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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB JOHN PULIDO,

Defendant and Appellant.

2d Crim. No. B281726
(Super. Ct. No. 2016000494)
(Ventura County)

Jacob John Pulido appeals judgment after conviction for participating in a criminal street gang (Pen. Code, § 186.22, subd. (a))¹ and assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)). The jury found true an allegation that he committed the assault for the benefit of a street gang, within the meaning of section 186.22, subdivision (b).² It also found true

¹ All further statutory references are to the Penal Code.

² The jury found Pulido's codefendant, Gabriel Cueva, guilty of the same charges. Cueva is not a party to this appeal.

prior strike, serious felony, and prior prison term allegations. It acquitted Pulido of robbery (§ 211).

We conclude sufficient evidence supports the jury's finding that Pulido committed the assault for the benefit of a street gang, and the jury instructions on motive did not unconstitutionally reduce the People's burden of proof on that allegation. We correct the sentence and otherwise affirm.

BACKGROUND

On a December evening, Michael Hurtado walked from his girlfriend's home to the Red Barn Liquors store on Ventura Avenue to buy ice cream and beer.

Hurtado has "805" tattooed across his throat. He testified it stands for "southern Mexican," which is a prison gang. He testified he has never been to prison and he is not a gang member, but he "grew up taught their way," in Santa Paula and he "know[s] [gang] politics"; he "know[s] their ways." He knew the liquor store was in Ventura Avenue Gangsters (VAG) territory, but he had been there before without a conflict.

As Hurtado walked into the store, VAG member Pulido stood at the counter. Hurtado and Pulido had met before. Pulido's tattoos were "a walking billboard of . . . allegiance to Ventura Avenue Gangsters," as his attorney conceded in closing argument. On this occasion, they may have been covered. He wore a Dodger blue sweater and hat, which signify VAG membership, as a gang expert explained at trial.

Pulido stared at Hurtado in a way that Hurtado understood to mean, "Who the fuck are you and what are you doing out there"? Hurtado returned his stare, "[b]ecause if you put your head down you're weak. [¶] . . . [¶] Which means they

know they got you. You stare them back a[nd] they know you're not intimidated -- they're not intimidating you like they should."

Video cameras recorded their interaction and subsequent events. Pulido walked out of the store first. He collected fellow VAG member Gabriel Cueva from an SUV and summoned VAG member Kenneth Cox from the parking lot. When Hurtado walked out of the store they were in place.

Hurtado turned toward his girlfriend's house. Pulido was in his path, urinating on a wall. Hurtado did not want to walk toward Pulido or look at him while he was urinating because it would be "awkward" and they "just had some mean stares in the store." Instead, Hurtado turned toward Cueva to make small talk and "wait Pulido out." Hurtado did not know Cueva was with Pulido.

Cueva asked Hurtado, "where [he] was from." This was a "red flag" to Hurtado. Hurtado testified: "When you get approached on the street and someone asks you where you from and . . . you're not a local from their town, it basically means you're in the wrong place at the wrong time." Hurtado answered that he was from Santa Paula. Hurtado said he told Cueva, "I came in the store for my girlfriend. No disrespect." He told Cueva, "this is his hood. I'm a visitor. And basically I wasn't there for trouble."

Hurtado heard footsteps behind him, and then Cueva punched him in the jaw. Pulido and Cox joined in the attack. They hit and kicked Hurtado in the face, the back of his head, and all over his body. They hit and kicked him down the street toward his girlfriend's home. A neighbor saw the group attacking him, and ran because she was with her children. She said they were kicking him and "wouldn't let him up."

Hurtado had a cut over his nose, bruises on the side of his head where he was kicked, and two broken teeth. He walked back to his girlfriend's house and realized his wallet, keys, and sunglasses were gone. A neighbor found the keys and sunglasses, but not the wallet.

A gang expert testified that Pulido, Cueva, and Cox are VAG members, based on his personal contacts with them. He testified that VAG is a criminal street gang and its primary activities include assaults and battery with serious injury, among other crimes. In his opinion, an assault like this would be for the benefit of the VAG gang. He said that respect is important to gangs, and gang members will respond to disrespect with violence. Violent crimes such as this assault benefit the gang by restoring respect, instilling fear in a neighborhood, discouraging cooperation with police, and enhancing the gang's reputation among other gangs.

