knife to promote, further, or assist in criminal conduct by gang members.” (*Ibid.*) We found no substantial evidence supported the expert’s opinion the minor acted with the requisite intent. (*Ibid.*)

We find the facts here distinguishable from *Frank S.* There is no question but that the minor was an AVL Norteno gang member. And while gang membership alone does not provide a specific intent to use the box cutter to promote, further, or assist in criminal conduct by gang members (*Frank S., supra*, 141 Cal.App.4th at p. 1199), we find there is substantial evidence to support the specific intent finding of the allegation.

Here, during the incident in question, the minor was summoned to the vice principal’s office because he was wearing a shirt that was considered “gang affiliated.” The minor knew it was gang affiliated because he had very recently been suspended for a similar offense. This is also evident from the fact that, when the vice principal asked to take a picture of the shirt, the minor attempted to conceal it by lifting it up. The box cutter, which was in the minor’s possession, was red, a color associated with Nortenos.

And while an expert may not testify directly whether a defendant committed an offense for gang purposes, he or she may express an opinion based on hypothetical questions that track the evidence, whether the offense, if it in fact occurred, would have been for gang purposes. “‘Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the ... gang enhancement.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048, quoting *People v. Albillar* (2010) 51 Cal.4th 47, 63.)

Jones’s testimony was that the primary activities of the AVL Norteno gang included homicide and attempted homicide, assault with a deadly weapon, shooting at a dwelling and “things of that nature.” Jones opined that possession of the box cutter provided protection against rival gang members, as well as a means to assault rival gang members. Jones’s opinion that carrying such a weapon under the facts presented,

together with the rest of the evidence presented, was sufficient to find the action in carrying the box cutter was for the benefit of, at the direction of, or in association with the AVL Nortenos with the specific intent to promote, further or assist in criminal conduct by the AVL Norteno gang.

Substantial evidence supports the trial court's true finding on the section 186.22, subdivision (d) enhancement and we reject the minor's argument to the contrary.

DISPOSITION

The judgment is affirmed.