Filed 3/26/13

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ZACKERY PRUNTY, Defendant and Appellant.	C071065 (Super. Ct. No. 10F07981)

APPEAL from a judgment of the Superior Court of Sacramento County, Marjorie Koller, Judge. Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputies Attorney General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of part I of the Discussion.

Confronted by a person he perceived to be a rival Sureño gang member, defendant Zackery Prunty, an admitted Norteño gang member, pulled a gun and fired six shots, striking and injuring his perceived rival and another person. A jury found defendant guilty of attempted voluntary manslaughter as a lesser included offense of attempted murder and of assault with a firearm and found true various enhancement allegations, including criminal street gang enhancement allegations under Penal Code[1] section 186.22.

On appeal, defendant contends there was insufficient evidence the Norteños qualify as a criminal street gang for purposes of the gang enhancements.[2] In support of his argument, defendant relies on *People v. Williams* (2008) 167 Cal.App.4th 983 for the proposition that where a larger group -- like the Norteños -- consists of different, smaller subsets, the larger group cannot be treated as a criminal street gang for purposes of section 186.22 unless there is evidence of collaborative activities or collective organizational structure between the subsets. As we explain, to the extent *Williams* can be understood to support this proposition, we disagree with *Williams* on this point because there is nothing in the statute that requires such evidence. Here, even if it could be found that defendant was a member of a smaller subset of the Norteños affiliated with his neighborhood, the evidence was sufficient for the jury to find that the Norteños as a whole qualify as a criminal street gang within the meaning of section 186.22, even

---

[1] All further section references are to the Penal Code unless otherwise noted.

[2] Defendant also contends his trial attorney provided ineffective assistance of counsel because the attorney failed to request an instruction telling the jury it could consider defendant's voluntary intoxication in determining whether he had the specific intent necessary for attempted murder and attempted voluntary manslaughter. We address and reject that argument in the unpublished part of our opinion because we conclude that on the facts here, defense counsel could have reasonably determined that requesting an instruction on voluntary intoxication would have been fruitless.

without evidence of collaborative activities or collective organizational structure between the various Norteño subsets. Accordingly, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

One evening in November 2010, Gustavo Manzo went to a restaurant in midtown Sacramento with his girlfriend and her little brothers to get something to eat. He was wearing an L.A. Dodgers cap. As they were walking up to the restaurant, two guys approached them and "started talking like mess." One of the guys, later identified as defendant, was wearing a red checkered jacket. He asked Manzo where Manzo was from and said, "fuck a Skrap, 916." Skrap is a derogatory term Norteño gang members use for Sureño gang members. In return, Manzo called defendant a "Buster" -- a derogatory term for a Norteño gang member. Defendant's companion, later identified as Emilio Chacon, tried to get defendant to leave, but defendant kept saying, "this is Norte, fuck a Skrap, 916." As defendant and Chacon eventually started backing away, Manzo took a couple of steps toward them. Defendant drew a gun and fired six times. Manzo tried to run but was struck in the buttocks with a bullet. One of Manzo's girlfriend's brothers was hit in the leg.

Defendant was charged with the attempted murder of Manzo and assault with a firearm on Manzo's girlfriend's brother. Various enhancements were also charged, including criminal street gang enhancements under section 186.22, subdivision (b)(1). At trial, the People's gang expert testified that both defendant and Chacon were Norteño gang members and that the shooting would benefit the Norteños by making them look stronger. Defendant's theory at trial was that he acted in self-defense.

The jury found defendant guilty of attempted voluntary manslaughter as a lesser included offense of attempted murder and of assault with a firearm and found the various enhancement allegations true. The trial court sentenced defendant to an aggregate prison term of 32 years. Defendant timely appealed.