DISCUSSION

Sufficiency of Evidence to Support Gang Allegation

Pulido contends there was not sufficient evidence to support the jury's finding that he committed the assault for the benefit of a gang. He points out that no one threw gang signs or called out the gang's name during the assault. Sufficient evidence supports the jury's finding.

Not every crime committed by a gang member is gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).) The gang enhancement requires proof that the underlying crime was committed (1) for the benefit of, at the direction of, or "in association with" a criminal street gang; and (2) with the specific intent to "promote, further, or assist" in

criminal conduct by the gang. (§ 186.22, subd. (b)(1); *Albillar*, at p. 60.)

We review the evidence 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 gang allegation true beyond a reasonable doubt. (*Albillar, supra*, 51 Cal.4th at p. 60.) We do not reweigh the evidence or reassess credibility. (*Ibid.*)

There is substantial evidence that Pulido committed the assault “in association with” the gang because he, Cueva, and Cox came together as a group to attack Hurtado. (*Albillar, supra*, 51 Cal.4th at p. 62.) Hurtado’s testimony and the video evidence demonstrate that Pulido and his fellow gang members backed each other up, relied on each other’s cooperation, and communicated to create a triangle that closed in around Hurtado. It “is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang,” but a jury may conclude that gang members acting together acted in association. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Substantial evidence supports a finding that Pulido assaulted Hurtado with the specific intent to “promote, further, or assist” in criminal conduct by VAG. Hurtado’s testimony, the video evidence, and the expert’s testimony all support the conclusion that Pulido and his fellow gang members beat Hurtado to maintain respect for VAG in its territory. Hurtado was marked with another gang’s tattoo across his throat and returned the stare of a VAG member who was wearing VAG clothing in VAG territory. Pulido went directly outside and

organized two other gang members to confront and beat Hurtado. Cueva issued a gang challenge before the assault, asking Hurtado where he was “from.” Hurtado understood the attack was gang-related, as did the jury. No gang signs or slogans were needed to convey that message.

Pulido argues there was no evidence that the assault actually enhanced VAG’s reputation because there was no evidence the community or other local gangs knew VAG committed it. Proof of success in benefiting the gang is not required: only intent. (§ 186.22, subd. (b)(1).) And the neighbor’s testimony that she ran away with her children demonstrated that the beating instilled fear in the neighborhood, as did Hurtado’s testimony that during the beating a 13-year-old boy cried and yelled for someone to help.

Pulido cites *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930, 936, for the proposition that the unsupported conclusion of a gang expert is not sufficient evidence that an offense is gang-related. Other evidence supported the expert opinion here, as it did in *Ferraez*. In *Ferraez*, the court affirmed a gang enhancement because it was supported by expert testimony that drug sales can enhance a gang’s reputation, coupled with testimony that the defendant intended to sell drugs in gang territory and had the gang’s permission. Here, the enhancement is supported by expert testimony that a violent assault by a group of gangsters in their territory can enhance its reputation, coupled with video and testimonial evidence of a violent assault by a group of VAG members on a member of another gang in their territory.

This case is unlike *People v. Ramon* (2009) 175 Cal.App.4th 843, in which no evidence supported the expert’s

opinion that a gang member who drove a stolen truck in gang territory did so with intent to benefit of the gang. The court vacated the enhancement in *Ramon*, but noted: “The analysis might be different if the expert’s opinion had included ‘possessing stolen vehicles’ as one of the activities of the gang.” (*Id.* at p. 853.) Here, the expert testified that violent assaults are one of the primary activities of VAG. And *Ramon* was decided before *Albillar*. (*Albillar*, *supra*, 51 Cal.4th at p. 63 [“Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of’” the gang].)

Jury Instruction on Motive

Pulido contends the gang enhancement should be vacated because the court gave a motive instruction that reduced the prosecution’s burden of proving specific intent to benefit the gang. The court gave the standard motive and gang enhancements instructions. (CALCRIM 370 & 1401.) Pulido forfeited the claim when he did not object to the instructions. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.)

We may review an incorrect instruction to which no objection was made if it impaired the defendant’s substantial rights. (§ 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) But the motive instruction was in harmony with the intent instruction and did not impair Pulido’s rights by reducing the People’s burden of proof. (*People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1135 (*Fuentes*).) The court instructed the jury that, “the People are not required to prove that a defendant had a motive to commit any of the crimes charged.” It instructed them that, “[t]o prove th[e] allegation [that the crime was gang-

related], the People must prove that . . . the defendant intended to assist, further, or promote criminal conduct by gang members.” There is no conflict between the pattern instructions on motive and the mental-state elements of the substantive offense of criminal-street-gang participation or the sentence-enhancement and special circumstance provisions related to criminal street gangs. (*Fuentes*, at pp. 1135, 1139-1140.)

