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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re N.P., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

N.P.,

Defendant and Appellant.

G046539

(Super. Ct. No. DL037925)

O P I N I O N

Appeal from orders of the Superior Court of Orange County,
Nick A. Dourbetas, Judge. Jurisdiction order affirmed in part, reversed in part, and
remanded with directions. Disposition order affirmed.

Sylvia Whatley Beckham, 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, Lise Jacobson and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

N.P. (the minor) appeals from a jurisdiction order in which the juvenile court made true findings on the count of street terrorism and on the gang enhancement allegations. There was substantial evidence to support an inference that the individual who was with the minor when the crime was committed was a member of a criminal street gang, and, therefore, that the minor's participation in the crime furthered or assisted in the felonious conduct of a gang member, and that the crime was committed for the benefit of a criminal street gang.

We agree with the minor, however, that the juvenile court erred in calculating his maximum period of confinement (MPC). We therefore reverse the jurisdiction order and remand the matter to the juvenile court to amend the record to reflect the correct MPC.

The minor also purports to appeal from the disposition order continuing him as a ward of the juvenile court, remanding him to the custody of the probation department, and imposing probation conditions. On appeal, however, the minor does not raise any arguments relating to the disposition order. Because the partial reversal of the jurisdiction order does not affect the disposition order, we affirm the disposition order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

About 11:45 p.m. on January 9, 2012, the victim was walking from the spot where he had parked his car to his home, when he heard a whistle. The victim recognized the minor, who was with an unidentified male (the assailant). The assailant asked the victim for a cigarette. The victim did not respond, and began walking faster.

The assailant told the victim several times to stop. The victim began running, and saw the assailant reach his hand toward his waistband. The victim then heard a gunshot.

As the victim opened the iron security door of his home, the assailant struck him on the back of the head with a gun. The victim pushed the assailant away; as the assailant stumbled, he dropped the gun. When the front wooden door to his home opened, the victim stepped inside; looking back, he saw the minor standing behind the assailant. The assailant picked up the gun and left.

The victim picked the minor's picture out of a photographic lineup.

The parties stipulated at trial that on January 9, 2012, Varrio Viejo was a criminal street gang. The attack on the victim in this case was committed in territory claimed by the Varrio Viejo gang.

Orange County Sheriff's Deputy Harrison Manhart testified as a prosecution expert witness on gangs. Manhart testified gang members generally do not commit crimes with nongang members. A gang member will commonly back up another gang member committing a crime: "'Backing up,' means, basically, backing up somebody's play. If they were committing a crime, you are there to make sure it doesn't get out of hand. If they need your help, you are there to join them in their efforts. You are, basically, a show of force to make the numbers look stronger to make that person look stronger. You are there to assist that person in committing that act, whatever it may be, and doing whatever they need you to do."

Manhart also testified that a gang gun is shared by all members of a gang, and that all members of a gang will know who is in possession of the gang gun. Manhart also testified about the importance of violence in the gang culture. Gangs gain respect by committing crimes, and gain increased respect by committing violent crimes. Gang members seek respect from fellow gang members, as well as from rival gang members, witnesses to or victims of their crimes, and members of the community in general. By using violence to create fear among the community, gang members discourage the public

from contacting the police when they witness a crime, or from cooperating with the police in investigating crimes.

The minor had been issued three California Street Terrorism Enforcement and Prevention Act (Pen. Code, § 186.20 et seq.) (STEP) notices. (All further statutory references are to the Penal Code, unless otherwise noted.) The STEP notices informed the minor that law enforcement believed him to be an active participant in a criminal street gang. The minor was with a documented Varrío Viejo gang member when he was served with the second STEP notice. When he was served with the third STEP notice, the minor was arrested for possession of a deadly weapon; at that time, he told the police that he “had been hanging out with [V]arrío Viejo his whole life.” There were also 14 police reports and 26 field interview cards (which document incidents not requiring a police report) regarding the minor; the minor had been with documented Varrío Viejo members on numerous occasions when contacted by the police. Manhart had personally contacted the minor numerous times in known gang areas, although the minor did not live in those areas. The minor had also been seen wearing gang clothing.

Based on all the foregoing evidence, and his training and experience, Manhart opined that the minor was an active participant in the Varrío Viejo criminal street gang on January 9, 2012, and that the attack on the victim benefitted the gang by making the gang’s rivals and the community in general fearful of the Varrío Viejo gang.

In defense, the minor’s mother, stepfather, and stepbrother testified that the minor was home at the time of the attack on the victim.

A petition was filed alleging negligent discharge of a firearm (§ 246.3, subd. (a)) (count 1), assault with a firearm (§ 245, subd. (a)(2)) (counts 2 and 3), assault with a deadly weapon (§ 245, subd. (a)(1)) (count 4), and street terrorism (§ 186.22, subd. (a)) (count 5). The petition alleged, as sentencing enhancements, that counts 1 through 4 were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)), and that in committing counts 1 through 3, the

principal was armed with a firearm (§ 12022, subd. (a)(1)). The juvenile court found the allegations of the petition as to counts 1, 3, 4, and 5, and their attendant sentencing enhancements to be true beyond a reasonable doubt. In the jurisdiction order, the juvenile court also determined the MPC was 16 years eight months.

In a later disposition order, the juvenile court ordered that the minor be continued as a ward of the court (Welf. & Inst. Code, § 602),¹ ordered the minor committed to the custody of the probation department for a term of 720 days, and imposed probation terms and conditions. The minor timely appealed from both the jurisdiction and disposition orders.

DISCUSSION

I.

