

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

In re KEVIN G., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN G.,

Defendant and Appellant.

G046232

(Super. Ct. No. DL 034278)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Nick A. Dourbetas, Judge. Affirmed.

Adrian Dresel-Velasquez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie I. Garland, Assistant Attorney General, Peter Quon, Jr., and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

After a hearing, the court found true the allegations defendant Kevin G. had unlawfully carried a concealed dirk or dagger (Pen. Code, § 12020, subd. (a)(4); all further statutory references are to this code) and was an active participant in a criminal street gang, the Alley Boys (§ 186.22, subd. (a)). Defendant then admitted the allegations in two other related petitions. The court declared him a ward of the court and placed him on supervised probation, imposing gang terms and conditions, 20 days of community service, and a \$100 fine.

Defendant appeals the street terrorism conviction, asserting there was insufficient evidence to prove the Alley Boys was a criminal street gang or that he knew the Alley Boys engaged in a pattern of criminal activity or defendant willfully promoted, furthered, or the gang members' criminal activity. We affirm.

FACTS

One night in April 2011 Detective Gurardo Zuniga saw defendant riding a bicycle with two other people walking beside him. Zuniga knew defendant from a prior contact with him. When Zuniga stopped to talk with them and asked if they were carrying weapons, defendant replied that he had a knife. After defendant consented to be searched, Zuniga found a "fixed[-]blade utility knife with a sharp pointed edge" in defendant's pocket. Defendant told Zuniga "a homey" had given it to him "for protection." It was Zuniga's opinion the knife could be used "as a stabbing weapon." Defendant also had a piece of paper in his pocket on which was written "A B R 13."

Zuniga took defendant to the police station and interviewed him. Defendant told him he had been "kicking back" with the Alley Boys for two years and was known as "Creeper" within the gang. He also admitted he had been in Alley Boys's claimed territory that night and should not have been carrying the knife.

Zuniga testified as a gang expert as well. He explained the importance of weapons, respect, and intimidation within a gang. Respect is gained by commission of violence and crimes, and the more violence, the more respect is obtained for the member and the gang as a whole. Weapons facilitate commission of crimes and intimidate witnesses, discouraging them from reporting crimes.

During his years in the gang unit Zuniga has spoken with gang members about the crimes they have committed. Discussing crimes within the gang is common. So is bragging about crimes committed alone. Generally members are proud of belonging to a gang.

Zuniga was familiar with the Alley Boys gang, which was over 30 years old. At the time of his testimony it had more than 100 members and he had spoken to more than 30 of them. The gang's colors are blue and black. Based on his review of police reports, speaking with members, making parole and probation checks, and investigating crimes, Zuniga was of the opinion the gang's primary activities are possession of illegal drugs for sale and felony possession of firearms. The gang's two predicate crimes were possessing a stolen firearm and street terrorism and sale of narcotics and street terrorism, both in 2008. He confirmed the Alley Boys claimed the territory in which he arrested defendant.

About a month before defendant's arrest, Zuniga saw him in the company of seven males and one young woman who identified herself as defendant's girlfriend. She stated defendant was a member of Alley Boys. All were given STEP (Street Terrorism Enforcement Prevention) notices. Defendant had a tattoo on his hand showing a stop sign, two street names, "Can't Stop," and the letters A and B. The street names are within Alley Boys's claimed territory. "A B" is commonly used by Alley Boys as is "A B R 13." Defendant also bore a tattoo showing "O C", commonly used by gang members to designate Orange County.

Defendant was given three other STEP notices, one for possessing the knife that is the subject of this appeal. In another he was wearing gang clothing and stated he had been “backing up” Alley Boys for four months. “Backing up means to provide a supporting role in the event of the commission of any crime.” The task is to act as a lookout or assistance in the completion of a crime. The third notice was given when defendant was in Alley Boys’s claimed turf. He had come three miles from school to be with his friends.

Zuniga also reviewed a police report where, during this time period, police saw defendant with another minor in an alley containing Alley Boys graffiti. They had markers used to apply graffiti. The other minor, who admitted he and defendant were Alley Boys associates, pleaded guilty to possessing a firearm and active membership in Alley Boys.

In Zuniga’s opinion defendant was an active member of Alley Boys. Zuniga based this opinion on defendant’s presence in the gang’s claimed territory on several occasions, his admission he associated with Alley Boys and his girlfriend’s verification of his membership, his tattoos, the STEP notices, the police reports, and the circumstances of the current crime, including defendant’s possession of a weapon he had obtained from a homey, having a moniker, and the piece of paper in his pocket with A B R 13.

