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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.

ANTHONY OSORIO LINARES,

Defendant and Appellant.

G048498

(Super. Ct. No. 09CF3099)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Anthony Osorio Linares was convicted of robbery and active participation in a criminal street gang, aka street terrorism. While conceding he committed robbery, he contends there is insufficient evidence to support the jury's finding he acted "for the benefit of, at the direction of, or in association with" a criminal street gang, which triggered a sentence enhancement under Penal Code section 186.22, subdivision (b)(1). He also contends his attorney was ineffective for failing to object to the prosecutor's characterization of that enhancement in closing argument, and his conviction for robbery must be reversed because that crime is a lesser included offense of street terrorism. Finding appellant's claims unmeritorious, we affirm the judgment.

FACTS

On December 18, 2009, appellant and fellow KPC gang member Eric Tlaseca entered Lee's Market in Santa Ana. As they approached the front counter, appellant pointed a gun at cashier Mija Lee and demanded the register money. Lee gave appellant over \$1,000, and then he and Tlaseca fled the store.

Store owner Young Suk Yang was present during the robbery. After the robbers left the store, he grabbed a gun from behind the counter and ran after them. At one point during the chase, Lee fired his gun into the air. Then the police arrived and arrested appellant. Officers found a loaded handgun in a nearby gutter and \$965 in appellant's left front pocket. Tlaseca fled the area and was not arrested until a later date.

At trial, defense counsel conceded appellant was guilty of robbery. But he maintained there was insufficient evidence the robbery was gang related. The prosecution's key witness on that issue was gang expert Roland Andrade. He testified KPC is a traditional Hispanic street gang that is involved in a wide range of criminal activity. In fact, its members are expected to commit crimes in order to make the gang more feared and respected. He said KPC members often work together and back each other up when pulling off crimes, because they trust one another as fellow gang members.

Andrade also testified that a portion of the proceeds gang members obtain from their crimes is usually returned to their gang. That money is then used to purchase guns and drugs for the gang. Based on his review of the police reports in this case, Andrade was aware Tlaseca used some of the robbery money to buy food and clothing.¹ Tlaseca also gave \$150 to KPC as recompense for the gun he and appellant lost during the robbery. Andrade took this to mean the gun was a “gang gun” that belonged to KPC. Asked if Tlaseca had to give KPC any additional money on top of the \$150 for the gun, as homage to the gang, Andrade said no because the rest of the robbery money was seized by the police.

Given a hypothetical steeped in the facts of this case, Andrade opined the robbery was committed in association with the KPC gang to assist members of that gang. He believed the robbers were able to perform more effectively by working as a team and dividing the duties between them as gunman and backup. He also opined the robbery would enhance KPC’s reputation as a notorious criminal enterprise.

The jury convicted appellant of robbery and found the gang allegation to be true. It also convicted appellant of street terrorism and found he personally used a firearm and had suffered a prior strike conviction. The trial court sentenced appellant to prison for 26 years.

I

Appellant contends there is insufficient evidence to support the jury’s true finding on the gang allegation. We disagree.

In assessing a challenge to the sufficiency of the evidence in a criminal case “we review the whole record in the light most favorable to the judgment to determine whether it discloses 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

¹ Although the evidence showed appellant obtained the robbery money from the cashier, the prosecution theorized he gave some of it to Tlaseca soon after they left the market, before he was arrested.

beyond a reasonable doubt. [Citations.]” (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) “Thus, ‘[w]e presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citations.] ‘Unless it is clearly shown that “on no hypothesis whatever is there sufficient substantial evidence to support the verdict” the conviction will not be reversed. [Citation.]’ The same standard of review applies to true findings on gang enhancement allegations. [Citation.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 624.)

Penal Code Section 186.22, subdivision (b)(1) authorizes a sentence enhancement when the defendant “is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]”² Unlike the substantive offense of street terrorism set forth in section 186.22, subdivision (a), the enhancement requires proof the felony in question was gang related, meaning it was done for the benefit of, at the direction of, or in association with, a gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).

