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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS IGNACIO SANCHEZ,

Defendant and Appellant.

G045349

(Super. Ct. No. 10WF1400)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed in part and reversed in part.

Mark S. Devore, 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, A. Natasha Cortina, Heidi T. Salerno and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Jesus Ignacio Sanchez of evading a police officer while driving recklessly, possessing a concealed firearm in a vehicle, active participation in a criminal street gang, and possession of a firearm by a felon. The jury also found a gang enhancement allegation to be true on all counts, except the gang participation offense, which did not include the enhancement allegation. After the trial court granted the prosecutor's motion to strike two of Sanchez's prior strikes under the "Three Strikes" law, the court in a bifurcated proceeding found enhancement allegations that Sanchez suffered a prior strike and a prior serious felony to be true.

Sanchez, who led police on a high speed vehicle chase, challenges the sufficiency of the evidence to support the jury's conclusions: (1) he possessed the weapon his gang compatriot displayed to him and then discarded from the vehicle during the chase; (2) he concealed the weapon during or before the chase so that it was at least partially out of view to a hypothetical person in a position to see it; and (3) participating in the chase benefitted his gang or otherwise qualified for the gang enhancement. As we explain, a reasonable trier of fact could conclude from the evidence presented that Sanchez constructively possessed the weapon in his truck before his associate discarded it, but it is sheer speculation to suppose Sanchez covered, hid, or partially concealed the gun while it was in his vehicle. The jury, however, reasonably could conclude attempting to evade pursuing police officers met the requirements for the gang enhancement. We therefore reverse Sanchez's conviction for possession of a concealed weapon in a vehicle, but we affirm the judgment in all other respects.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On a June evening in 2010, Police Officer Jeremy Hill, his partner, and a probation officer observed Sanchez make a U-turn at a Garden Grove intersection, pull his vehicle to the side of the road and turn off the headlights, but Sanchez kept his engine running while engaging his brake lights. His passenger, Ivan Castellanos, stepped out of the vehicle and sprayed graffiti on a nearby wall. Castellanos did not have a gun visible in either hand; he crossed out existing graffiti and wrote new graffiti in large, four-foot high letters. Hill pulled his unmarked vehicle behind Sanchez's, activated his lights, and he and his fellow officers exited the vehicle to confront Castellanos, but Castellanos fled and jumped into Sanchez's truck.

A high-speed chase ensued in which Sanchez accelerated through residential neighborhoods, reaching speeds up to 70 miles per hour in 40-mile per hour zones, running six or seven stoplights and two red lights, and crossing intersections at 50 miles per hour in moderate traffic. Rounding a corner into stopped traffic on a four lane road with a center divider median, Sanchez crossed over to the wrong lane of traffic, forcing oncoming vehicles to swerve out of the way. Sanchez never turned on his headlights during the chase. After a police helicopter joined the pursuit, Sanchez ran a final stop sign and came to a halt at the next intersection, where he and Castellanos were apprehended. The police found a can of black spray paint on the floor in the front passenger compartment of the truck.

A passerby who heard the chase in his neighborhood found a loaded .38-caliber handgun on the street while walking his dog soon after the incident. The police retrieved the weapon, which was not registered to either Sanchez or Castellanos,

but Castellanos admitted in a police interview that it was his and he had thrown it from the truck during the pursuit. Castellanos acknowledged that just before Hill had approached him, he had crossed out a rival gang's graffiti and written "EWLS," which stood for his gang, "Evil Ways Loco," and that he also drew an arrow pointing down to the ground. The arrow indicated the area was his gang's "turf." According to the prosecution, the tagging incident occurred at the "heart" of a turf war between two Garden Grove gangs.

Castellanos had several gang-related tattoos, including "GG" or City of Garden Grove, "Death before dishonor" with a bullet bisecting the word "Dishonor" on his stomach, and "Only God can judge me" on his chest. He admitted he belonged to the Evil Ways gang; a friend had given him the gun a week earlier for protection from "enemies" because a rival gang recently had shot an Evil Ways member in the leg.

