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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DELEON F. GIVENS,

Defendant and Appellant.

B276541

(Los Angeles County
Super. Ct. No. BA431742)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Remanded for resentencing; judgment of conviction otherwise affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Deleon Givens guilty of kidnapping for robbery and second degree robbery and found true gun and gang allegations. On appeal, he contends there was insufficient evidence to support the gang allegations, that the trial court abused its discretion by denying his *Marsden*¹ motions, and that remand is necessary for the court to exercise its discretion under newly enacted Senate Bill No. 620. We agree that remand is necessary for reconsideration of the sentence under that new law, but we otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Background

A. *The kidnappings and robberies*

On November 12, 2014 at approximately 11:00 p.m., Officer Brian Schneider responded to a call of “415 gang group” at 2641 Manhattan Place, which was a known hangout for Rolling 20s gang members. Once there, Officer Schneider saw four people (Givens, Marvin Carroll, Jumanee Buard and Woodysha Pilcher) in a green Ford Explorer. Officer Schneider, who knew Carroll from prior encounters, asked Carroll if he was still hanging out with the Rolling 20s, and Carroll answered yes.

Approximately four hours later, at 3:30 a.m. on November 13, 2014, Maryuri Melendez and Fatima Baires were at the 7-Eleven on Washington and Western, which was just two miles from 2641 Manhattan Place and was also in Rolling 20s’s territory. Carroll and Givens were also at the 7-Eleven. Surveillance footage from the 7-Eleven showed them arriving at

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

the store in the green Ford Explorer.² Baires noticed Carroll watching her and Melendez, and Baires scolded Melendez for publically displaying her money, \$400 or \$500 in cash.

The women left the store and got into Baires's car. Video surveillance showed Carroll leaving the 7-Eleven in the Ford Explorer at the same time and turning out of the parking lot in the same direction as Baires's car.

Unbeknownst to Melendez and Baires, Givens was hiding in the backseat of Baires's car. Givens held a gun to Baires's head and told her to follow his instructions and not to turn, otherwise he'd shoot her. He made Baires drive to an alley, where he demanded the women's purses. Asking if the women liked Black men, Givens touched the women's breasts as if to see whether they had anything hidden. Another person was with Givens in the alley, but it is unclear whether the person was male or female and whether that person had also hid in the backseat area.³

After taking property from Baires and Melendez, Givens and the other person ran. Melendez heard but did not see a car drive off.

² Officer Schneider recognized Givens and Carroll from the video.

³ Melendez identified Givens as the man in the backseat but she could not identify Carroll as the other man in the alley who robbed her. Baires could not tell if the second person in the alley was a man or woman, but Melendez thought it was a man.

B. *Gang expert testimony*

Los Angeles Police Department Officer John Thompson testified for the People as a gang expert. During his two and one-half years assignment to Gang Enforcement, he monitored the Rolling 20s Neighborhood Blood gang. The 7-Eleven at Washington and Western is in the gang's territory. Gang members "put in work"—commit crimes—to show the gang's power and to intimidate the community. The more "work" a gang member puts in, the more respect the gang gets. Rolling 20s's primary activities include robberies, and it is one of the crimes its gang members commit regularly to instill fear in the community and to get money.

Officer Thompson knew Givens and Carroll, having encountered them in the field. Both self-admitted that they were Rolling 20s gang members to him, and both had gang tattoos. Givens's moniker was A1, and Carroll's monikers were Time Bomb and Twin.

Officer Thompson opined that both Givens and Carroll were active gang members in November 2014 and, based on a hypothetical modeled on the facts of this case, the officer opined that such a crime was committed for the benefit of and in association with the Rolling 20s gang.

II. Procedural background

Givens and Carroll were jointly tried by a jury. On May 12, 2016, the jury found Givens guilty of counts 2 and 3, kidnapping to commit a robbery (Pen. Code, § 209, subd. (b)(1))⁴ and of counts

⁴ All further undesignated statutory references are to the Penal Code.

4 and 5, second degree robbery (§ 211). As to all four counts, the jury found true firearm (§ 12022.53, subd. (b)) and gang (§ 186.22, subd. (b)(1)(C)) enhancements. As to Carroll, the jury deadlocked and the trial court declared a mistrial.

On July 27, 2016, the trial court sentenced Givens, on count 2, to life for the kidnapping, 10 years for the firearm enhancement (§ 12022.53, subd. (b)), and 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)). The court imposed the same, but concurrent, sentence on count 3. On counts 4 and 5, the court imposed five years, 10 years for the firearm enhancement (§ 12022.53, subd. (b)), and 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)). The court stayed the sentences on counts 4 and 5 under section 654.