DISCUSSION

I

Ineffective Assistance Of Counsel

Defendant contends his trial attorney provided ineffective assistance of counsel because there was evidence defendant was drunk when he committed the shooting but his attorney did not request an instruction on how the jury could consider defendant's voluntary intoxication in determining whether he had the specific intent required for attempted murder or attempted voluntary manslaughter. We find no merit in this argument.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) When "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged," "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal." (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Citing *In re Cordero* (1988) 46 Cal.3d 161, 189, defendant first asserts that "effective assistance includes a duty to prepare and request all instructions applicable to the case." In effect, defendant suggests that because a voluntary intoxication instruction would have been applicable here, his trial attorney rendered ineffective assistance by failing to prepare and request such an instruction. But *Cordero* held no such thing. What the court in *Cordero* held was that "[a]dequate representation requires an attorney to research ' "carefully all defenses of . . . law that may be available to the defendant," ' " and "counsel's duty 'includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense

rests.' " (*Ibid.*) Contrary to defendant's suggestion, ineffective assistance of counsel cannot be proven under *Cordero* merely by showing that trial counsel failed to prepare and request an instruction that was potentially applicable to the case.

Defendant next cites *People v. Frierson* (1985) 39 Cal.3d 803 for the principle that "defense counsel cannot decline to present the defendant's only viable guilt defense for the purpose of saving it for the penalty phase." Like *Cordero*, however, defendant misreads *Frierson* and misapplies it to this case. The court in *Frierson* made clear that "[t]he principal issue presented [there wa]s whether a defense counsel's traditional power to control the conduct of a case includes the authority to withhold the presentation of *any* defense at the guilt/special circumstance stage of a capital case, *in the face of a defendant's openly expressed desire to present a defense at that stage* and despite the existence of some credible evidence to support the defense." (*Id.* at p. 812, italics added.) Indeed, the court "emphasize[d] that [its] holding rest[ed] on the fact that the record in th[e] case expressly reflect[ed] a conflict between defendant and counsel over whether a defense was to be presented at the guilt/special circumstance stage." (*Id.* at p. 818, fn. 8.) No such thing happened here. Trial counsel did, in fact, present a defense for defendant -- self-defense -- and defendant points to no evidence that he openly expressed a desire to take a different tack by relying on voluntary intoxication instead of (or in addition to) self-defense. *Frierson* simply has no application here.

As we have indicated, as long as trial counsel could have had *some* satisfactory explanation for the conduct complained of, a claim of ineffective assistance must be rejected on direct appeal. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.) On the record here, we conclude that defendant's trial attorney could have reasonably determined that requesting an instruction on voluntary intoxication would have been fruitless. Accordingly, the failure to request such an instruction did not amount to ineffective assistance of counsel.

The principles of law involved here are straightforward. "Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act." (Pen. Code, § 29.4, subd. (a) [formerly § 22].) "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (*Id.*, subd. (b).) However, "[a] defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

In *Williams*, the defendant requested an instruction on voluntary intoxication as a defense to homicide based solely on a witness's testimony that the defendant was " 'probably spaced out' on the morning of the killings." (*People v. Williams*, *supra*, 16 Cal.4th at p. 677.) The trial court refused to give the requested instruction. (*Ibid.*) On review, the defendant contended the trial court erred in refusing to give the instruction, and he sought "to bolster that argument by pointing to comments he had made in the recorded interview with police that around the time of the killings he was 'doped up' and 'smokin' pretty tough then.' " (*Ibid.*) The Supreme Court rejected the defendant's argument, stating as follows: "Even if we consider all three of these statements, there was no error. Assuming this scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent." (*Id.* at pp. 677-678.)

The same conclusion applies here. As in *Williams*, the evidence of intoxication here was scant. In fact, the only such evidence was defendant's statement to police that he was "drunk already" on brandy, from a bottle he had stolen earlier in the evening in South Sacramento and had drunk with a couple of other people, when he headed

downtown with Chacon to steal another bottle. There was no evidence of exactly how much alcohol defendant had actually consumed, over what period he had consumed it, or just how drunk he was at the time of the shooting. Furthermore, just as in *Williams*, there was no evidence at all that defendant's voluntary intoxication had any effect on his ability to formulate intent. To the contrary, by his own admission in his statement to police, despite his consumption of some unknown portion of the original bottle of brandy, defendant nonetheless managed to formulate the intent to "go steal [another] bottle from Safeway." If he could form the intent to steal another bottle despite his earlier alcohol consumption, there would have been no rational basis for the jury to conclude that he could not also have formed the intent to kill required for attempted murder or attempted voluntary manslaughter. Under these circumstances, defendant's trial attorney could have reasonably determined that the trial court would have refused to give a voluntary intoxication instruction, and that the jury would not have been persuaded by such an instruction in any event. Accordingly, the failure to request such an instruction did not amount to ineffective assistance of counsel.