The police also interviewed Sanchez, who explained that Castellanos showed him the gun during the chase, stated, "I got to ditch this," and threw it out the window. Sanchez claimed he did not know until that moment that Castellanos had a gun. Sanchez admitted he had been an Evil Ways member for nine years; he had several gang tattoos, and two gang experts for the prosecution testified concerning Sanchez's gang history and that Evil Ways's primary activities included illegal firearm possession and assault with a deadly weapon. A gang expert also opined that Sanchez and Castellanos were active participants in the Evil Ways criminal street gang.

## II

### DISCUSSION

#### A. *Possession*

Sanchez challenges the sufficiency of the evidence to support his conviction for unlawful firearm possession. (Former Pen. Code, § 12021, subd. (a)(1), see now § 29800, subd. (a)(1) [felon in possession]; all statutory references are to this code.) He argues the evidence did not show he possessed the gun Castellanos discarded. One need not physically hold a weapon to possess it: possession may be constructive instead of actual, and possession may be shared by two or more people. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 (*Sifuentes*)). Constructive possession may be established by circumstantial evidence and reasonable inferences from the evidence (*People v. White* (1969) 71 Cal.2d 80, 83), but “mere proximity to the weapon, standing alone, is not sufficient evidence of possession” (*Sifuentes*, at p. 1417). To prove possession or constructive possession of a weapon, the prosecutor must prove three elements: the defendant’s (1) knowledge of the weapon, (2) his or her right to control the weapon, either controlling it directly or through another person, and (3) that the defendant had the general intent to possess it. (*Ibid.*; *People v. Spirlin* (2000) 81 Cal.App.4th 119, 130 [“Possession may be either actual or constructive as long [as] it is intentional”; firearm possession is a general intent crime].)

We emphasize that a gang expert’s testimony concerning a so-called “gang gun” and a gang member’s *access* to a gun under that concept does not by itself establish the elements of possession or constructive possession. Here, Detective Vincent Vaicaro of the Garden Grove Police Department testified as a gang expert for the prosecution. He explained the gang gun concept in a rather disjointed fashion: “[I]t’s gang-specific, but

some gangs may only have one or two guns [at] their disposal [and] if [a member] need[s] a gun, it's a gun that can be used [at] their disposal. They have — they have access to it. It's a gun that has access to all the members of the gang [*sic*].”

Vaicaro undoubtedly meant that all members of the gang have access to a “gang gun” but, nevertheless, the foregoing testimony by itself establishes *none* of the elements necessary to show actual or constructive possession. This is particularly true concerning the right of control element. As we explained in *Sifuentes*, access to an item is not necessarily the same as having the right to control it. “For example, an employee may have access to another coworker’s desk, but it does not logically follow that gives the employee the right to exercise control over the items on the desk, such as keys or a wallet.” (*Sifuentes, supra*, 195 Cal.App.4th at p. 1419, fn. 6.) Each case is different or, as Vaicaro put it, “gang-specific.” Thus, we observed in *Sifuentes* that despite general testimony suggesting members have access to gang guns, “one may question,” for example, “whether a newly admitted 14-year-old gang member could demand the right to use a gang gun held by a 30-year-old veteran.” (*Id.* at p. 1418, fn. 4.)

True, the testimony in a particular case could show that veteran gang members typically have become aware of the harsh penalties for adult offenders for firearm offenses, particularly gang members and repeat offenders, and therefore a gang’s policy or practices may generally provide a juvenile member *should* hold a weapon or claim possession when apprehension by the authorities is likely, given the lesser penalties for juveniles. Notably, however, while such testimony might help establish the juvenile’s right of control and not mere access in those circumstances, and also establish the *veteran’s* intent for the juvenile to possess the weapon, standing alone it would not show the juvenile defendant actually harbored the requisite possessory intent. Perhaps the jury

could infer such intent from *other* evidence showing the juvenile's commitment to the gang, but again each case turns on the particular evidence presented.

We conclude here that the evidence supports Sanchez's possession conviction. An appellate court reviews the record in the light most favorable to the judgment below. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; *People v. Johnson* (1980) 26 Cal.3d 557, 576–578 (*Johnson*).) The test is whether substantial evidence supports the verdict, not whether the appellate panel is persuaded the defendant is guilty beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) It is the jury's exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) Thus, the fact circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932–933.) Accordingly, a defendant "bears an enormous burden" when challenging the sufficiency of the evidence. (*Sanchez*, at p. 330.)

