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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JERRELL GUYTON, Defendant and Appellant.	B267187 (Los Angeles County Super. Ct. No. TA134962)

APPEAL from an order of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as modified.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Jerrell Guyton appeals from the judgment following his jury conviction of conspiracy to commit a home invasion robbery for the benefit of a gang. We conclude that the conviction is supported by substantial evidence. We modify the judgment to replace the 10-year enhancement under Penal Code section 186.22, subdivision (b)(1)(C) with a 15-year minimum parole eligibility term under subdivision (b)(5).[1] The judgment is affirmed as modified.

FACTUAL AND PROCEDURAL SUMMARY

Sergeant Frederick Douglass Reynolds, a homicide investigator for the Los Angeles County Sheriff's Department, used Harold Morgan, a paid informant with an extensive criminal record, over several months in 2014. On September 3, 2014, Morgan notified Reynolds that appellant, a member of the Rollin 60's gang, had asked him to participate in a home invasion robbery and murder of a drug dealer in Lynwood. Appellant had suggested that Morgan dress as a police officer for the robbery. Four of Morgan's subsequent telephone conversations with appellant were recorded.[2]

During the first recorded call, appellant told Morgan that an unidentified man had proposed robbing the intended victim's

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[1] Subsequent undesignated statutory references are to the Penal Code.

[2] The transcripts of the calls indicate they were made on September 3, 2014. Reynolds confirmed that date at the preliminary hearing, but at trial, he testified that the last two calls were made on September 4, 2014. Contrary to appellant's representation, there is no uncertainty regarding the sequence of the calls, which can be determined from their substance.

house, but would not participate in the robbery itself because he was out of town. The man was related to an unidentified woman, whose presence in the victim's house was repeatedly discussed during the phone calls. The woman was alternatively referred to as "the girl" or "the bitch." The man who had proposed the robbery was identified as her "baby daddy" or her "nigga," and the intended victim was described as "his baby mama folks."

Appellant said his "little cousin" would participate in the robbery "for extra, for security trip." Immediately after talking about "the girl" and "the nigga," appellant told Morgan: "He be big riding on my little cousin. They boys. They be big riding, low key. You know, he know my cousin[']s a real warrior out here, tattoos on his face, ready with the shit, all the way out." The "baby daddy" expected to get "a cut" from the robbery, but appellant was ambivalent about the size of his expected share, suggesting he would get "crumbs," and "[t]he cut is just three ways . . . me, you, and cuzz."

Appellant made several unclear references, implicating his own cousin and the "baby daddy" in ongoing conversations. During the second recorded call, appellant said he planned to join Morgan in a conference call with the "baby daddy," who was out of town. At the same time, appellant explained that his own cousin was "in court." Later in the call, appellant said: "when I talk to cuz, soon as he calls me, I'm gonna get the [victim's] address and I'm gonna forward it to you cuz, so you can go over there and do your homework and scout the whole shit out." Still later in the call, appellant said: "I'm fixing to stalk my cousin for that address (INAUDIBLE). He's still in court, but the nigga gonna call me. So, I have to get in touch with him so, (INAUDIBLE) address." In the third recorded call, during which

appellant gave Morgan the exact address of the intended victim's home, appellant confirmed he had "just got off the phone" with "the baby daddy dude."

Appellant made several other statements indicating that multiple individuals were involved in the conspiracy to commit the robbery. He began by telling Morgan: "We waiting on you. . . . [¶] It ain't gonna work unless you wanna go." He mentioned that "some street niggas" were involved, who had wanted to see Morgan because they did not know him, and that "they're not fixing to talk over the phone." Appellant explained that after Morgan's initial reluctance to participate, the others had gone "back to doin' what they were doin'." Appellant said he now had to tell them, or he had "just told'em," that Morgan had agreed to participate and "all we gotta do is come in and work it . . . ."— that is, "clean the house out, 'cause that's what we do." Appellant claimed there would be "niggas . . . in the car" with him when he met with Morgan, even though he told Morgan, "[i]t's just my cousin, me, and you."

The general plan was that Morgan would knock on the victim's door dressed as a police officer, and when the victim answered, the others would enter the house, tie up the victim, and rob him. At Morgan's prodding, appellant suggested the victim would be maimed or killed if he resisted. Appellant would supply Morgan with a gun, and Morgan would procure a police uniform on his own.

