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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.T., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.T.,

Defendant and Appellant.

G044426

(Super. Ct. Nos. DL036715-001 &
DL036715-002)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Jacki C. Brown, Judge. Reversed and remanded.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Kyle Niki Shaffer, Deputy Attorneys General, for Plaintiff and Respondent.

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Minor J.T challenges the sufficiency of the evidence to support the juvenile court's dispositional order adjudicating him a ward of the court and imposing probation terms based on his active participation in a criminal street gang and his graffiti and knife possession offenses. (Pen. Code, §§ 186.22, subd. (a) [gang offense]; 594, subd. (b)(2)(A) [vandalism; damage less than \$400]; 626.10, subd. (a) [weapon possession on school grounds]; former 12020, subd. (a)(4) [dirk or dagger possession]; all further statutory references are to the Penal Code unless noted.) Minor focuses his challenges solely on the gang offense and related gang allegations, not whether he committed the underlying offenses. He asserts the prosecutor failed to establish his gang's primary activities included offenses listed in the criminal street gang statute (§ 186.22, subd. (e)) or that he committed his graffiti or knife possession offenses for the benefit of his gang (§ 186.22, subds. (b) & (d) [elevating wobbler offenses to a felony if gang-related]). Minor also argues the gang expert strayed into opining on his subjective intent in responding to hypothetical questions, contrary to the rule stated in *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.

We need not reach these challenges because minor also raises, and the Attorney General fails to address, a dispositive claim that the prosecutor failed to prove the necessary predicate acts to establish a pattern of criminal gang activity by members of minor's gang. (§ 186.22, subd. (e).) We therefore reverse the juvenile court's gang findings and remand the matter for the juvenile court to reconsider the proper disposition of minor's case without the gang allegations.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2009, Santa Ana Police Officer Pedro Duran and his partner used their vehicle spotlight to illuminate minor, age 15, and two other males looking down at fresh graffiti painted on a sidewalk. No one else was around. The light triggered a hasty departure: one male rode away on a bicycle, and minor and his companion walked the other way before crouching down between two nearby cars. Duran followed and stopped the bicyclist while Duran's partner detained the duo near the graffiti. There, Duran found the initials "CLS" painted in large black letters in two spots about 10 feet apart, along with a similarly freshly-drawn black line crossing out the letters "KDK." He also found a shoe polish marker with a brush size and ink color that matched the graffiti. Duran knew from previous field contacts with minor that minor belonged to the "Crazy Little Stoners" (CLS) gang, a rival of the "Kausing Damage Krew" (KDK) gang.

After waiving his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), minor admitted he was a member of the CLS gang and that he had, on other occasions, inscribed CLS graffiti to "support the gang," but he claimed he was not the offender this time. Minor denied the black smudge marks on his hands came from the shoe polish can. He suggested Duran instead interview "the other two guys."

A few months later, in May 2010, a security guard and a police officer responded to a report of a fight in the Santa Ana High School cafeteria, where they found minor walking away from a large congregation of male students. He had visible red marks on his face consistent with having been struck there. The police officer noted that the dispersing male students were members of the Brown Evil Soldiers (BES) street gang. As the security guard escorted minor away from the area, she heard the loud clanging

sound of metal hitting concrete. The school custodian had been walking directly behind minor at the time, and informed the security guard that minor removed a dagger from his pants pocket and dropped it to the floor.

The police took minor into custody and, after waiving his *Miranda* rights, he admitted he dropped the knife, which he had received from a fellow gang member for protection. Specifically, he explained that a CLS gang member had shot a BES member the previous day, and the CLS gang anticipated retaliation. His assault in the cafeteria was a direct result of the feud.

The prosecutor filed separate delinquency petitions against minor based on the graffiti and knife possession incidents, which the juvenile court heard together in a combined jurisdictional and dispositional hearing. At the hearing, the prosecutor introduced two predicate acts by other CLS gang members to establish the pattern of criminal gang activity necessary to show CLS qualified as a criminal street gang. The two prior acts, however, were more than three years apart from each other and both occurred more than three years before the offenses charged against minor in the delinquency petitions. One incident was a robbery committed in 2002, and the other was a felon-in-possession firearm conviction in 2006. The record is not entirely clear, but the prosecutor referred to an exhibit concerning one of the two incidents as “a certified copy of the predicate act,” and we infer that the two exhibits the court admitted consisted of certified copies of court records of the 2002 and 2006 convictions. (See Evid. Code, § 452.5 [hearsay exception for certified court records].)

II

DISCUSSION

Minor challenges the sufficiency of the evidence to support the conclusion CLS qualified as a criminal street gang as defined in section 186.22, subdivision (f). “To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group’s primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) *the group’s members must engage in, or have engaged in, a pattern of criminal gang activity.*” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457, italics added.) The criminal street gang finding is a necessary predicate to the substantive offense of active participation in a criminal street gang (§ 186.22, subd. (a)) and to enhancing minor’s graffiti and knife possession offenses as gang crimes (§ 186.22, subds. (b), (d)). The Attorney General makes no effort to respond to minor’s contention the prosecutor failed to establish the requisite pattern of criminal gang activity. Minor’s challenge is meritorious.

The requisite “pattern of criminal gang activity” consists of “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of *two or more* of [certain enumerated offenses], *provided* at least one of these offenses occurred after the effective date of this chapter *and the last of those offenses occurred within three years after a prior offense*, and the offenses were committed on separate occasions, or by two or more persons” (§ 186.22, subd. (e), italics added.) Here, the prosecutor’s reliance on the 2002 robbery and 2006 firearm possession offenses committed by CLS members failed by their plain

dates to establish the requisite pattern of criminal gang activity because they neither occurred within three years of each other (*People v. Fiu* (2008) 165 Cal.App.4th 360, 388 (*Fiu*)), nor within three years of minor's charged 2009 and 2010 offenses (*In re Lincoln J.* (1990) 223 Cal.App.3d 322, 327-328 (*Lincoln J.*)).

Charged offenses may establish the requisite pattern of criminal gang activity either by themselves (*People v. Loeun* (1997) 17 Cal.4th 1, 4-5; *Fiu, supra*, 165 Cal.App.4th at p. 388) or in conjunction with earlier predicate crimes (*Lincoln J., supra*, 223 Cal.App.3d at pp. 327-328). But here neither minor's 2009 vandalism charge for graffiti causing less than \$400 in damage, nor the 2010 knife possession charge qualified as criminal street gang pattern activities. (Compare § 186.22, subs. (e)(20) [felony vandalism exceeding \$400 in damage] and (e)(24), (31), (32) & (33) [*firearm* possession offenses].) The Attorney General does not cite or discuss any other potential predicate offenses and, indeed, does not address minor's challenge at all. We note the prosecution's gang expert, Detective Rashad Wilson of the Santa Ana Police Department, alluded to robbery, assault with a deadly weapon, and felony vandalism as among the CLS gang's primary activities, but this did not establish the requisite pattern of actual instances of felony conduct. (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003 ["vague, secondhand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred"]; *In re Leland D.* (1990) 223 Cal.App.3d 251, 259-260 (*Leland D.*) [court records of conviction not required to prove pattern conduct, but more required than "nonspecific hearsay and arrest information"].)

III

DISPOSITION

The juvenile court's order finding that minor engaged in active participation in a criminal street gang and committed graffiti and knife possession offenses for the benefit of his gang is reversed. On remand, the juvenile court may reconsider the proper dispositional order for minor absent the gang allegations.

(Leland D., supra, 223 Cal.App.3d at p. 260.)

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.