SUFFICIENCY OF THE EVIDENCE

The minor argues there was insufficient evidence to support the true finding on the street terrorism count (count 5), or to support the true findings on the gang enhancement allegations, because there was no evidence that the assailant was a gang member. The same substantial evidence standard of review in adult criminal cases is applicable in juvenile delinquency proceedings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) “In considering the sufficiency of the evidence in a juvenile proceeding, the appellate court ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and we must make all reasonable inferences that

¹ The petition filed in connection with the January 9, 2012 attack was the seventh petition alleging the minor came within the jurisdiction of the juvenile court pursuant to Welfare and Institutions Code section 602.

support the finding of the juvenile court. [Citation.]”” (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089.)

In this case, substantial evidence supports an inference that the assailant was a member of the Varrio Viejo gang, and that the minor’s participation in the crime therefore furthered or assisted in the felonious conduct of a gang member.² The minor had hung out with Varrio Viejo gang members his whole life, and had numerous contacts with the police when he was in the company of Varrio Viejo gang members. The attack occurred in an area claimed by the Varrio Viejo gang, and was not the neighborhood in which the minor lived. The conduct of the minor and the assailant during the attack was consistent with Manhart’s testimony that gang members commit crimes with other gang members, so that one can back up the other. Additionally, the minor stayed with the assailant after he began shooting at and attacking the victim, which supports an inference that the minor was there to back up the assailant in his commission of the crimes. The victim did not testify to any communication between the assailant and the minor, from which it could be inferred that the assailant and the minor already had an agreement as to their actions.

The foregoing evidence also supports the juvenile court’s finding that the crimes of negligent discharge of a firearm, assault with a firearm, and assault with a deadly weapon were committed for the benefit of, at the direction of, or in association with a criminal street gang. Additionally, Manhart’s testimony supports an inference that a violent crime committed against a nongang member walking through territory claimed by the Varrio Viejo gang would benefit the gang, because it would tend to instill fear of

² Because we reach this conclusion, we need not address the separate argument, raised by the Attorney General, that the minor’s own conduct may assist in the felonious conduct of a gang member, himself. This issue is currently pending before the California Supreme Court in *People v. Rodriguez* (2010) 188 Cal.App.4th 722, review granted January 12, 2011, S187680.

the gang in the neighborhood, and give the gang (and the individuals committing the crime) more respect.

We therefore affirm the juvenile's court's finding that the minor was an active participant in a criminal street gang, and the findings that counts 1, 3, and 4 were committed for the benefit of a criminal street gang.

II.

MPC CALCULATION

The minor argues, and the Attorney General agrees, that the juvenile court erred in calculating the MPC. Pursuant to Welfare and Institutions Code section 726, subdivision (c), the juvenile court set the MPC at 16 years eight months. The court calculated the MPC as follows: Count 3 was selected as the principal term, with an upper term of four years, plus a five-year gang enhancement and a one-year armed principal enhancement, for a total of 10 years. On count 4, the court used a consecutive one-year term (one-third of the middle term of three years), plus a 20-month gang enhancement, for a total of two years eight months. On count 1, the court used a term of eight months (one-third of the middle term of two years), plus a 20-month gang enhancement, and a one-year armed principal enhancement, for a total of three years four months. On count 5, the court used a term of eight months (one-third of the middle term of two years). The court's calculation of the MPC was incorrect in three ways.

First, section 12022, subdivision (a)(1) provides for a one-year sentencing enhancement if the felony is committed while the principal is armed with a firearm, "unless the arming is an element of that offense." Being armed with a firearm is a necessary element of both assault with a firearm and negligent discharge of a firearm. (*People v. Allen* (1985) 165 Cal.App.3d 616, 627.) The firearm enhancement should not have been added to count 1 (negligent discharge of a firearm) or count 3 (assault with a firearm).

Second, the aggravated five-year term for the gang enhancement should not have been applied to count 1, because negligent discharge of a firearm is not a serious felony. While section 1192.7, subdivision (c)(28) makes “any felony offense, which would also constitute a felony violation of Section 186.22” a serious felony, the California Supreme Court has explained this provision is only applicable when the defendant reoffends. “Thus, section 186.22(b)(1)(A), (B), and (C) speaks to an event that occurs in the current proceeding. Section 1192.7, subdivision (c), on the other hand, comes into play only if the defendant reoffends, at which time any *prior* felony that is gang related is deemed a serious felony. Thus, any felony that is gang related is not treated as a serious felony in the current proceeding, giving effect to section 186.22(b)(1)(A). . . . ¶ . . . [W]hile it is proper to define any felony committed for the benefit of a criminal street gang as a serious felony under section 1192.7(c)(28), it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B).” (*People v. Briceno* (2004) 34 Cal.4th 451, 465.) Therefore, the juvenile court should have calculated the MPC based on section 186.22, subdivision (b)(1)(A), and the term of the enhancement should have been one year (one-third of the middle term of three years).

Finally, any execution of sentence under count 5 must be stayed, pursuant to section 654. As the Supreme Court recently held in *People v. Mesa* (2012) 54 Cal.4th 191, 197-198: “[S]ection 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have “willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang” [citation], and (2) the underlying felony that is used to satisfy this element of gang participation.’ [Citation.] Section 654 applies where the ‘defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.’ [Citation.]”

The correct MPC is 13 years four months, which we calculate as follows: Nine years for count 3, the principal term, consisting of an upper term of four years, plus a five-year gang enhancement; two years eight months on count 4, consisting of one year, as one-third of the middle term of three years, plus 20 months for the gang enhancement; one year eight months on count 1, consisting of a term of eight months (one-third of the middle term of two years), plus a one-year gang enhancement; and execution of sentence on count 5 stayed.

DISPOSITION

The jurisdiction order is reversed, and the matter remanded with directions to the juvenile court to enter a new jurisdiction order reflecting a maximum period of confinement of 13 years four months. In all other respects, the orders are affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.