DISCUSSION

I. Sufficiency of the evidence to support the gang allegation

The jury found true allegations that Givens committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang (the gang-related prong), with the specific intent to promote, further, or assist in any criminal conduct by gang members (the specific intent prong). (§ 186.22, subd. (b)(1); *People v. Albillar* (2010) 51 Cal.4th 47, 59 (*Albillar*).) He now contends there was insufficient evidence to support the gang related and specific intent prongs of the enhancement. We disagree.

In reviewing a sufficiency of the evidence challenge to support an enhancement “we review the entire record in the light most favorable to the judgment to determine whether it contains 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 beyond a reasonable doubt.
[Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.
[Citation.] 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." (*Albillar, supra*, 51 Cal.4th at p. 60.)

The gang-related element of section 186.22, subdivision (b)(1), may be proven in three distinct alternatives. The crime was gang related if the offense is committed either (1) for the benefit of a gang; (2) at the direction of a gang; *or* (3) in *association with a gang*. Since the gang related prong is in the disjunctive, even in the absence of evidence that the commission of the crime benefited the gang or was directed by the gang, liability may be imposed if there is substantial evidence that the crime was committed in association with a gang. (*People v. Leon* (2008) 161 Cal.App.4th 149, 162.)

Givens's challenge to the first prong is based on the sufficiency of the evidence to show that he committed the crimes in association with another gang member. Our Supreme Court has recognized that not every crime committed by gang members is gang-related. (*Albillar, supra*, 51 Cal.4th at p. 60.) But, where, as here, there is evidence that defendants "came together *as gang members*" to commit the crimes, then the association alternative is met.⁵ (*Id.* at p. 62.) In *Albillar*, for example, the three defendants (two brothers and their cousin) raped the victim in concert. A gang expert testified, among other things, that

⁵ Here, the prosecutor's principal theory under the first prong was that Givens and Carroll committed the crimes in association with the gang.

gang members commit crimes together because it increases their chance of successfully completing the crime. The evidence showed that the defendants relied on each others' cooperation and loyalty to commit their crimes. (*Id.* at pp. 61–62; see also *People v. Vang* (2011) 52 Cal.4th 1038, 1048 [expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a finding on a gang allegation].)

Similar to the gang expert in *Albillar*, Detective Thompson testified here that robbery is one of the crimes that Rolling 20s gang members regularly commit, and two gang members will work together, with one acting as the lookout. What happened here fits that scenario. Givens and Carroll were self-admitted Rolling 20s gang members. The crimes occurred in Rolling 20s's territory, only miles from the gang's hangout where Givens and Carroll had, just hours before the crimes, been together in a green Ford Explorer. Givens and Carroll arrived together at the 7-Eleven in the same green Ford Explorer. After Givens exited the vehicle, Carroll remained seated in the Explorer for seven and a half minutes, before following Baires and Melendez into the 7-Eleven, during which time, Givens entered and hid in Baires's car. Inside the market, Carroll watched Baires and Melendez, when Melendez indiscreetly displayed her money. Carroll then covered his face with his hands when Melendez looked in his direction. When the women drove out of the parking lot, video surveillance showed that Carroll followed them in that same Ford Explorer. Both victims were certain that there was someone else in the alley assisting Givens but they were unable to identify that person. When the suspects ran off, Melendez heard a vehicle drive off.

Although Givens concedes that there is substantial evidence that Carroll was at the 7-Eleven, Givens, nevertheless, asserts that there is insufficient evidence that he came together with Carroll as a gang member to commit the offenses. In support of this assertion, Givens focuses on the absence of direct evidence that Carroll was the person in the alley with Givens. Givens seems to suggest that the crimes started and ended in the alley. That is not the case. The crimes started in the 7-Eleven, where Givens entered Baires's car, and did not end until Givens reached a temporary place of safety after he fled from the alley. Thus, even if we assumed that Carroll was not with Givens in the alley, there was substantial direct and circumstantial evidence that Givens and Carroll came together as gang members to commit the robberies and kidnappings. The evidence shows that Carroll transported Givens to the 7-Eleven, he waited until Givens had successfully secreted himself within Baires's vehicle before entering the 7-Eleven, he closely watched Melendez and Baires while inside the 7-Eleven, and then he followed Baires's vehicle out of the parking lot. This evidence is consistent with Carroll coming together with Givens, his fellow gang member, by "casing" the victims at the 7-Eleven. This evidence is also consistent with the expert testimony that Rollin' 20s gang members help facilitate robberies by having one gang member act as a lookout while the other gang member commits the taking. In addition, after the women were robbed and Givens and his accomplice fled, Melendez heard a car, which raises a reasonable inference that Carroll or another accomplice was nearby in a getaway car. In other words, substantial evidence indicates that Givens and Carroll acted together as gang members when Givens committed the offenses here.