Although he discussed the robbery over the phone, appellant did so reluctantly. He warned Morgan: "[w]e can't be talking on these phones. . . . You not understanding these phones." At times when Morgan pressed for the exact details of the plan—such as whether appellant would be armed as well,

who would be driving, or how the stolen property would be divided—appellant suggested they should "roundtable." He justified the need for a face-to-face meeting because of his cousin's absence, stating: "[W]e can't come up with something and then my cousin come up with somethin' and you not there . . . . We go and sit at a round table and come with . . . the skit," and "we gotta sit down and talk so everybody can come to the same understanding, 'cause I don't think it's registering to my, my cousin, though, you feel me? He ain't never seen no shit like this before, so it ain't registering to him right now. So when we sit down and talk to him, then he gonna understand like, oh all right, let's go."

Appellant envisioned they would meet immediately before the robbery. He told Morgan, "that's how much faith I got in this lick, bro, you all don't gotta' see each other until game time." He later said: "[O]nly one I want to see is my cousin. The other nigga, we don't need to meet with him," and added, "I don't want cuzz to see you anyway, bro. For what?" After giving Morgan the exact address and detailed directions to the intended victim's house in the third recorded phone call, appellant suggested he and Morgan should meet first in the daytime on appellant's side of town, "[a]nd then we can just meet up over there. Once we meet up, it'll be game time. I don't want to meet up when we get there and discuss shit! I just want to meet up over there and get cracking."

In the last recorded phone call, appellant and Morgan agreed to meet at a McDonald's parking lot at 6:45 p.m. Appellant said: "When we get right there we gonna make it all come together. We can't plan right now. We trying to put the plan together, but my cousin ain't here . . . . So when we get to

the McDonald's cuz, we gonna put it together. We can't, we can't draw up no plan 'cause it has to be around you. It ain't gonna come out right. . . . [W]e meeting . . . [f]or you to give me the last, on what you fixing to do, how you gonna do it." Appellant confirmed he would give Morgan the gun when they met at McDonald's, and Morgan promised he would have the police uniform by then.

After Reynolds heard the phone conversations, he obtained a search warrant for the intended victim's house, set up a command post nearby, and arranged for surveillance of the McDonald's parking lot where appellant and Morgan had agreed to meet. Detective George Semenez, who surveilled the location, saw the two meet once in daylight. During a second meeting after sunset, Semenez saw at least one other individual join them. The detective did not hear what was said during either meeting.

At 8:09 p.m. that night, Morgan texted Reynolds that appellant "called and said 20 minutes, he and crew will be at McDonald's, they're going to kill him, they got guns and one extra guy. . . ." Later, Morgan complained, "This has gotten way out of hand, . . . you know I'm in deep trouble, it's after 9:00 . . . how can I not get paid for all this. . . . [¶] I'm a nervous [w]reck." [3]

After the second meeting at McDonald's, one of the surveillance teams was notified that appellant's car had arrived at the meeting place "and had diverted from the original plan."

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[3] Morgan did not testify at appellant's second trial, but Reynolds admitted having been told by Morgan that Morgan did not meet with appellant because Morgan believed appellant was going to kill him.

The officers followed the car after it left the parking lot and saw a handgun being thrown out of the front passenger window. A loaded gun was immediately recovered. When the car eventually stopped, the front passenger, Tiyon Jones,[4] jumped out and ran, but was soon apprehended. Appellant and the other passenger, Clarence Hill, remained in the car and were arrested. The site of the arrest was approximately 10 miles away from the intended victim's house.[5]

Appellant identified Hill as his cousin. Like appellant, Hill was a member of the Rollin 60's gang, and he had gang tattoos on his face. Jones, too, had tattoos related to the Rollin 60's. Morgan was a member of the 111 Neighborhood Crips, a gang friendly with the Rollin 60's.

Appellant, Hill and Jones were jointly charged with conspiracy to commit home invasion robbery. (§§ 182, subd. (a)(1); 213, subd. (a)(1).) It was alleged that they had conspired "together and with another person and persons whose identity is unknown" to commit the robbery and that they had committed an overt act by meeting at McDonald's. Gang allegations were

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[4] In the reporter's transcript, Jones's first name is spelled "Teon"; we adopt the spelling used in the information.