Additional facts are set out in the discussion.

DISCUSSION

1. Introduction

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review 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.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] ‘This standard applies whether direct or circumstantial evidence is involved.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701, italics omitted.) It is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Section 186.22, subdivision (a) punishes a “person who actively participates in any criminal street gang with knowledge 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” The offense has three elements: “Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, . . . ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and . . . ‘willful[] promot[ing], further [ing], or assist[ing] in any felonious criminal conduct by members of that gang.’ [Citation.]” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

Defendant claims there is insufficient evidence to support his street terrorism conviction. Specifically, he asserts the prosecution did not prove Alley Boys was a criminal street gang, that he knew its members have engaged in a pattern of criminal activity, or that he promoted, furthered, or assisted Alley Boys members in committing felonies. We disagree.

2. *Primary Activities*

To prove Alley Boys is a criminal street gang, the prosecution had to show it had “as one of its primary activities the commission of one or more of the criminal acts enumerated in [section 186.22, subdivision (e)]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Zuniga testified that two of the gang’s primary activities are possession of illegal drugs for sale and felony possession of firearms. He based this on his review of police reports, investigating crimes, speaking with members of Alley Boys, and conducting probation and parole checks. Both of those crimes are listed in section 186.22, subdivision (e).

Although defendant acknowledges this element may be proven by an expert (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324), he argues Zuniga’s testimony was inadequate because he could identify only three or four narcotics cases in the last couple of years and only five firearms cases. Defendant maintains these few crimes are not enough to show they are “‘chief’ or ‘principal’ occupations.” (*Id.* at p. 323.) He points to testimony in *Gardeley* where the expert satisfied this element by testifying to hundreds of crimes. (*People v. Gardeley, supra*, 14 Cal.4th at p. 620.)

But the law does not require a certain number of crimes. For example, in *People v. Hunt* (2011) 196 Cal.App.4th 811, the expert testified robbery was one of the gang’s primary activities but could recall only one conviction in addition to the counts of robbery with which the defendant was charged. This was held to be sufficient evidence. (*Id.* at p. 821.) And, Zuniga thought there were more drug cases and many more firearm cases in addition to those about which he testified. It was reasonable for the court to conclude the two primary activities were committed more than occasionally.

3. *Defendant’s Knowledge of Alley Boys’ Pattern of Gang Activity*

Defendant does not dispute that Alley Boys members have engaged in a pattern of criminal activity, only his knowledge of it. He asserts there was no evidence

he knew either of the perpetrators of the predicate crimes or that they had committed them. He claims the only evidence was Zuniga's testimony, which he challenges as "entirely circumstantial." This does not disqualify the evidence, which is sufficient to satisfy this element.

Zuniga testified it is common for gang members to boast about and relate details of their crimes to fellow members. Usually they like to have other members with them when they commit the crimes. In addition defendant admitted he "backed up" Alley Boys. Another time he was in the company of minor in an alley containing Alley Boys graffiti and possessing graffiti paraphernalia. His companion acknowledged both he and defendant belonged to the gang and pleaded guilty to membership and possessing a firearm.

Several months after his detention in this case, defendant was observed with three others, one of whom had "A" and "B" tattoos. When they saw police, two ran into an apartment; defendant and the fourth did not. One of those who ran into the apartment threw a gun out of a window. In connection with that incident Zuniga testified that, based on his training and confirmed by his experience, when one gang member has a gun, "the majority of the time everybody in that group out of respect for everybody involved knows who has the firearm and that there's a firearm present." A gang member's failure to alert others of gun possession could result in "repercussions."

This evidence supports a finding defendant knew about Alley Boys's criminal activities. "Knowledge . . . is rarely susceptible of direct proof and generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise." (*People v. Bucklely* (1986) 183 Cal.App.3d 489, 494-495.) Therefore, proof of "a state of mind such as knowledge," frequently requires "[r]eliance on circumstantial evidence" (*People v. Lewis* (2001) 26 Cal.4th 334, 379.)

Defendant relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644 (disapproved on another ground in *People v. Vang* (2011) 52 Cal.4th 1038, 1041-

1048, fn. 3) to challenge the expert's testimony. *Killebrew* reversed a conviction for conspiracy to possess a firearm by a gang member where expert testimony was the only evidence the prosecution put on to prove the crime's elements. The court held the expert improperly was allowed to testify about the defendant's "subjective *knowledge and intent*" and the opinion "did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id.* at p. 658.)