As the prosecutor did below, the Attorney General relies primarily on the “in association with” language of section 186.22, subdivision (b)(1) in arguing the robbery in this case was gang related. She cites *People v. Leon* (2008) 161 Cal.App.4th 149 and *People v. Morales* (2003) 112 Cal.App.4th 1176 for the proposition that the association requirement is satisfied whenever two active gang members commit a crime together. But both of those cases recognized “it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang.” (*Id.* at p. 1198; *People v. Leon, supra*, 161 Cal.App.4th at p. 162.) Indeed, our Supreme Court has made it clear that “[n]ot every crime committed by gang members is related to a gang.” (*Albillar, supra*, 51 Cal.4th at p. 60.)

²

All further statutory references are to the Penal Code.

The *Albillar* court found sufficient evidence to support the “in association with” prong of the gang enhancement where three gang members committed a crime together. But that finding was based on the fact the defendants “came together *as gang members*” to commit the offense. (*Albillar, supra*, 51 Cal.4th at p. 62.) It wasn’t just that the defendants belonged to the same gang; rather, the evidence showed the defendants’ gang ties and the trust they had in each other by virtue thereof helped facilitate their commission of the subject offense. (*Id.* at pp. 61-62.)

Here, the evidence likewise showed appellant’s gang ties helped him and Tlaseca in their criminal endeavor. The gang expert testified gang members operate in a “circle of trust” that allows them to rely on each other when they are committing crimes. The solidarity created from their common allegiance to the gang helps ensure they will stick together and support each other when carrying out their criminal objectives.

Moreover, the gun appellant and Tlaseca used during the robbery belonged to their gang and was basically on loan to them for the purpose of committing the crime. It wasn’t just that appellant and Tlaseca worked in association *with each other* during the robbery, they also worked in association *with their gang* to acquire the means for carrying out the crime. When they lost the gun, they had to reimburse the gang for it – pretty powerful evidence they were working in association with the gang. Based on all of the circumstances presented, the jury could reasonably find the robbery was gang related in that it was committed in association with a criminal street gang. We therefore uphold the jury’s true finding on the gang enhancement allegation.³

³ Given this result, we need not assess whether the robbery was committed for the benefit of appellant’s gang. Since the gang enhancement applies whenever the underlying felony was committed “for the benefit of, at the direction of, *or* in association with” a gang (§ 186.22, subd. (b)(1), italics added), it suffices that one of those criteria was met.

II

Appellant also contends his attorney was ineffective for failing to object to the prosecutor's characterization of the gang allegation in closing argument. This argument also comes up short.

In discussing the gang allegation in closing argument, the prosecutor told the jurors, "This one is real simple, ladies and gentlemen [] I have to prove that this defendant committed this crime for the benefit of, or in association with a criminal street gang. I don't have to prove both, okay. For the benefit of, or in association. [¶] Detective Andrade told you that this crime was committed with another gang member, that was stipulated to. Association, ladies and gentlemen, is just dictionary definition. Did this individual go in and commit this crime with another KPC gang member. If he did, . . . you can check off the first element, okay."

The prosecutor also argued KPC benefitted from the robbery because gangs usually reap the proceeds from the crimes its members carry out, and the facts showed Tlaseca had to repay KPC for the gun he and appellant lost during the robbery. The prosecutor asserted, "So, there's a benefit that the gang gets in crimes like this. But it's easiest to just look at the dictionary definition, was this crime committed in association."

Defense counsel argued the robbery was not gang related. Although Tlaseca gave KPC some of the robbery proceeds, defense counsel asserted this was done simply to cover the cost of the lost gun and make the gang whole. Defense counsel surmised that rather than benefitting the gang, this simply put KPC in the same position it occupied prior to the robbery.

In rebuttal, the prosecutor called this argument a "red herring." He told the jury, "I proved up the benefit, but remember, I don't have to prove a benefit. If this crime was committed in association and to assist, he is guilty, okay."