[5] The amount of money and drugs found during the search of the house was significantly lower than Morgan had led police to expect. No guns were found, contrary to representations appellant had made to Morgan, and no woman was in the house at the time of the search.

attached. (§§ 186.22, subd. (b)(1)(C) & (5).)[6] It also was alleged that appellant previously had been convicted of three serious or violent felonies that qualified as prior strikes, and that he had served a prior prison term. (§§ 667, 667.5, subd. (b), 1170, subd. (h)(3), 1170.12.)

After a deadlocked jury resulted in a mistrial, appellant was allowed to represent himself at his second jury trial. On retrial, he was found guilty of conspiracy to commit home invasion robbery, and the gang allegation was found to be true. Appellant's subsequent motion for new trial was denied and his request for counsel granted. The court found the prior conviction allegations to be true and sentenced appellant to 25 years to life in prison under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), plus 10 years for the gang enhancement.

This appeal followed.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence supporting his conviction.

In considering claims of insufficient evidence, we review the record in the light most favorable to the prosecution, drawing all inferences and resolving all conflicts in favor of the judgment. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid.*) That the

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[6] Jones and Hill pled out of the case. A separate evading an officer count was later dismissed. An allegation of Hill's personal gun use was not submitted to the jury.

circumstances may be susceptible to more than one interpretation does not warrant reversal. (*Id*. at p. 358.) """Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt."""" (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

A conspiracy consists of an agreement to commit a crime, followed by an overt act in furtherance of that agreement. (*People v. Homick* (2012) 55 Cal.4th 816, 870.) There is no requirement that the conspirators actually meet to form an agreement. (*People v. Zamora* (1976) 18 Cal.3d 538, 559.) Instead, the existence of the agreement may be proven circumstantially through "'the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.) "[F]eigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other coconspirators who actually agree to the commission of the subject crime, specifically intend that the crime be committed, and themselves commit at least one overt act for the purpose of accomplishing the object of the conspiracy." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1131.)

Appellant contends there is no evidence that anyone other than Morgan, the informant, agreed to the robbery, or that any overt act beyond planning took place. These contentions are based on the assumption that the recorded phone calls show only

that appellant "had hatched a scheme and had secured Morgan's purported agreement to participate, but that he had *not* yet obtained his cousin's agreement, or anyone else's for that matter. The record shows at most that appellant wanted to meet at McDonald's so that his cousin would come to an agreement to participate in the robbery." We do not agree.

In the first recorded call, appellant represented that there already was an agreement in place to proceed with the robbery if Morgan was willing to participate dressed as a police officer. Appellant told Morgan: "We waiting on you. . . . It ain't gonna work unless you wanna go." Once Morgan agreed to procure the police uniform and participate, appellant said he was either going to or had "just told" the others "now all we gotta do is come in and work it . . . ."

Besides regularly speaking in the plural, appellant specifically identified the individual identified as the "baby daddy" as a coconspirator. That individual had proposed the robbery and expected to receive a "cut," even though he would not participate in the actual robbery and appellant was somewhat ambivalent about sharing the proceeds with him. (See *People v. Britz* (1971) 17 Cal.App.3d 743, 751 [conspirator need not participate in target crime].) Appellant suggested he would get the intended victim's exact address from either his cousin or "the baby daddy." The fact that he obtained it before the third recorded call, during which he told Morgan he had "just got off the phone with [the baby's daddy]," supports the inference that appellant had discussed the conspiracy with at least one other coconspirator in between his calls to Morgan.

Appellant also repeatedly implicated his cousin in the conspiracy. Hill, with whom appellant was arrested immediately

after the meeting at McDonald's, not only turned out to be appellant's cousin, but he had tattoos on his face, as appellant had described him to Morgan. Appellant argues Hill's presence in the car did not establish his knowledge or intent to participate in the conspiracy. While taken in isolation that may be true, it is not unreasonable to infer from the totality of appellant's statements in the recorded phone calls that Hill's presence in the car was not accidental.

Appellant told Morgan that the "baby daddy" knew appellant's cousin was "a real warrior." Appellant also told Morgan that he intended "to stalk my cousin for that address." That appellant's cousin had the intended victim's address and was respected by the man who proposed the robbery supports an inference that the cousin was an active participant in the conspiracy. (See *People v. Homick*, *supra*, 55 Cal.4th at p. 870 [conspiracy may be inferred from relationship and activities of conspirators before and during conspiracy].)

