

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN LY,

Defendant and Appellant.

G045177

(Super. Ct. No. 09ZF0065)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Rex Williams, 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, Garrett Beaumont and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

Brian Ly appeals from a judgment after a jury convicted him of conspiracy to commit robbery, attempted second degree robbery, street terrorism, assault with a semiautomatic firearm, and street terrorism, and found true street terrorism and firearm enhancements. Ly argues insufficient evidence supports his convictions. We disagree.

FACTS

Detective Elijah Hayward arranged to buy Ecstasy from a person he believed was part of a group dealing drugs in Orange and Los Angeles counties. Hayward agreed to meet a man by the name of “Jay” and purchase 2,000 Ecstasy pills for \$5,200. After a series of text messages and telephone calls, the parties agreed to meet at a Pavilions Shopping Center in Newport Beach on an April 2008 evening at 8:45 p.m. Hayward carried a handgun and wore a wire to transmit conversations to officers nearby. If Hayward needed assistance, he would yell, ““Help”” and put his hands in the air.

Soon after Hayward arrived, a black Honda Civic drove into the parking lot and stopped to the left of Hayward’s car. Hayward saw three people inside the Honda: the driver, Hoang Nguyen, the front passenger, Khoa Vo, and the backseat passenger, Ricky Ly.

Vo, who identified himself as “Jay,” told Hayward to get inside the car but Hayward refused. The Honda’s occupants told Hayward they wanted to see the money. Hayward told Nguyen to pull the Honda closer and they could see the money in a backpack that was hanging on a headrest; the backpack was empty. Hayward said he wanted to see the Ecstasy before he would give them the money. Ricky Ly showed Hayward a black backpack but he could not see inside.

A blue Acura drove into the parking lot and stopped with the front end of the car next to Hayward. The Acura’s driver, who was revving the car’s engine, asked Hayward, ““Where you from?”” ““Where you from?”” Hayward asked the Acura’s occupants the same question. The Honda’s occupants also asked the same question. The Acura’s driver asked, ““Where the fuck are you from?””

Hayward started to feel uncomfortable and gave the prearranged signal. As Hayward backed away, he saw Vo get out of the Honda and point a black semiautomatic handgun at him. An officer approached Vo from behind and said, “Police.” When Vo turned around, Hayward ran to his vehicle. As Vo got back into the Honda, Hayward shouted at him to drop his weapon. The Honda and the Acura drove away.

Officers stopped the Acura; there were four males and one female in the car. The driver, and the person with whom Hayward spoke, was Jimmy Luong. A female, Cassidy Ngo, was sitting in the front passenger seat. In the backseat were Ly, who was sitting behind the driver, and David Che, who was sitting in the rear passenger seat. Jonathan Louie was sitting in the backseat between Ly and David Che. Officers found a baseball bat but no other weapons. Officers also found three cellular telephones in the glove box and one in the backseat; Ly admitted the telephone in the backseat was his. A citizen approached the police and asked the officer to follow him back up the street. The officer recovered a loaded semiautomatic handgun. Hayward identified the gun as the one Vo pointed at him.

Officers also stopped the Honda. Officers recovered cellular telephones from Nguyen, Vo, and Ricky Ly, and one from the car’s center console. They recovered two .32 caliber rounds from the gutter next to where the Honda had stopped. Officers did not find any Ecstasy.

Detective Matthew Graham interviewed Ly and advised him of his *Miranda*¹ rights. Ly said “Jimmy” picked him up at his girlfriend’s house. Ly initially said “Jimmy” was alone, but then stated his girlfriend was with him. Ly said he did not know where they were going and he fell asleep in the car. Ly said he woke up, overheard someone say they were going to the beach, and fell back asleep. Ly claimed he woke up when the police pulled them over. Ly said he did not know anything about a Honda

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

Civic, other friends, or a meeting. Graham did not think he told Ly that another car was involved or the type of car.

An indictment charged Ly² with conspiracy to commit robbery (Pen. Code, §§182, subd. (a)(1), 211, 212.5, subd. (c))³ (count 1)⁴, attempted second degree robbery (§§ 664, subd. (a), 211, 212.5, subd. (c)) (count 2), assault with a semiautomatic firearm (§ 245, subd. (b)) (count 3), and street terrorism (§ 186.22, subd. (a)) (count 6). The indictment alleged Ly committed counts 1, 2, and 3 for the benefit of a criminal street gang (§ 186.22, subd. (b)). As to count 2, the indictment also alleged Ly was a gang member who vicariously discharged a firearm (§ 12022.53, subds. (b), (e)(1)).