But unlike in *Killebrew*, Zuniga never testified defendant knew about Alley Boys's gang activity. "*Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.)

Defendant's assertion he was never arrested for possessing a gun nor was there evidence the person who possessed the gun ever told anyone does not nullify the substantial evidence. At best, this is only conflicting evidence. For the same reason we reject his arguments he was never arrested nor were allegations found true that he "backed up" Alley Boys or applied graffiti or the lack of evidence he knew either of the gang members who committed the predicate crimes.

Finally, defendant makes a one-sentence claim "this evidence" should not have been admitted. It is unclear to what evidence he refers. If it is the hearsay on which Zuniga was allowed to rely to form his expert opinion defendant was a member of Alley Boys, the argument fails. It is proper for experts to rely on and testify about hearsay to support their opinions. (*People v. Gardeley, supra*, 14 Cal.4th 605, 618; Evid. Code, §§ 801, 802.) If this claim refers to some other evidence, it has not been sufficiently briefed, lacking a discrete heading (Cal. Rules of Court, rule 8.204(a)(1)(B)), citations to authority, and reasoned legal argument. This argument has been forfeited. (*People v. Windham* (2006) 145 Cal.App.4th 881, 893, fn. 8.)

4. Evidence Defendant Willfully Furthered, Promoted, or Assisted Alley Boys Criminal Activity

Defendant argues there is insufficient evidence to satisfy this element because he was alone when he was arrested for possession of the knife and there is no evidence the crime was connected to Alley Boys. We disagree.

Defendant contends the only evidence supporting this element was his actual possession of the knife. He asserts the evidence he “backed up” the gang, and on other occasions was in the company of another gang member carrying a gun, and found with graffiti paraphernalia in an alley already marked with Alley Boys graffiti with a fellow gang member should have been excluded. Without deciding this issue, but not considering that evidence, the record is sufficient.

The knife carried by defendant, which Zuniga testified could be used to stab someone, was given to defendant by a fellow gang member to protect himself. Moreover defendant was in an area claimed by Alley Boys as their territory and was carrying a piece of paper bearing initials used to designate Alley Boys. Zuniga testified gangs consider weapons important because they facilitate members committing crimes. All of this raises a reasonable inference defendant possessed the knife to promote, assist, or further the gang’s activities.

Defendant argues that because he acted alone he cannot be found to have willfully furthered, promoted, or assisted a gang’s criminal activity. We are not persuaded. An active participant who takes a knife from a fellow gang member to use as protection, presumably against rival gangs, possesses that knife for the benefit and at the direction of the gang, with the specific intent to promote, further or assist in criminal conduct by the gang. These and other facts here also show defendant committed the crime in association with other gang members.

Furthermore, even if defendant had acted alone, the issue of whether this element is satisfied when a defendant acts alone is before our Supreme Court. (*People v. Gonzales* (2011) 199 Cal.App.4th 219, review granted Dec. 14, 2011, S197036; *People v. Cabrera* (2010) 191 Cal.App.4th 276, review granted Mar. 23, 2011, S189414; *People v. Rodriguez* (2010) 188 Cal.App.4th 722, review granted Jan. 12, 2011, S187680.)

But the current majority view does not require that a defendant aid and abet another gang member. *People v. Ngoun* (2001) 88 Cal.App.4th 432 affirmed a street terrorism conviction of a defendant who committed a crime when in the company of other gang members. Likewise, in *People v. Salcido* (2007) 149 Cal.App.4th 356, while the defendant was accompanied by gang members when he committed a crime, there was no proof they participated. The court affirmed a conviction, ruling that fact was irrelevant. Both cases reasoned that an active gang member who directly commits a gang-related crime is no less culpable than an active gang member who aids and abets or who is otherwise connected to such conduct. (*People v. Salcido, supra*, 149 Cal.App.4th at pp. 369-370; *People v. Ngoun, supra*, 88 Cal.App.4th at p. 436; see also *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1307-1308 [street terrorism conviction upheld for a defendant who, in the company of non-gang member, committed robberies.

We are persuaded by the reasoning of *Salcido*, *Ngoun*, and *Sanchez*, and conclude someone can “promote” or “further” felonious criminal conduct by acting alone, without assistance or participation by others. The Legislature surely did not intend for an active gang participant committing a felony alone to be punished less harshly than an active gang participant assisting such felonious conduct. Based on the reasoning of those cases, it is irrelevant that the knife was hidden and his companions did not know he possessed it, nor does defendant’s claim he had it to protect himself make a difference.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.