Appellant argues that some of the statements he made during the recorded phone calls support a contrary inference—that his cousin had not yet agreed to participate in the robbery. Appellant points to his comment that "I don't think it's registering to my, my cousin . . . . He ain't never seen no shit like this before, so it ain't registering to him right now. So when we sit down and talk to him, then he gonna understand like, oh all right, let's go." As we have discussed, appellant made many other statements indicating a preexisting agreement to rob the intended victim, so long as Morgan agreed to impersonate a police officer. Appellant repeatedly stated that, with Morgan's commitment in place, there would be no problem with proceeding with the robbery. The only detail that remained to be discussed

at McDonald's was what Morgan was "fixing to do, how you gonna do it." Thus, it is reasonable to infer that appellant's cousin, like appellant, already had agreed to participate in the conspiracy and only needed to know how Morgan intended to accomplish the impersonation of a police officer. On appeal, we may not draw an inference favorable to appellant if the record also lends itself to an inference supporting his conviction. (See *People v. Zamudio*, *supra*, 43 Cal.4th at pp. 357–358.)

Appellant argues that his repeated references to the need to "roundtable" show that the conspiracy was still in the planning stages. He claims the meeting at McDonald's could not have been an overt act since the jury was instructed with CALCRIM No. 415 that "[t]he overt act must be more than the act of agreeing or planning to commit the crime . . . ." (See *People v. Profit* (1986) 183 Cal.App.3d 849, 882 ["An 'overt act' means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to accomplish the conspiracy's object"], italics omitted.) Appellant is mistaken.

Once in existence, a criminal agreement is "a continuous act," which is why a conspiracy "is said to be a continuing crime." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 244, citing *People v. Hess* (1951) 104 Cal.App.2d 642, 678.) An overt act is required to prove the existence of the agreement and give an opportunity to conspirators to withdraw. (*People v. Brown* (1991) 226 Cal.App.3d 1361, 1368.) The act must be "'done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.'" (*People v. Zamora*, *supra*, 18 Cal.3d at p. 549, fn. 8, quoting *Chavez v. United States* (9th Cir. 1960) 275 F.2d 813, 817.)

"[O]nce a punishable agreement is formed, internal discussions and arrangements between coconspirators can easily constitute overt acts in furtherance of the conspiracy. [Citation.]" (*People v. Von Villas, supra,* 11 Cal.App.4th at pp. 244, 245 [affirming alleged overt acts consisting of "solicitation of additional conspirators," "requests for information regarding the victim and the plan," "payments to secure a coconspirator's assent to the conspiracy," and "numerous phone conversations laying out the manner in which the conspiracy would be carried out"]; see also *People v. Sconce* (1991) 228 Cal.App.3d 693, 699 [alleged overt acts consisted of defendant's pointing out intended victim to coconspirator, coconspirator's solicitation of another conspirator, and defendant's inquiries of one coconspirator to """take care of and kill""" victim].)

Appellant's statements during the recorded phone calls support an inference that he solicited Morgan as an additional participant in an already existing conspiracy. Appellant's reluctance to discuss details of the planned robbery over the phone does not mean there was no agreement or plan in place. Rather, appellant indicated that the others involved in the conspiracy distrusted phone conversations and that he shared that distrust. Nevertheless, the details of the plan appellant and Morgan discussed sufficiently supported Morgan's report to Reynolds that appellant had invited him to impersonate a police officer in a robbery before the recorded phone calls took place. Nothing appellant said during those phone calls indicates the overall plan was expected to change significantly.

The meeting at McDonald's was neither intended nor necessary to form an agreement or plan to commit the robbery, as the general agreement and plan already were in existence, and

Morgan had agreed to join the existing conspiracy. (See *People v. Guillen* (2014) 227 Cal.App.4th 934, 1001 [face-to-face meeting is not necessary for formation of criminal agreement since conspiracy does not require that participants know each other or know all details].) That is because "[c]ommon design is the essence of a conspiracy and the crime can be committed whether the parties comprehend its entire scope, whether they act in separate groups or together, by the same or different means known or unknown to them, if their actions are consistently leading to the same unlawful result. . . ." (*People v. Means* (1960) 179 Cal.App.2d 72, 80.) Appellant's statements regarding the meeting at McDonald's support the conclusion that the meeting was an outward act intended to advance the "common design" of the conspiracy since the stated purpose of the meeting was for Morgan to give appellant "the last, on what you fixing to do, how you gonna do it," and appellant confirmed he would give Morgan the gun when they met.