Vaicaro explained in a hypothetical that based on his training and experience concerning Garden Grove gangs like Evil Ways, members of a gang traveling in the same vehicle typically will inform each other if a gang gun is present. They do so out of respect for each other, particularly if one of the occupants, like Sanchez, "may be on probation or parole or [otherwise] not want to get caught with a gun," and also for "planning purposes," including "protection," especially if they may "run across a rival, somebody from another gang . . . ." Such confrontations require that all fellow gang members "know [of the gun] for offensive/defensive reasons."

Here, Sanchez does not dispute he and Castellanos were active participants in the Evil Ways gang, with lengthy experience in the gang's operations, including

holding guns for their gang's use. Indeed, one factor the gang expert relied on was a police contact two years earlier where officers stopped a vehicle occupied by four Evil Ways members, including Sanchez, and Sanchez admitted possessing a loaded .38-caliber revolver for "protection" because his gang was involved in a "plac'ing" or "tagging" war with a rival gang, in which the two gangs crossed out each other's graffiti in areas of disputed "turf" and inscribed their own. Sanchez knew the activity was dangerous, noting he could be "hit up" by rival gang members, and he therefore carried the gun for protection. Vaicaro explained a hit up generally precipitated a violent confrontation between gang members, that gangs protect their turf with "fear and violence," and that gang members invading another gang's turf could expect "violent" resistance or reprisal. Vaicaro also explained that gang guns are prized possessions because fellow members are expected to use this firepower "basically like their backup" to support each other in offensive or defensive confrontations.

Against this backdrop, the jury reasonably could infer that because Sanchez was on probation and particularly in embarking on a dangerous tagging foray into disputed gang territory, Castellanos informed Sanchez he had brought a gun into the truck, thus satisfying the knowledge element of constructive possession. The jury also reasonably could infer Sanchez's evasive action in the police pursuit was "indicative of his guilty knowledge of the presence of the . . . weapon[]." (*People v. Gant* (1968) 264 Cal.App.2d 420, 425 [driver's efforts to avoid law enforcement in a 90-mile per hour police pursuit suggested knowledge of stolen weapons in vehicle].)

The jury could also reasonably infer Sanchez's right to control and intent to jointly possess Castellanos's gun. The circumstances suggested Sanchez had more than bare access to the gun, but also that Sanchez had a right to — and indeed would be

expected to — wield the gun if necessary to provide defensive “backup” to Castellanos in their tagging mission. That Sanchez embarked on the mission with Castellanos supported the jury’s conclusion he harbored the requisite general intent to possess the gun. His appellate challenge therefore fails.

B. *Concealed Weapon*

Sanchez challenges the sufficiency of the evidence to support the conclusion he concealed the firearm somewhere in his truck. (See former § 12025, subd. (a)(1) [proscribing “concealed” firearm possession “within any vehicle that is under the person’s control or direction”], now codified at § 25400, subd. (a)(1).) We agree the evidence was insufficient. “[T]he offense of carrying a concealed firearm in a vehicle is committed with the single passive act of carrying the firearm *in a concealed fashion* in a vehicle.” (*People v. Arzate* (2003) 114 Cal.App.4th 390, 400, italics added.) Partial concealment suffices to commit the offense. (*People v. Hale* (1974) 43 Cal.App.3d 353, 355-356; see, e.g., *People v. May* (1973) 33 Cal.App.3d 888 [gun “concealed” in defendant’s pocket though officer could see it through opening in pocket].) Thus, to avoid the reach of the statute, the gun must be exposed to plain view, for example, lying uncovered on the seat of an automobile. (38 Ops.Cal.Atty.Gen. 199, 200 (1961).

Nevertheless, “[t]hat an event *could* have happened . . . does not by itself support a deduction or inference it did happen.” (*People v. Moore* (2011) 51 Cal.4th 386, 406, original italics.) Rather, substantial evidence — defined as evidence that is reasonable, credible, and of solid value — must support the judgment. (*Johnson, supra*, 26 Cal.3d at pp. 576-578.)