Pulido attempts to distinguish *Fuentes* because that court did not instruct the jury it could consider proof of the defendant’s gang activity to determine whether he “had a motive to commit the crimes charged,” as the court did here. (CALCRIM 1403.) But this is a distinction without a difference. CALCRIM 1403 refers to “the crimes charged,” not to an allegation. (See *People v. Snow* (2003) 30 Cal.4th 43, 98.) The instructions distinguished between “crimes” and “allegations” throughout. And the instructions as a whole told the jury that, whether or not there was proof of motive, they could only find Pulido’s crime was gang-related if the People proved he committed it with the specific intent to promote, further, or assist criminal gang activity. It is not reasonably likely the jurors were misled.

Unauthorized Concurrent Term for Street Terrorism (§ 654)

The People concede that the trial court erred when it imposed both a four-year term for gang participation and a 16-year sentence for the underlying felony, assault for the benefit of a street gang. (§ 654; *People v. Mesa* (2012) 54 Cal.4th 191, 197-198.) As the prosecutor argued, “the felonious criminal conduct in this case is the robbery and assault with force likely to cause great bodily injury.” We therefore modify the judgment to stay Pulido’s sentence for gang participation.

Presentence Credit Calculation

The trial court erred when it awarded Pulido only one day of presentence credit. He contends he is entitled to 380 days credit, from arrest to sentencing. He is not. He is entitled to presentence credit only for the 244 days during which his custody was solely attributable to this case. (§ 2900.5, subd. (b).)

Pulido was arrested in this case on January 7, 2016. Eight months later, on September 6, the court sentenced him in another case. Four months later, on January 20, 2017, the court sentenced him in this case, it resentenced him in the other case, and declared that the sentences run concurrently. (§ 669, subd. (a).)

The court gave Pulido presentence credit for one day in this case and 756 days in the other case, consisting of 378 days actual time and 378 days conduct time. Pulido is entitled to credit from the date of his arrest (January 7, 2016) to the date of sentencing in the other case (September 6, 2016): 244 days. This is the period that is solely attributable to conduct in this case. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) He should therefore receive 244 days of credit for actual custody and 244 days of conduct credit for a total of 488 days.

Pulido contends he is entitled to credit from the date of arrest to the date of sentencing in this case (from January 7, 2016, to January 20, 2017), regardless of his September sentencing in the other case. He points out that a defendant who serves concurrent sentences imposed at the same time for unrelated crimes is entitled to presentence custody credits on each sentence, “provided he is not also in postsentence custody for another crime.” (*People v. Kunath* (2012) 203 Cal.App.4th

906, 908.) But Pulido was in postsentence custody for the other crime after September 6, 2016, when he was sentenced.

Pulido contends he was not in “postsentence custody” for the other crime until he was delivered to prison. He relies on section 2900, subdivision (a), which provides that a “term of imprisonment” commences with delivery to custody of the Director of Corrections. He also relies on the statement in a section 1170.1 case that “[a]fter sentencing and before delivery, the defendant’s custody is considered presentence time to be credited against the actual prison term.” (*People v. Holdsworth* (1988) 199 Cal.App.3d 253, 258.) But the court in *Holdsworth* was not calculating presentence credits. It was deciding whether section 1170.1, subdivision (c)’s imposition of full consecutive terms for offenses committed “in prison” applies to offenses committed in jail by a sentenced felon awaiting delivery to prison. The court concluded it does not apply, because the offense was committed in jail, not “in prison.”

The question here is not whether Pulido was “in prison” or serving his “prison term.” The question is whether his custody was attributable solely to his conduct in this case. That Pulido was later resentenced in the other case does not change the calculation. From September 6, 2016, until January 20, 2017, he was a sentenced prisoner in the other case and his custody was not solely attributable to his conduct in this case.

Finally, we do not decide Pulido’s contention that the court miscalculated his credits in other cases, because he did not file a notice of appeal in those cases or provide an adequate record for our review.

DISPOSITION

The judgment is modified to stay Pulido's sentence for gang participation (§ 186.22, subd. (b)(1)) pursuant to section 654, and to award Pulido 488 days of presentence custody credit, consisting of 244 actual days and 244 days conduct credit. The clerk of the superior court is ordered to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gilbert A. Romero, Judge
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