Givens also places importance on the jury’s inability to find Carroll guilty of the offenses. Assuming the jury’s verdicts are inconsistent, the jury’s inability to reach a verdict as to Carroll is not a sufficient reason to set aside a verdict as to Givens. (See *People v. Palmer* (2001) 24 Cal.4th 856, 860–861.) Instead, where there is substantial evidence to sustain the conviction, it will be upheld despite an apparently inconsistent verdict as to another defendant. (*Id.* at p. 861.)

Givens relies on a similar argument to attack the specific intent prong of the gang enhancement. *Albillar*, however, held that all the enhancement requires is a “specific intent to promote, further or assist criminal conduct by *gang members*.” (*Albillar*, *supra*, 51 Cal.4th at p. 67.) Thus, “if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Id.* at p. 68.) As we have explained, such substantial evidence existed here. We therefore also reject Givens’s sufficiency of the evidence challenge to the specific intent prong of the gang enhancement.

II. *Marsden*

Next, Givens argues that the trial court⁶ abused its discretion by denying his requests to appoint new trial counsel under *Marsden*, *supra*, 2 Cal.3d 118.

⁶ The Honorable C.H. Rehm presided over both *Marsden* motion hearings.

A. *Additional background*

Givens made two *Marsden* motions. At the first, on October 29, 2015, Givens expressed disappointment that his counsel had not filed a section 995 motion to set aside the information, had not presented Givens transcripts of his police interview, had not played the recorded interview for Givens, had failed to “press” the witness’s inability to identify Givens at a lineup, and had not shown Givens the surveillance video from the 7-Eleven market. Counsel, who detailed his extensive criminal defense experience, responded that he had to get a court order to bring his computer into county jail to show Givens the surveillance video, was in the process of having a transcript made of Givens’s statement, had just received that morning additional recordings of Givens’s jail cell phone calls, that he would raise the lineup issue at trial, and that there was no basis for a 995 motion. The trial court denied the *Marsden* motion.

Thereafter, Givens made a second *Marsden* motion on February 4, 2016. This time he argued that his counsel was ineffective because counsel wanted him to take a deal. Counsel, however, denied this, saying that there hadn’t even been an offer, although counsel did tell Givens to consider any offer, given the potential sentence Givens faced. Givens was also unhappy because he still had not seen the 7-Eleven video or heard audio of his police interview and added that counsel had not shown him anything that incriminated him. Counsel replied that he had provided Givens with copies of all the police reports. Counsel explained that there was a technical problem with the discs that contained the video and audio so the prosecutor had to provide him with a flash drive and he was preparing a transcript of Givens’s and Carroll’s police interviews for Givens to review.

Counsel then detailed the work he'd done on the case. The trial court again denied the motion. However, back in open court, Givens asked why his request had been denied, given his discomfort in having "my life in his hands." The court repeated that "discomfort with your representation is not a ground to relieve your counsel" and explained that a client can dislike his attorney but that attorney is still the best person to represent him. Givens's mother, who was in the audience, said that when she talked to counsel about her son's case, counsel told her to "shut the fuck up, I've been doing this shit for 27 years.'" Counsel denied "disrespect[ing]" his client's mother, but he did tell her that she was not his client and would not get into an argument with her. He denied using profanity. The court noted that foul language is not a reason to relieve an attorney.

B. *The trial court did not abuse its discretion by denying the Marsden motions.*

The constitutional right to assistance of counsel includes the right to discharge or substitute appointed counsel, if the failure to do so would substantially impair the accused's rights. (*Marsden, supra*, 2 Cal.3d at p. 123.) Accordingly, "[w]hen a defendant seeks substitution of appointed counsel . . . , 'the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 599.) Whether to permit a defendant to discharge his or her appointed counsel and substitute another attorney is within the trial court's discretion. (*Ibid.*) The court does not abuse its discretion in denying a *Marsden* motion "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel.'" (*Ibid.*) Substantial

impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when ‘the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) Applying these principles, we conclude that Givens fails to show the court abused its discretion in refusing his requests to substitute counsel.