Appellant contends his attorney was remiss for not objecting when the prosecutor stated the association requirement only required proof that appellant

committed the robbery with another KPC member. We agree. Section 186.22, subdivision (b)(1) speaks to “association with [a] criminal street gang,” not mere association among its members. As noted above, the mere fact that two gang members commit a crime together will not suffice to make a gang allegation stick unless the prosecutor can also show they “came together *as gang members*” to carry it out. (*Albillar, supra*, 51 Cal.4th at p. 62.) The gang statute does not apply where gang members commit a crime together, yet are acting on a “frolic” or “detour” unrelated to their gang. (*People v. Morales, supra*, 112 Cal.App.4th at p. 1198; *People v. Leon, supra*, 161 Cal.App.4th at p. 162.)

Still to prevail on a claim of ineffective assistance of counsel, the defendant must not only prove his attorney’s performance was deficient, he must also affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) To do this, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694.)

Had appellant’s attorney objected to the prosecutor’s characterization of the association element, the trial court presumably would have clarified that element for the jury and cautioned them that not all crimes committed by gang members are gang related. However, even if the court had done so, it would have been relatively easy for the prosecutor to show the subject robbery was related to appellant’s gang. That’s because appellant and Tlaseca obtained a key component of the robbery — the gun — from their gang. Because the robbery was facilitated by appellant’s connection to his gang, the association element was clearly met in this case. It is not reasonably probable appellant would have obtained a more favorable result had his attorney acted differently.

III

Lastly, appellant claims that under the circumstances presented in this case, robbery was a lesser included offense of street terrorism, and therefore his conviction for robbery must be reversed. Again, we disagree.

While a defendant may generally be convicted of multiple crimes arising from the same act or course of conduct, an exception to this rule “prohibits multiple convictions based on necessarily included offenses.” [Citation.]” (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) “In deciding whether multiple convictions is proper, a court should consider only the statutory elements.” [Citation.] ‘Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.’ [Citations.] In other words, “[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.” [Citation.]” (*People v. Sanders* (2012) 55 Cal.4th 731, 737.)

Appellant acknowledges these principles. He also concedes that robbery is not a necessarily included offense of street terrorism under the elements test. Indeed as this court has explained, “Section 186.22, subdivision (a) [the street terrorism statute] provides: ‘Any 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, shall be punished. . . .’ Thus, utilizing the statutory elements, we see that one can be convicted of street terrorism without ever committing . . . a robbery Promoting or furthering any felonious criminal conduct will do. Since the elements of [robbery] are not common to street terrorism, [robbery is] not [a] necessarily included offense[] under the statutory test.” (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944-945 (*Burnell*).)

Despite this, appellant argues robbery should be considered a necessarily included offense in this case because it was charged as a separate offense and the jury instructions made it clear that robbery was the felony underlying the street terrorism charge. However, as our Supreme Court has made clear on numerous occasions, in applying the elements test, “we do not consider the underlying facts of the case or the language of the accusatory pleading. (*People v. Reed, supra*, 38 Cal.4th at pp. 1229-1230 [declining to consider the language of the accusatory pleading in deciding whether one offense is necessarily included in another]; *People v. Ortega* [1998] 19 Cal.4th [686,] 698 [declining to consider the evidence adduced at trial in deciding whether one offense is necessarily included in another]; see also *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [the court considers whether one offense is necessarily included in another ‘in the abstract’].)” (*People v. Sanders, supra*, 55 Cal.4th at p. 739.)

Therefore, it is immaterial that robbery was charged as a separate offense and identified by the jury instructions as the felonious conduct underlying the street terrorism charge. Because street terrorism can be committed without committing robbery, we adhere to our holding in *Burnell* that the latter crime is not a lesser included offense of the former. (*Burnell, supra*, 132 Cal.App.4th at pp. 944-945.) We discern no basis for disturbing appellant’s robbery conviction.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.