Morgan's text messages to Reynolds on the night of September 4, 2014 show appellant and two other men were headed to meet him, which is supported by the presence of Hill and Jones in appellant's car. They also show Morgan was increasingly nervous about his continued feigned participation in the conspiracy. Appellant's car was seen at the McDonald's parking lot twice, and Detective Semenez observed a meeting between Morgan and appellant, followed by a meeting between the two of them and at least one other individual. In the recorded phone calls, appellant had stated he did not want his cousin to meet Morgan "until game time," and "[o]nce we meet up, it'll be game time." These statements support a reasonable

inference that appellant brought Hill and Jones to McDonald's to meet Morgan on their way to commit the robbery.

Appellant points to his statement that he needed to get his "tools" before meeting with Morgan, but no robbery "tools" were found in the car. In *People v. Dewitt* (1983) 142 Cal.App.3d 146, on which appellant relies, the agreement to commit a robbery was inferred from the presence of disguises, gloves, and handcuffs in the defendants' car, which was parked in front of an expensive residence. (*Id*. at p. 151.) That does not mean, however, that a conspiracy to commit robbery always must be proven through physical evidence. Moreover, the only object appellant specifically promised to bring was a gun, and a gun was retrieved after having been tossed out of the car. To the extent the record supports conflicting inferences, we must resolve the conflict in favor of the judgment. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.)

A conspiracy does not require that the target crime be committed or even attempted, or that the overt act be itself criminal. (See *People v. Johnson* (2013) 57 Cal.4th 250, 258; *People v. Von Villas*, *supra*, 11 Cal.App.4th at p. 244.) Therefore, the fact that no separate criminal act was committed is not material.

The record sufficiently establishes that appellant had an agreement with others besides Morgan to rob the intended victim's home. The record also sufficiently establishes that appellant's showing up for a prearranged meeting at McDonald's along with two other men (one of whom was a known coconspirator) was an overt act, intended to immediately precede the robbery, and therefore to further the object of the conspiracy. That parts of the record may support inferences favorable to

appellant is not a valid reason to overturn his conviction, which is supported by substantial evidence.

II

Respondent concedes that the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) was incorrectly imposed, and that the trial court should have imposed a 15-year minimum parole eligibility period under subdivision (b)(5) instead.

Where a gang allegation is found true, section 186.22, subdivision (b)(1)(C) provides for a 10-year enhancement if the underlying crime is a violent felony under section 667.5, subdivision (c). Conspiracy to commit residential robbery is not a violent felony under that statute. (*In re Mitchell* (2000) 81 Cal.App.4th 653, 657.)

Section 186.22, subdivision (b)(5) imposes a 15-year minimum parole date if the underlying crime is "a felony punishable by imprisonment in the state prison for life." As we explained in *People v. Williams* (2014) 227 Cal.App.4th 733, 745, a sentence of 25 years to life imposed under the Three Strikes law, such as the one imposed here, is considered a life sentence subject to section 186.22, subdivision (b)(5). (*Williams*, at pp. 742–745, citing *People v. Lopez* (2005) 34 Cal.4th 1002, 1006–1007; *People v. Jones* (2009) 47 Cal.4th 566, 577–578.)[7]

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[7] "The true finding under section 186.22(b)(5), which provides for a lower minimum term, 'is a factor that may be considered by the Board of Prison Terms when determining a defendant's release date, even if it does not extend the minimum parole date per se.' [Citation.]" (*People v. Lopez*, *supra*, 34 Cal.4th at p. 1009; see also *People v. Williams, supra*, 227 Cal.App.4th at p. 745, fn. 11 ["The Board of Parole Hearings may

We modify the judgment to delete the 10-year gang enhancement and to insert the 15-year minimum term for parole eligibility.

DISPOSITION

The judgment is modified to delete the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) and to replace it with the 15-year minimum term for parole eligibility under section 186.22, subdivision (b)(5). As modified, the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a certified copy of an amended abstract of judgment that reflects the modification.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.

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consider [the gang enhancement] findings when determining defendant's release date"].)