II

Evidence Of A Criminal Street Gang

Subdivision (b) of section 186.22 provides an additional term of imprisonment for "any person who 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." For purposes of this enhancement, a " 'criminal street gang' " is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A " 'pattern of criminal gang activity' " is "the

commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain] offenses [identified in the statute], provided at least one of these offenses occurred after the effective date of [the law] and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (*Id.*, subd. (e).)

The People sought to prove the gang enhancement allegations here by showing "that there is a criminal street gang known as the Norteños , who have three or more members, who have a common name, sign or identifying symbol, and whose primary criminal activities are the commission of [certain] crimes." On appeal, however, defendant contends there was insufficient evidence to prove that the Norteños *as a whole* constitute a criminal street gang within the meaning of section 186.22. Defendant argues that this is so "because [the People] failed to provide substantial evidence of any collaborative effort among the various Norteño subsets" and the People "treated all Norteño subsets as fungible goods, without providing any substantial evidence that such treatment was warranted." Stated another way, defendant contends the People wrongfully "conflat[ed] multiple gangs into one."

The gang evidence here was substantially as follows: Detective John Sample of the Sacramento Police Department testified as an expert in the area of Hispanic street gangs, including their culture. When asked, "who are the Nortenos?" Detective Sample responded that "[t]hey're a Hispanic street gang active in Sacramento and throughout California." There are approximately 1,500 local members of the Norteños. The Norteños identify with the north and use the letter N as a common identifying symbol and also the number 14 because N is the 14th letter of the alphabet. The color typically associated with Norteños is red. They are affiliated with a prison gang known as Nuestra Familia. Norteños are predominant in Northern California.

The primary enemies of the Norteños are Sureño gang members. Sureños identify themselves with the south, the color blue, and the letters S and M and the number 13.[3] They are predominant in Southern California.

The Norteños do not have a particular "turf" in the area but are located all over Sacramento. There are a lot of subsets based on different neighborhoods. For example, Chacon was affiliated with Varrio Franklin Boulevard, a local set of Norteños in South Sacramento. Chacon had a tattoo of the San Francisco 49ers emblem, which can be gang-related because Norteño gang members used the letters "SF" to refer to "Skrap free" or "Sureno free." Chacon also had tattoos on the interiors of his fingers, a one on the left hand and a four on the right side, consistent with the number 14.

In an interview with Detective Sample, defendant identified himself as a Northerner from Detroit Boulevard. He claimed Detroit Boulevard as his set. Defendant started claiming Norte because his mother's side of the family claims Norte.[4]

---

[3] Sureños identify with the number 13 and the letter M (the 13th letter of the alphabet) because they are connected to the Mexican Mafia, which is a Hispanic prison gang.

[4] It is not even clear from the evidence whether a discernible subset of Norteños based in defendant's Detroit Boulevard neighborhood actually exists. During an interview, Detective Sample asked defendant if he was a "Northerner." Defendant responded, "Yeah." When Detective Sample asked "from where?" defendant answered, "Detroit Boulevard." Detective Sample responded, "Now is that a set down there cause I haven't heard -- or is it or do you just claim Norte?" Defendant replied, "Yeah. That's my set. But everybody else from the D's is Bloods." Detective Sample said, "[S]o you're a Norte and you're just claiming your neighborhood?" Defendant responded, "Boulevard yeah." When Detective Sample asked, "So nobody else claims Detroit Boulevard?" defendant answered, "Mm-mm. Well some other people do but not like me. They ain't putting down on me." At trial, Detective Sample testified, "I think he was saying they're not putting it down like me," which the detective understood to mean "that they're active within the gang."

From this evidence, it is not clear that a discernible subset of Norteños based in defendant's Detroit Boulevard neighborhood actually exists. Assuming for the sake of

Detective Sample testified that the primary activities of the Norteños in the Sacramento area include unlawful homicide, attempted murder, assault with a firearm, shooting into an inhabited dwelling, shooting at an occupied motor vehicle, and weapons violations. Detective Sample also testified that Norteños in the Sacramento area engage in a pattern of criminal gang activity. For one of the predicate crimes, Detective Sample testified that members of a subset of Norteños in North Sacramento, the Varrio Gardenland Norteños, were convicted of various charges, including murder and attempted murder, for an incident in August 2007 arising out of a conflict with a Del Paso Heights Norteño. For the other predicate crime, Detective Sample testified that in July 2010 members of the Varrio Centro Norteños shot at a drop-out Norteño gang member.

