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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.

ELBERT JACKSON, JR.,

Defendant and Appellant.

G050882

(Super. Ct. No. FBA1200568)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Victor R. Stull, Judge. Affirmed in part and reversed in part.

Laurel M. Nelson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, William M. Wood, Heather Crawford and Meagan J. Beale, Deputy Attorneys
General, for Plaintiff and Respondent.

Appellant Elbert Jackson, Jr., was convicted of unlawfully possessing a firearm and marijuana that was discovered inside a backpack. The jury also found he possessed the firearm for the benefit of a criminal street gang. On appeal, Jackson argues the record is devoid of substantial evidence he knowingly possessed the items in the backpack or acted to benefit a gang. While there is sufficient evidence to support the jury's verdict on the possession charges, we reverse its true finding on the gang allegation for lack of evidentiary support. In all other respects, we affirm the judgment.

FACTS

On the afternoon of July 20, 2012, Ronald Skjerve was driving his truck in Barstow. While waiting to turn out of a shopping center, he saw a police car pull up to an apartment complex on his right. At about the same time, he “saw a backpack go up onto [a] carport” behind the complex. Skjerve made his turn and then circled back to the shopping center out of curiosity. He parked facing the carport, but due to a six-foot fence, he could not see what was happening on the ground in that area. He did notice the backpack was no longer on top of the carport, but moments later, he saw “the backpack fly back up there again.” Then he saw four men jump over the fence and mill about on his side of the fence.

One of the men who jumped the fence was Jackson. He seemed to be watching the backpack intently as a small crowd gathered to see what was going on with the police in the front of the complex. While the other three fence jumpers joined the crowd, Jackson walked over to the nearby DMV, sat down on the curb and continued to keep his eye on the backpack. Thinking something was amiss, Skjerve called 911 and reported his observations to the dispatcher.

Barstow Police Detective Rudy Perez was the officer who Skjerve had seen pull up to the apartment complex. While patrolling in his squad car, Perez had noticed a group of people standing in front of the complex. The group included Anthony Maloy and Terrell Perkins, who belonged to a gang known as Westside Village Park (WVP).

Knowing Maloy had a warrant out for his arrest, Perez contacted him and took him into custody. Because the encounter occurred in front of the complex, Perez had no idea what was going on in the back by the carport. However, after taking Maloy to the police station, which was only about a half mile away, Perez heard a radio dispatch that caught his attention. The dispatch said a witness had seen “a backpack fly on top of a carport” and two people running from that area, so Perez returned to the apartment complex.

By the time he arrived there, another officer had already detained Jackson and Perkins at the front of the complex. So, Perez went around back and looked for the backpack, which he found on the top of a carport. Upon opening the backpack, he discovered a pair of blue jeans, a t-shirt, socks, boxer shorts and a plastic grocery bag. Because the jeans felt heavy, Perez reached into a pocket, where he found a loaded pistol. He also opened the grocery bag, which contained a few ounces of marijuana.

At that point, Perez called Skjerve, and Skjerve told him what he had seen with respect to the backpack. Then Perez arrested Jackson and took him to the police station. Perez arrested Jackson because he was on parole, not because there was anything connecting him to the backpack. However, once they arrived at the police station, Perez searched the backpack and found a digital photo card in an outer pocket. When Perez inserted the card into a computer, he discovered the card contained several pictures of Jackson and various members of his family.

Thinking this was indicative of ownership, Perez questioned Jackson about the backpack. After waiving his *Miranda* rights, Jackson denied the backpack or any of its contents were his. Asked how his photo card got inside the backpack, he said he did not know, but he had lost the card about two years earlier. When told a witness had seen him throwing the backpack by the carport, he questioned how that was possible in light of the fence. Forced to admit to Skjerve that he had jumped the fence, he nonetheless insisted he had no connection to the backpack.

Jackson also insisted he was not a gang member. However, when asked about the large “Coast Crip L.A.” tattoo on his back, he said his whole family was born into the 76 East Coast Crips, a gang in Los Angeles. Jackson was also aware the Riverside Drive Crips (RDC) were a rival of WVP. Asked if he ever caught flak from RDC for hanging out with WVP members, Jackson admitted he had. However, he claimed it never caused him any problems.