To show that his right to counsel was substantially impaired and that an irreconcilable conflict existed between himself and his counsel, Givens principally focuses on his counsel’s delay in sharing evidence with him and his overall feelings of discomfort with counsel’s representation. Counsel was appointed to represent Givens in November 2014. By October 29, 2015, when Givens made his first *Marsden* motion, counsel had yet to play the 7-Eleven video surveillance or Givens’s recorded statement for Givens. Counsel explained that he had to obtain a court order to bring his computer to jail. Also, counsel indicated that he didn’t want to play Givens’s statement until it was transcribed. By February 4, 2016, counsel still had not reviewed these items with Givens, who cited that failure as a basis for the second *Marsden* motion. Counsel represented that the transcription of Givens’s interview would be completed that week and Carroll’s by Monday or Tuesday, and that it was easier and faster for Givens to read the transcript than to listen to the audio. As to the video surveillance, counsel indicated there was a problem with the disc, so the deputy district attorney gave counsel a flash drive. Counsel added that although Givens had seen the critical portions of the surveillance video at the preliminary hearing, counsel fully intended to play all of the

video and audio recordings for Givens prior to the trial date, which had yet to be set. Therefore, counsel was addressing his client's concerns.

The trial court was entitled to credit counsel's explanations for any delay in showing Givens the entirety of the video evidence and playing the audio recordings. (*People v. Taylor, supra*, 48 Cal.4th at p. 600.) Moreover, the trial court was also in a position to discount Givens's assertion that counsel had not provided him with anything that incriminated him since counsel had provided Givens all of the police reports. Counsel was preparing to review the requested items with his client, and that it wasn't happening as fast as Givens wanted does not show that counsel was ineffective. In any event, the record shows that counsel's performance was more than adequate.

As to Givens's general sense of discomfort as a basis for replacing counsel, long standing Supreme Court authority has rejected this rationale. In *People v. Crandell* (1988) 46 Cal.3d 833, 860,⁷ our high court explained why a loss of faith alone does not establish a conflict that would warrant substituting appointed counsel: "[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." In *People v. Freeman* (1994) 8 Cal.4th 450, 481, our high court specifically held that a defendant's distrust of counsel because counsel

⁷ Abrogated on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364–365

suggested considering a plea agreement did not justify removing appointed counsel.

Nor do we agree that “later events” show that Givens’s “loss of faith” in his counsel was justified. Counsel did ask to continue trial and, it appears, did not pursue a motion to sever Givens’s trial from Carroll’s trial. But “ [t]actical disagreements between the defendant and his attorney do not by themselves constitute and “irreconcilable conflict.” ’ ” (*People v Jackson* (2009) 45 Cal.4th 662, 688.) Rather, those were matters within counsel’s discretion and this record shows no substantial impairment of Givens’s rights in connection with them.

III. Senate Bill No. 620

When Givens was sentenced in 2016, the trial court lacked discretion to strike the enhancements found true under section 12022.53, subdivision (b). Givens contends that he is now entitled to the benefit of a new amendment to section 12022.53 giving trial courts discretion to strike an enhancement under that section. (§ 12022.53, subd. (h).) Newly amended section 12022.53, subdivision (h), which became effective January 1, 2018, provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

Although the People correctly concede that the amendment to section 12022.53 applies retroactively to Givens’s case (see generally *People v. Woods* (2018) 19 Cal.App.5th 1080; *In re Estrada* (1965) 63 Cal.2d 740), the People argue that remand is unnecessary. The People point out that the trial court did not exercise its discretion to strike the gang enhancement. Based on

this, the People argue that the court would not have exercised its discretion to impose a lesser sentence. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand to consider striking a prior conviction pursuant to *Romero* unnecessary when the record demonstrated the court would not have exercised its discretion to impose a lesser sentence].) However, the court also imposed concurrent rather than consecutive sentences on the aggravated kidnapping counts and stayed the sentences on the robbery counts. It is therefore unclear to us that the court would not have exercised its sentencing choices differently. The matter must be remanded so that the trial court can exercise its informed discretion. We offer no opinion as to how its discretion should be exercised.

DISPOSITION

The sentence is vacated and the matter is remanded for reconsideration of the sentence in light of Senate Bill No. 620. The judgment of conviction is otherwise affirmed.

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KALRA, J.*

We concur:

LAVIN, Acting P. J.

EGERTON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.