The testimony offered by Detective Sample to establish the Norteños as a criminal street gang within the meaning of section 186.22 was remarkably similar to evidence offered for the same purpose in *In re Jose P.* (2003) 106 Cal.App.4th 458. There, "Officer Burnett testified that the Norteño gang was an ongoing association of around 600 persons, identified by the color red and the number 14, and that it had as one of its primary activities the commission of the criminal acts listed in section 186.22. She detailed the gang's pattern of criminal activity by describing [certain] firearms offenses and [a] convenience store robbery." (*Jose P.*, at p. 467.) On appeal, the appellate court concluded "[t]his [wa]s sufficient evidence to establish that Norteño was a criminal street gang." (*Ibid.*)

In *People v. Ortega* (2006) 145 Cal.App.4th 1344, much like defendant here, the defendant argued "there was insufficient evidence to sustain a finding of the existence of a criminal street gang because the gang to which the prosecution's expert testified was

---

argument that there was sufficient evidence for the jury to find the existence of such a subset, we nonetheless conclude for the reasons stated hereafter that the jury still could find that the Norteños as a whole constituted a criminal street gang for purposes of section 186.22.

the Norteño gang, and the term 'Norteño' is merely the geographical identity of a number of local gangs with similar characteristics, but is not itself an entity." (*Id.* at p. 1355.) This court rejected that argument, explaining as follows: "Detective Aurich, the prosecution's gang expert, testified there were thousands of documented Norteño gang members in Sacramento. He testified some of their commonly used symbols are the letter N, the Roman numeral IV, 'catorce' (Spanish for 14), and the color red. He testified some of their primary activities are the commission of murder, assault, witness intimidation, car-jacking, robbery, extortion, and dope dealing. Detective Aurich also testified regarding the facts of two crime reports of offenses committed by Norteños. One involved a shooting into a crowd of rival gangsters. The other involved a Norteño gang member shooting someone at a gas station who was wearing Sureño colors. [¶] Evidence was thus presented, through the prosecution's gang expert, to establish every element of the existence of the Norteños as a criminal street gang." (*Ibid.*)

Virtually ignoring *Jose P.* and *Ortega*, defendant instead relies primarily on *People v. Williams*, *supra*, 167 Cal.App.4th at page 983 in arguing that the evidence that the Norteños qualify as a criminal street gang was insufficient here. In *Williams*, the victim "was stabbed to death because she ostensibly caused a conflict between two members of a group of young men calling themselves the Small Town Peckerwoods." (*Id.* at p. 985.) A jury found the defendant guilty of murder with a criminal street gang enhancement and of active participation in a criminal street gang. (*Id.* at pp. 983, 985.) On appeal, he challenged the sufficiency of the evidence underlying the gang enhancement and the gang crime -- specifically, he asserted "there was insufficient evidence of the primary activities element that had to be proven in order to establish the Small Town Peckerwoods (STP) constituted a criminal street gang." (*Id.* at p. 986.) The appellate court "conclude[d] the evidence was sufficient to establish the Small Town Peckerwoods were a criminal street gang, but [the court could not] determine whether jurors based their determination in this regard solely on evidence concerning that group

or also erroneously considered evidence related to some larger Peckerwood organization." (*Id.* at p. 985.) Accordingly, the court reversed the gang enhancement finding and the conviction for the gang crime. (*Ibid.*)

In explaining its conclusion, the appellate court in *Williams* noted that "[e]vidence of gang activity and culture need not necessarily be specific to a particular local street gang as opposed to the larger organization," but the court concluded that "having a similar name is [not], of itself, sufficient to permit the status or deeds of the larger group to be ascribed to the small group." (*People v. Williams*, *supra*, 167 Cal.App.4th at p. 987.) The expert in the case had "testified that the Peckerwoods are a criminal street gang, as defined by the Penal Code, and that smaller groups, such as the Small Town Peckerwoods, are all factions of the Peckerwood organization." (*Id.* at p. 988.) As far as the record showed, however, the expert's conclusion "appear[ed] to have been based on commonality of name and ideology, rather than concerted activity or organizational structure." (*Ibid.*) The court concluded as follows: "In our view, something more than a shared ideology of philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization. There was no such showing here." (*Ibid.*)