Testifying as a gang expert for the prosecution, Perez stated WVP has about six to ten members who are “active,” meaning they are “on the street, . . . selling drugs, . . . hanging out together, . . . [and] getting in fights.” Perez said the gang’s primary activities include theft and drug sales, and there has been a lot of gang and graffiti activity in the area where the backpack was discovered.¹ Although Perez admitted Jackson was not a member of WVP, he believed Jackson was friends with members of that gang. Perez also surmised that, by having a gun in the backpack, Jackson intended to “enhance [WVP] as a gang.”

Jackson was charged with being a felon in possession of a firearm, carrying a loaded firearm while a member of a criminal street gang, and possessing more than 28.5 grams of marijuana. (Pen. Code, §§ 29800, subd. (a)(1), 25850, subd. (a); Health & Saf. Code, § 11357, subd. (c).) For sentence enhancement purposes, it was also alleged Jackson possessed and carried the firearm for the benefit of, at the direction of, or in association with a gang and that he had a prior strike conviction and three prior prison terms to his name. (Pen. Code, §§ 186.22, subd. (b), 667, subds. (b)-(i), 667.5, subd. (b).)

At trial, the parties stipulated Jackson was a convicted felon at the time the present case arose. They also stipulated no usable fingerprints were recovered from the backpack in which the gun and drugs were found. At the end of the prosecution’s case-in-chief, the trial court denied Jackson’s motion for acquittal based on insufficient

¹ One of the graffiti postings said “Vil Killer,” which Perez interpreted as a sign of disrespect toward WVP. However, Perez did not know who authored that posting or when it was written.

evidence, but it granted the prosecution's motion to dismiss the carrying-a-loaded-firearm-as-a-gang-member count. The jury convicted Jackson on the remaining two counts and found the gang allegation true. After finding the prior strike and prison term allegations true, the trial court sentenced Jackson to 10 years in prison.

DISCUSSION

Sufficiency of the Evidence on the Substantive Counts

Jackson contends his convictions for possessing the firearm and the marijuana must be reversed because there is insufficient evidence he knowingly possessed those items. We disagree.

In reviewing the evidence to support a criminal conviction, we review the record in the light most favorable to the judgment below to determine whether it discloses substantial evidence, i.e., 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. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “By definition, ‘substantial evidence’ requires *evidence* and not mere speculation . . . about any number of scenarios that may have occurred.” (*People v. Thomas* (1992) 2 Cal.4th 489, 545.) However, “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. [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

To establish Jackson was guilty of the charged offenses, the prosecution had to prove he 1) possessed the backpack, and 2) knew about the gun and the marijuana inside the backpack. (Pen. Code, § 29800, subd. (a)(1); Health & Saf. Code, § 11357, subd. (c); CALCRIM Nos. 2511, 2375.) The law is well established that “[p]ossession may be physical or constructive, and more than one person may possess the same contraband. [Citation.]” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 410.) Constructive possession requires that a defendant have the right to exercise dominion or control over either (a) the contraband or (b) the place the contraband is found. (*Ibid.*;

People v. Pena (1999) 74 Cal.App.4th 1078, 1083-1084; *People v. Rushing* (1989) 209 Cal.App.3d 618, 622; 2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 107, p. 753.) While circumstantial evidence can be enough to show dominion or control (*People v. Miranda, supra*, 192 Cal.App.4th at pp. 410-411), mere presence or proximity to the contraband is not enough. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1419; *People v. Small* (1988) 205 Cal.App.3d 319, 326; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 335.)

Jackson was not seen in actual possession of the backpack found on the carport at the rear of the apartment complex. However, he was seen leaving that area after the police arrived at the complex. And although Jackson was with three other men when he hopped the fence and walked away, he is the only one who kept his eye on the backpack. While his companions mingled into the crowd that had gathered upon Officer Perez's arrival, Jackson lingered in the area, watching the backpack from the nearby DMV. From all appearances, he seemed to have a keen interest in the backpack.

As it turned out, the backpack not only contained the gun and the drugs, it also contained a digital photo card that belonged to Jackson. Granted, the photo card was located in an outer pocket of the backpack, not among the items found inside the pack, and the prosecution never established the clothes in the backpack belonged to Jackson, but the presence of the photo card in such close proximity to the contraband was highly suspicious *in and of itself*. And when Perez asked Jackson how his card ended up in the backpack, all he could say is that he had lost the card about two years earlier. While it is possible the presence of Jackson's photo card in the backpack was sheer coincidence, the more logical inference, given the totality of the circumstances, is that the items in the backpack either belonged to Jackson or he had dominion and control over them. Even though the evidence of Jackson's guilt is not overwhelming, there is substantial circumstantial evidence from which a reasonable trier of fact could find he constructively

possessed the backpack with knowledge of its contents. We are therefore powerless to disturb his convictions.