Here, there was *no* evidence about the manner in which Sanchez or his passenger carried the gun in the vehicle to suggest they concealed it. To the contrary, it

appears Castellanos *displayed* the gun to Sanchez when he said, “I got to ditch this,” and threw it out the window. True, a reviewing court must accept reasonable inferences a jury may have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) But the Attorney General’s suggestion the jury could infer Castellanos concealed the gun somewhere on his person or in the glove compartment or under the seat “right before he threw it out the window” is nothing more than supposition. For example, the Attorney General suggests Castellanos may have hidden the gun in his pocket “for easy access while he was tagging” and kept it concealed “when he jumped [back] in the car . . . .” But the premise that Castellanos pocketed the gun merely inserts an assumption in an evidentiary void.

Demonstrating the arbitrary, unsupported nature of the Attorney General’s argument, the prosecutor argued to the contrary that *Sanchez* may have held the gun after Castellanos’s exit, “ready to use a weapon, if something interrupted their actions that night.” We note the prosecutor in his closing argument incorrectly referred to the concealment offense as simply “the crime of having a *concealable*-type weapon in your vehicle” (italics added), which may have led the jury astray. In any event, the unsupported conviction cannot stand. ““A reasonable inference . . . “may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.”” [Citations.]” (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.) We therefore must reverse Sanchez’s concealed firearm conviction.

### C. *Gang Enhancement*

Sanchez challenges the sufficiency of the evidence to support the jury's true finding on the gang enhancement for recklessly evading a peace officer. He argues the evidence does not show he harbored the specific intent "to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) Specifically, he insists, "Clearly, the reason for [his] escape was his desire to avoid jail," not to benefit his gang and, "even if the car chase in this case had the byproduct of giving the Evil Ways gang some additional standing in the community of either 'respect' or 'fear', that still does not establish [he] *acted with that purpose* when he led the police on the car chase." (Italics added.)

Sanchez confuses the benefit and specific intent prongs of the enhancement defined in section 186.22, subdivision (b)(1). The enhancement requires proof of two elements: "first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, **or** (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the *specific intent* to (a) promote, (b) further, **or** (c) assist in any criminal conduct by gang members." (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358, boldface added, original italics.) Thus, the statute's "disjunctively worded" subparts in each element provide three separate and alternative means to satisfy each element. (*People v. Leon* (2008) 161 Cal.App.4th 149, 162 (*Leon*).)

Consequently, the prosecution need *not* establish that the underlying felony benefits the gang; rather, when a defendant commits the offense with a fellow gang member, he has committed the crime "in association" with the "criminal street gang" and the jury may infer an intent to assist criminal conduct by gang members. (*Leon, supra*,

161 Cal.App.4th at p. 163.) In other words, “the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).

*Morales* also explains, “[S]pecific intent to *benefit* the gang is not required,” but instead “specific intent to promote, further, or assist in any criminal conduct by gang members . . . .” (*Morales, supra*, 112 Cal.App.4th at p. 1198, original italics.) Of course, where a gang member perpetrates the underlying offense, as Sanchez did here piloting the evasive vehicle, he or she promotes or furthers that felonious conduct no less than an accomplice providing assistance, and therefore the perpetrator is subject to the enhancement. (Cf. *People v. Ngoun* (2001) 88 Cal.App.4th 432, 435; *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1306-1308; *People v. Salcido* (2007) 149 Cal.App.4th 356, 367-368 [perpetrator’s liability for gang offense].)

Granted, the individuals must associate “together *as gang members*” for the enhancement to apply (*People v. Albillar* (2010) 51 Cal.4th 47, 62, original italics), but that may be inferred where they rely on their mutual gang affiliation. Here, for example, the jury could infer Castellanos held up the gun for Sanchez to see and stated, “I got to ditch this,” because their mutual gang ties meant he could rely on Sanchez to speed away from the jettisoned gun or otherwise not disclose their illegal firearm possession to authorities. (See *ibid.* [“their common gang membership ensured that they could rely on each other’s cooperation in committing” underlying crime and “that none of them would cooperate with the police”].) Substantial evidence supports the enhancement.

II

DISPOSITION

Sanchez's conviction for possession of a concealed weapon in a vehicle (count 3; § 12025, subds. (a)(1) & (b)(6)) is reversed. The judgment is affirmed in all other respects.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.