Relying on *Williams*, defendant contends there was no substantial evidence here of any connection between the various Norteño subsets to which Detective Sample testified. Defendant argues further that the People's evidence "contradicted the theory of collaboration among the subset gangs" by showing "the subset Norteño gangs were often in fierce rivalry with one another -- not working together for any common Norteño purpose." According to defendant, the evidence here was insufficient under *Williams* because "[t]here was no substantial evidence these various subsets participated in

collaborative efforts, or had any organization, structure or communication that linked the subsets."

To the extent the appellate court in *Williams* required that "some sort of collaborative activities or collective organizational structure must be inferable from the evidence" before "various groups reasonably can be viewed as parts of the same overall organization" for purposes of determining the existence of a criminal street gang under section 186.22 (*People v. Williams, supra*, 167 Cal.App.4th at p. 988), we believe the court erred in adding an element to the statute that the Legislature did not put there. (See Code Civ. Proc., § 1858 ["In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert was has been omitted"].) The statute requires an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) Whether such an organization, association, or group exists does not necessarily depend on proof of collaborative activities or collective organizational structure between various subsets that identify themselves as part of a larger group. Where, as here, smaller neighborhood subsets all claim a common name (Norteño) and common identifying signs and symbols (the color red, the letter N, the number 14), *and* share a common enemy (the Sureños) (even though sometimes they fight amongst themselves too), it is for the finder of fact to decide whether the larger group, as opposed to each smaller subset, has been shown to constitute a criminal street gang. Certainly proof of collaborative activities or collective organizational structure between various subsets can support a finding that the larger group satisfies the statutory requirements necessary to be a criminal street gang, but we find nothing in section 186.22 *requiring* proof of such activities or structure. Just as in *Jose P.* and *Ortega*, where

evidence that did not include proof of collaborative activities or collective organizational structure between various subsets was found sufficient to support the finding that the larger group (the Norteños) constituted a criminal street gang, so the evidence here was sufficient for that purpose.

The evidence here showed that defendant identified himself as a Norteño -- albeit a Norteño associated with the Detroit Boulevard neighborhood. The evidence further showed that those like defendant who claim to be Norteños identify with the north and the color red and use the letter N and the number 14 as common identifying symbols. The evidence showed that those who identify themselves as Norteños also share a common enemy -- the Sureños -- who identify with the south, the color blue, the letters M and S, and the number 13. The evidence also showed that the primary activities of the Norteños in the Sacramento area include various qualifying crimes and that Norteños in the Sacramento area engage in a pattern of criminal gang activity. We believe nothing more was required to prove the existence of a criminal street gang under section 186.22. From this evidence, the jury could have reasonably found, at the very least, that the Norteños in the Sacramento area constitute an "informal," "ongoing organization, association, or group of three or more persons" that has "a common name [and] common identifying sign[s] or symbol[s]" and has "as one of its primary activities the commission of one or more of the criminal acts enumerated in [section 186.22]" and "whose members individually or collectively . . . have engaged in a pattern of criminal gang activity."

To the extent defendant argues that the crimes he committed were "objectively for personal reasons" rather than for the benefit of, at the direction of, or in association with a criminal street gang, and to the extent that argument is based on his assertion that "there was no evidence of a single gang's relationship to [his] offenses" because the People failed to provide sufficient evidence that the Norteños as a whole constituted a criminal street gang, our discussion above disposes of this argument. There was sufficient evidence that the Norteños in the Sacramento area constitute a criminal street gang within

the meaning of section 186.22, notwithstanding the evidence that there are different subsets of the gang associated with various neighborhoods throughout the area. Furthermore, there was more than enough evidence that defendant committed the shooting because he found himself threatened in a confrontation with a person he perceived to be a rival Sureño gang member. Under the facts presented here, it was more than reasonable for the jury to conclude that defendant committed the shooting for the benefit of or in association with the Norteño gang.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.