Ly and David Che were tried together.⁵ At trial, Officer David White testified he examined the cellular telephones. White stated that in Ly's cellular telephone, his address book had telephone numbers for Luong, Vo, and the number for one of the telephones recovered from the Honda. White said one of the last numbers Ly dialed was Vo. He testified Che's cellular telephone had address entries for Ly, Luong, and Vo. White said the address book in Luong's cellular telephone had telephone numbers for Ly and Che. White testified Luong's cellular telephone had multiple text messages from the cellular telephone Hayward used, and that minutes after Hayward

² The indictment also charged Louie (Wah Ching), Ricky Ly (V Boys), Nguyen (V Boys), Che (Cool Boys), Luong (Cool Boys), and Vo (V Boys).

³ All further statutory references are to the Penal Code.

⁴ The indictment listed six overt acts, including Luong sent Vo a text message with directions and the Honda arrived at Pavilions and its occupants told Hayward to get into the car, and the Acura arrived at Pavilions, and pulled next to Hayward and engaged in a gang "hit up."

⁵ In a nonpublished opinion filed concurrently, we affirm David Che's convictions. (*People v. Che* (June 19, 2012, G045016).)

texted Luong directions to Pavilions, Luong (who was driving the Acura), texted Vo (who was a passenger in the Honda), directions to their destination.

The prosecutor also offered the testimony of gang expert, Detective Thomas Yu. After detailing his background, training, and experience, Yu testified concerning the culture and habits of Asian gangs. He stated Asian gangs, unlike African-American and Hispanic gangs, are not territorial; they are economically driven and will travel to commit primarily economic crimes. Yu explained how to join a gang, what it means to claim a gang, and the concepts of “hitting up” rival gang members, and backing up your own and allied gang members. Yu stated that in Asian gangs, allied gang members will work together to commit economic crimes. He also explained the importance of tattoos and cigarette burns, respect and disrespect, weapons, and violence within the gang culture. He said a gang gun is a firearm that belongs to the gang, not a particular individual, and can be used by a gang member and returned to a safe house for later use by another gang member. Based on conversations with gang members, Yu learned that “when Asian gang members commit a crime with a gang gun, members of that gang would know about the gun or who has the gun.” Yu stated gang members commit crimes with other gang members to intimidate the victims and so they can boast about the crimes to gain respect in the gang. Yu stated it is common for Asian gang members to use two or more cars to commit a crime. He stated there is a primary car and a backup car, which provides security. Yu explained the distinction between being a gang member (a person who is jumped into a gang) and being a gang associate (a person who “hangs out with the gang”).

Based on his experience investigating Asian street gangs, Yu opined V Boys was a criminal street gang at the time of the offenses. He detailed its formation and history and described its membership and common signs and symbols. Yu stated its allies are Asian Boys and Cool Boys and its rival is Wah Ching. Yu said V Boys’ primary activities are attempted murder, extortion, possession of controlled substance for

sale, transportation of controlled substance, drive-by shootings, and assault with and without firearms. Yu opined Nguyen, Ricky Ly, and Vo were active participants of V Boys at the time of the offenses.

He also opined Wah Ching was a criminal street gang at the time of the offenses and Louie was an active participant in Wah Ching at the time of the offenses. Based on his experience investigating Asian street gangs, Yu opined Cool Boys was a criminal street gang at the time of the offenses. He detailed its formation and history and described its membership and common signs and symbols (“32”). Yu stated its allies are “Hell Side,” “Red Door,” and “Four Seas.” Yu stated its primary activities are possession of controlled substance for sale, transportation of controlled substance, and assault with and without firearms. Yu testified concerning the statutorily required predicate offenses. Based on his investigation, he concluded Che and Luong were active participants in Cool Boys at the time of the offenses. Yu opined that at the time of the offenses, Ly was an active participant in Cool Boys based on his prior contacts with law enforcement and his prior admission. Yu stated Ly had tattoos on his back that read, “Cool Boys” and “32” and his moniker is “Cricket.”

Based on a hypothetical question mirroring the facts of this case, Yu opined the offenses were committed in association with and for the benefit of a criminal street gang. He added that the offenses were done to promote, further, and assist criminal conduct by the criminal street gang. Yu explained the offenses promoted and furthered criminal conduct because the gang members were “putting in work[.]” for the gang. He added the crimes would make it easier for other gang members to commit the same crime on a later date. Finally, he stated the proceeds of the offense would be distributed among the other gang members.