Sufficiency of the Evidence to Support the Gang Enhancement

The gang enhancement is a different matter, however. Although the same deferential standard of review applies to the sufficiency of the evidence to support a sentence enhancement (*People v. Wilson* (2008) 44 Cal.4th 758, 806), we do not believe the evidence regarding the gang allegation passes muster under this standard.

With respect to the gun crime, the prosecution alleged Jackson committed that offense for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b). Unlike the substantive offense of street terrorism set forth in subdivision (a) of that section, the gang 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.) However, it need not be shown that the defendant belonged to the gang his actions allegedly assisted. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402.)

The gang issue in this case had an interesting twist because not only was it undisputed that Jackson was not a member of WVP – the gang he allegedly benefited – he was born into the Crips, which would make him a natural ally of WVP’s enemy, RDC. Addressing this anomaly, the Attorney General claims Jackson had alienated RDC by hanging out with WVP members. In fact, the Attorney General goes so far as to say Jackson “admitted that he had been involved in an altercation with [RDC] . . . because of [his] association with [WVP].” But when Perez questioned Jackson about that issue, he said his friendship with WVP members has *not* caused any altercations with RDC. While Jackson admitted RDC members sometimes “hit [him] up,” i.e., question him, about why he would want to hang out with WVP members, he dismissed the notion that his association with WVP caused any problems between him and RDC.

Even if Jackson was more closely aligned with WVP than RDC, there was no credible, solid evidence he possessed the gun to benefit WVP in this case. Echoing the prosecutor's closing argument, the Attorney General theorizes Jackson had the gun in the backpack to protect WVP's turf and its members from rival gang attacks. Granted, WVP has many rivals, and in the past there had been gang and graffiti activity in the area where the backpack was found. But there is nothing in the record to suggest WVP was under attack, or the threat of attack, at the time Jackson possessed the backpack, or that there had been a specific incident that might call for protection or retaliation. It is not reasonable to infer Jackson had the gun to help WVP simply because WVP was involved in ongoing hostilities with other gangs. We cannot just assume any gang member who possesses a gun does so for the benefit of the gang.

The Attorney General correctly notes that expert testimony may be used to establish a particular crime was gang related. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) But Perez's testimony on that issue was vague and convoluted. When the prosecutor asked him if he believed Jackson had the gun "to promote, benefit, or enhance [WVP] as a gang," Perez said "to enhance the gang." He then offered this explanation as to why he believed that was the case:

"Mr. Jackson carrying a firearm; he's hanging out with [WVP]; he's aware of the current rivalry between them. He even stated to me that they hit him up. Riverside Drive Crips hit him up. And him carrying the gun, gang members know they carry – other gang members know other gang members carry guns. Mr. Jackson, being from L.A., now in Barstow, he probably holds a higher status with these guys from [WVP] because that's the big city, big crime. So I would imagine they look up to Mr. Jackson."

It is unclear from this passage – which constitutes the sum and substance of Perez's testimony on the issue – whether in speaking of "other gang members" Perez was referring to members of WVP or members of RDC. In any event, there was no evidence any member of either gang actually knew about the gun in the backpack. And while

Jackson's "big city" background may have given him clout among the WVP members, we fail to see how this has anything to do with the issue before us. The members of WVP may have looked up to Jackson, but there is nothing in the record to suggest he had the gun for the purpose of protecting them, as opposed to some other reason. It may be that there was sufficient evidence to establish the gang enhancement, but it was not expressed in this turbid testimony. Because the evidence does not reasonably, credibly and solidly establish Jackson possessed the gun for the benefit of, at the direction of, or in association with, a criminal street gang, the jury's true finding on the gang enhancement allegation cannot stand.²

DISPOSITION

The true finding on the gang allegation is reversed, and appellant's three-year sentence for that enhancement is stricken. The clerk of superior court is directed to prepare a new abstract of judgment reflecting these changes and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

² In light of this holding, we need not address Jackson's claim the trial court failed to properly instruct the jury on the intent requirement for the gang enhancement.