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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.

GABRIEL ESTRADA LORENZO,

Defendant and Appellant.

G045494

(Super. Ct. No. 10NF3888)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Nicholas S. Thompson, Judge. Affirmed as modified.

Jennifer Peabody, 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, Lynne McGinnis and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Alleging insufficient evidence and sentencing error, Gabriel Estrada Lorenzo appeals from a judgment entered after a jury convicted him of attempted robbery and active participation in a criminal street gang. As the Attorney General concedes, the judgment must be modified to stay appellant's sentence on the gang count. In all other respects, we affirm.

FACTS

On March 27, 2010, shortly after midnight, Guillermo Perez was in his garage drinking beer with his cousin when a woman approached them from the alley and asked for \$20. The woman was initially accompanied by two men on bicycles, but after Perez announced he didn't have any money, the men departed. The woman then asked Perez to join her in the alley, and he obliged. She repeated her request for money, but Perez again turned her down. He then began walking back to his garage when the woman grabbed his shirt and started hitting him. Perez slipped out of his shirt and ran toward his garage. He could hear the woman yelling something in English, but he did not understand what she was saying.

As Perez was running, he noticed a group of about six men in the alley. The men chased him into his garage and began beating him about the head and face. The beating continued until someone yelled "stop," at which point the men fled. Perez subsequently determined his wallet was missing. He told the police he thought someone took it during the beating, but at trial he had no recollection of that actually happening.

Soon after the attack, the police found appellant and another member of the Fullerton Toker Town gang hiding together in the alleyway not far from Perez's garage.¹ Appellant had a bloodstain on his shirt that matched Perez's DNA, and Perez identified both appellant and his companion as being among the men who had attacked him.

¹ A gang expert testified that Fullerton Toker Town's primary activities include assault and robbery and that gang members are generally expected to back each other up when they are committing crimes.

Appellant was charged with robbery and active participation in a criminal street gang. It was also alleged he committed the robbery for the benefit of a gang, had a prior strike conviction and had served a prior prison term. The jury convicted appellant of the lesser included offense of attempted robbery, as well as the gang offense, and all of the allegations were found true. The court sentenced appellant to 16 years and 4 months in prison, including 16 months for the gang offense.

I

Appellant contends there is insufficient evidence to support his conviction for attempted robbery. We disagree.

In reviewing the sufficiency of the evidence to support a criminal conviction, we review the entire record “to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Stuedemann* (2007) 156 Cal.App.4th 1, 5.) In so doing, we presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “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.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

In challenging his conviction for attempted robbery, appellant does not dispute he participated in the attack on Perez. Rather, he maintains there is no credible evidence he specifically intended to rob Perez. We cannot agree. “For purposes of an attempt, ‘[s]pecific intent may be, and usually must be, inferred from circumstantial evidence.’ [Citation.]” (*People v. Davis* (2009) 46 Cal.4th 539, 606.) And in this case, the circumstantial evidence abundantly supports the jury’s finding appellant committed attempted robbery.

At the time of the attack on Perez, appellant was a member of a gang whose primary activities include assault and robbery. Appellant clearly acted in concert with other members of his gang, and in the wake of the attack, Perez's wallet was missing, signifying a monetary motive for their actions. Moreover, the attack was precipitated by very suspicious circumstances. The record shows Perez was originally approached by two men on bikes and a woman who asked him for money. After he turned her down, she lured him into the alley and repeated her request. When he declined again, not only did she start hitting him, but appellant's entire group emerged from the shadows and attacked Perez. Based on all of the evidence and the timing of events, the jury could reasonably conclude appellant was working in concert with the woman and the others in an effort to take Perez's money by means of force or fear. We therefore reject appellant's challenge to the sufficiency of the evidence.

II

Appellant's next argument requires little discussion. In count 2, he was convicted of active participation in a criminal street gang for willfully promoting, furthering or assisting felonious conduct by members of his gang. (Pen. Code, § 186.22, subd. (a).)² At sentencing, he received a consecutive term of 16 months for that offense. However, a defendant cannot be punished twice for committing a single act. (§ 654.) Here, the record shows the prosecution relied solely on the robbery/attempted robbery alleged in count 1 to satisfy the felonious conduct requirement in count 2. Under these circumstances, as the Attorney General concedes, appellant's sentence on count 2 must be stayed. (*People v. Mesa* (2012) 54 Cal.4th 191.) We will modify the judgment accordingly.

²

All further statutory references are to the Penal Code.

III

At sentencing, the court awarded appellant 699 days of presentence credit, based on 467 days of actual custody, plus 232 days of conduct credit. Appellant contends he is entitled to additional conduct credit, but that is not the case.

In 2011, the Legislature amended section 4019 to allow jail inmates to receive conduct credit (for work and good behavior) at a rate of two days for every two days spent in actual custody. (§ 4019, subs. (b), (c) & (f), as amended by Stats. 2011, ch. 15, § 482.) Using that formula, appellant would have been entitled to 466 days conduct credit, instead of 232. However, the 2011 amendment did not become operative until October 1, 2011, and by its terms, it only applies “prospectively” to jail inmates who are confined for a crime committed on or after that date. (§ 4019, subd. (h), as amended by Stats. 2011, ch. 39, § 53.) Appellant acknowledges that, because he committed his crimes in 2010, he does not come within the ambit of the 2011 amendment. But, he insists that to deny him the benefit of the amendment would be to deny him equal protection. Appellant is mistaken.

As our Supreme Court recently explained, in order to establish a violation of equal protection, it must be shown ““that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.”” [Citation.] ‘This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.”’ [Citation.]’ (*People v. Brown* (2012) 54 Cal.4th 314, 328 (*Brown*).)

Brown addressed a 2009 amendment to section 4019 that, like the 2011 amendment at issue here, prospectively increased the rate at which jail inmates may receive presentence conduct credits. (*Brown, supra*, 54 Cal.4th at p. 318.) Recognizing the purpose of conduct credits is to provide inmates with an incentive for good behavior, *Brown* ruled that purpose is “not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response.

That prisoners who served time before and after [the 2009 amendment] took effect are not similarly situated necessarily follows.” (*Id.* at pp. 328-329.)

In so ruling, *Brown* distinguished the two cases appellant primarily relies on here, *People v. Sage* (1980) 26 Cal.3d 498 and *In re Kapperman* (1974) 11 Cal.3d 542, on the basis *Kapperman* involved custody credits, not conduct credits, and *Sage* failed to consider the fact “that conduct credits, by their nature, must apply prospectively to motivate good behavior.” (*Brown, supra*, 54 Cal.4th at p. 330.) Given that fact, appellant is not similarly situated with persons who committed crimes after the 2011 amendment to section 4019 became operative. Therefore, he is not entitled to the benefit of that amendment as a matter of equal protection.

DISPOSITION

The judgment is modified to stay appellant’s sentence on count 2 for active participation in a criminal street gang. The clerk of the superior court is directed to prepare a new abstract of judgment reflecting this modification and send a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.