The jury convicted Ly of all counts and found true the enhancements. After the trial court denied Ly’s new trial motion, the court sentenced him to the middle term of

two years on count 2, and a consecutive 10-year term on the firearm enhancement (§ 12022.53, subs. (b), (e)(1)). The court stayed the sentences on the other counts.

DISCUSSION

Ly argues insufficient evidence supports all of his convictions. None of his contentions have merit.

“In considering a challenge to the sufficiency of the evidence . . . , [the appellate court] review[s] 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. [Citation.] [It] presume[s] every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] 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. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).

Conspiracy to Commit Robbery and Attempted Second Degree Robbery

Ly argues insufficient evidence supports his conviction for counts 1 and 2 because there was no evidence he intended to aid and abet the commission of those offenses. We disagree.

Conspiracy to commit robbery requires that two or more people conspire to commit robbery and at least one person performs an overt act in furtherance of the conspiracy. (*People v. Swain* (1996) 12 Cal.4th 593, 600.) As with robbery and attempted robbery, conspiracy to commit robbery is a specific intent crime that requires the intent to conspire and the intent to commit the robbery. (*Ibid.*)

Robbery is the felonious taking of another’s property against his will by the use of force or fear. (§ 211.) An attempted robbery requires that the defendant both

harbor a specific intent to rob the victim and take a direct but ineffectual step to commit the robbery. (*People v. Medina* (2007) 41 Cal.4th 685, 694.)

“To be guilty of a crime as an aider and abettor, a person must ‘aid[] the [direct] perpetrator by acts or encourage[] him [or her] by words or gestures.’ [Citations.] In addition, . . . [citations] . . . , the person must give such aid or encouragement ‘with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,’ the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person ‘must share the specific intent of the [direct] perpetrator,’ that is to say, the person must ‘know[] the full extent of the [direct] perpetrator’s criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator’s commission of the crime.’ [Citation.]” (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

Here, there was sufficient evidence for the jury to reasonably infer Ly was aware of and intended to aid in the conspiracy to commit robbery and attempt to rob Hayward. After Hayward texted Luong the directions to the meeting place, Luong, who was driving the Acura, texted those directions to Vo, who was a passenger in the Honda. After Nguyen stopped the Honda near Hayward’s car, Vo told Hayward to get inside. Vo claimed to be “Jay,” the person Hayward had spoken with and texted. A few minutes later, Luong stopped the Acura, in which Ly was a passenger, near Hayward, and he “hit up” Hayward. After Hayward asked them where they were from, the Honda’s occupants “hit up” Hayward. When Hayward started to back away, Vo pointed a gun at him. The jury could reasonably infer from this evidence, and the fact officers did not find any Ecstasy, Luong orchestrated the meeting so he and his confederates could rob Hayward. The fact officers thwarted their attempt does alter our conclusion. (*People v. Bonner* (2000) 80 Cal.App.4th 759, 761-762, 765 [sufficient evidence attempted robbery of hotel

manager and assistant manager where defendant armed himself, went to scene, placed a mask over his face and hid but gave up when detected by other hotel employees].)

The expert gang testimony further supports this conclusion. Yu testified that Asian gangs often work together to commit economic crimes. He also explained it is common for gangs to use two or more cars, with one car acting as backup. Yu testified that when one gang member has a gun, the other gang members know their confederate is armed. Moreover, the occupants of the Acura were not unarmed, they had a baseball bat. Ly was a known Cool Boys gang member, and he was in the Acura with two other Cool Boys gang members. Although there was a Wah Ching gang member in the Acura, there was testimony it is not unusual for rival Asian gangs to act in concert to commit economic crimes. And all the occupants in the Honda were members of the V Boys criminal street gang, an ally of Cool Boys. The jury heard testimony that Ly had tattoos on his back that read, "Cool Boys" and "32".

Although Ly was not in the Honda with the gun and he was not a member of the same gang, based on the entire record there was sufficient evidence for the jury to reasonably conclude the V Boys and the Cool Boys, including Ly, conspired with each other and attempted to rob Hayward.

Ly grouses the record contains no evidence anyone in either car intended to or tried to take any property from Hayward. (Perhaps a Freudian slip but near the end of his discussion, Ly states: "Here, there can be no reasonable inference from the facts other than that Vo intended to rob Hayward.") He adds no one demanded Hayward turn over the backpack, or attempted to take the backpack from Hayward. As we explain above, after Hayward refused to get into the Honda and refused to hand over the money, Vo pointed a gun at him. This was sufficient evidence from which the jury could reasonably infer Vo had the specific intent to rob Hayward. (*People v. Anderson* (1934) 1 Cal.2d 687, 690 [approaching a ticket office and pulling out a gun were direct acts sufficient for the attempted armed robbery of a theater].) To the extent Ly suggests other

inferences can be drawn from the evidence, that is not our role on appeal. (*Albillar, supra*, 51 Cal.4th at pp. 59-60.)

Assault with a Semiautomatic Firearm

Ly contends insufficient evidence supports his conviction for count 3 because there was no evidence he aided and abetted the assault with a semiautomatic firearm or that the assault with a semiautomatic firearm was a natural and probable consequence of conspiracy to commit robbery or attempted second degree robbery. Neither of his contentions have merit.

The elements of assault with a deadly weapon are: (1) the defendant did an act with a semiautomatic firearm that by its nature would directly and probably result in the application of force to a person; (2) the defendant did the act willfully; (3) when he or she did so, the defendant was aware of facts that would lead a reasonable person to realize his or her act would result in the application of force to someone; and (4) the defendant had the present ability to apply force with the semiautomatic firearm. (§§ 240, 245, subd. (b)(1); *People v. Golde* (2008) 163 Cal.App.4th 101, 121.)

“[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the ‘natural and probable consequence’ of the target crime.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) A jury “must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the defendant’s confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.” (*Id.* at p. 262, fn. omitted.)

Here, there was sufficient evidence Ly aided and abetted the assault with a deadly weapon and that the assault with a deadly weapon was the natural and probable consequence of the conspiracy to commit robbery.⁶ As we explain above more fully, there was evidence from which the jury could reasonably conclude the Cool Boys planned to rob Hayward under the pretense they were going to sell him Ecstasy and called the V Boys for back up. Ly was with the gang member who arranged to meet Hayward and who texted the location to Vo, the man who later pointed the gun at Hayward. And the gang expert testified that based on his conversations with Asian gang members, “[w]hen Asian gang members commit a crime with a gang gun, members of that gang would know about the gun or who has the gun.” Based on this evidence the jury could conclude Ly knew Vo was armed and planned to assault Hayward and assisted him in committing that offense.

Additionally, the jury could also conclude that not only did Ly know of Vo’s purpose but he assisted in the commission of the target offense (conspiracy to commit robbery) and the nontarget offense (assault with a deadly weapon) was a natural and probable consequence of the target offense. It was certainly reasonable to conclude that when a gang member takes a gun to rob someone, it is foreseeable he will use that gun to assault the victim. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [assault with a deadly weapon is natural and probable consequence of armed robbery].)

Street Terrorism

Ly claims insufficient evidence supports his conviction for count 6 and the jury’s true findings on the street terrorism enhancements. Not so.

The street terrorism substantive offense, section 186.22, subdivision (a), states: “Any person who actively participates in any criminal street gang with knowledge

⁶ The trial court instructed the jury on both general aiding and abetting principles and the natural and probable consequences doctrine.

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, shall be punished . . . in the state prison for 16 months, or two or three years.” There are three elements to the substantive street terrorism offense: (1) active participation in a criminal street gang; (2) knowledge the gang’s members have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*Albillar, supra*, 51 Cal.4th at p. 56.)

Section 186.22, subdivision (f), defines a “‘criminal street gang’” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a *pattern of criminal gang activity*.” (Italics added.)

Section 186.22, subdivision (e), states: “As used in this chapter, ‘*pattern of criminal gang activity*’ means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following 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” (Italics added.) Conspiracy to commit robbery, attempted second degree robbery, and assault with a deadly weapon are all qualifying offenses. (§ 186.22, subd. (e)(1)(2).) The prosecutor may rely on the charged felony offenses to establish the predicate acts. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 (*Duran*).)

Yu testified Sidney Young Hwa Kang, a known Cool Boys gang member was convicted of assault with a deadly weapon in July 2008. Ly concedes this offense

established one of the predicate offenses. However, Ly asserts that because insufficient evidence supports his convictions for counts 1, 2, and 3, there is no evidence Cool Boys is a criminal street gang, and thus, insufficient evidence supports his conviction for count 6 and the jury's finding he committed counts 1, 2, and 3 for the benefit of a criminal street gang. Because we have concluded sufficient evidence supports his convictions for counts 1, 2, and 3, Ly's claim is meritless.

The second statutorily required predicate offense is the charged offense, count 3, assault with a deadly weapon, which the jury was instructed it could consider as one of the predicate offenses and which have concluded is supported by substantial evidence. (*Duran, supra*, 97 Cal.App.4th at p. 1457 [charged offense counts as one predicate offense].)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.