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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO OCHOA,

Defendant and Appellant.

B251608

(Los Angeles County
Super. Ct. No. NA077110)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Fernando Ochoa was convicted by jury of first degree murder (Pen. Code, § 187, subd. (a)).¹ The jury also found true the allegations that appellant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b)–(d)), and that he committed the murder for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). Appellant was sentenced to 50 years to life in state prison: 25 years to life for murder, plus 25 years to life for the section 12022.53, subdivision (d) firearm enhancement.

Appellant's sole contention is that there was insufficient evidence to support the jury's true finding on the gang enhancement allegation.² We disagree and affirm.

FACTS

Prosecution Evidence

Events Leading to Murder

At 11:30 p.m. on January 12, 2008, appellant's brother and a friend were sitting outside a home in Wilmington, California, drinking and listening to music. Ernesto Romero (Romero), a member of the Westside Wilmas gang, approached them after Romero's god brother told Romero that he had been choked earlier that night by the friend of appellant's brother. Romero attacked the friend. Appellant's brother joined the fight and was knocked out. When he came to, he learned that his car (an Infiniti QX4) and some other belongings had been stolen. Romero and others left the scene in the Infiniti.

Romero went to the home of his friend and fellow Westside Wilmas gang member Alfred McCullin (the victim). They learned that appellant, who was a higher ranking

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The People point out that while the gang enhancement did not affect appellant's sentence, the jury's true finding remains and "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." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1009.)

member of the Westside Wilmas gang, was looking for whoever beat up his brother and demanding return of the Infinity. At the time of the attack, Romero did not know one of the men was appellant's brother. Romero "was calling everyone" trying to reach the person who had the Infinity so they could return it to appellant and explain what happened. They were delayed from doing so that night because they had to take the victim's girlfriend to the hospital after she cut her hand.

The Murder

The following day, January 13, 2008, Romero, the victim, and appellant were supposed to meet at a house on Ravenna Avenue in Wilmington, that was a Westside Wilmas gang hangout. By the time Romero and the victim arrived, the Infinity had already been parked down the street out of view of the house. The victim went to the front of the house to smoke a cigarette and Romero went into the backyard. Romero heard appellant and the victim arguing. Appellant was looking for Romero. Romero began walking toward the front of the house. He heard appellant tell the victim, "[Y]ou're not going to touch my little homie no more." As Romero rounded the front corner of the house, he saw appellant shoot the victim. Romero ran into the backyard and hopped a fence, fearing that he would also be shot.

A neighbor who lived on Ravenna Avenue heard about four gunshots at around 12:25 p.m. on January 13, 2008. When he looked out the window, he saw a Hispanic man walk toward the driver's side of a White Dodge Magnum and then drive away. The man was about 25 to 30 years old and was wearing a black hoodie. At the time, appellant was 27 years old and regularly drove his mother's white Dodge Magnum.

The victim died of multiple gunshot wounds, suffering wounds to his chest, abdomen, neck, and grazing wounds to his arm, hand, and side of his head. Four nine-millimeter Luger Speer shell casings and two bullet fragments were recovered from the scene.

Investigation

On January 14, 2008, police executed a search warrant on appellant's house. They recovered two nine-millimeter Luger Speer bullets in a dresser in a bedroom. A piece of

mail addressed to appellant was found on top of the dresser. Appellant's fingerprints were found inside and outside of his mother's Dodge Magnum.

A day or two after the shooting, Romero saw the victim's mother at a carwash. Romero was crying and emotional. She told Romero that if he knew anything about the shooting, he should tell the police. Romero was arrested that day for vehicle theft, and gave a statement to police about the shooting, identifying appellant as the shooter. The interview was played for the jury.

On August 17, 2011, three and one-half years after the murder, appellant was arrested in Tijuana, Mexico.

Gang Evidence

Los Angeles Police Department Officer Mark Maldonado testified as a gang expert. He was familiar with the Westside Wilmas gang, whose primary activities included murder, attempted murder, narcotics sales and use, and grand theft auto. The areas of the fight and the victim's shooting are within the gang's territory. Officer Maldonado had met appellant a couple of times and appellant admitted being a member of the Westside Wilmas gang. Appellant's moniker was "Seco," and he has gang tattoos, including on his face and neck. In 2008, appellant "was considered one of the older, more well-respected gang members within the gang." Neither Romero nor the victim had appellant's well-respected status within the gang.

Officer Maldonado testified that in gang culture, respect is "everything" and is earned through violence. When an individual gang member commits violence, his status within the gang is elevated, and the gang's status among other gangs is also elevated. Gangs use fear to intimidate community members into not cooperating with police, so the gangs can continue to commit crimes. "Snitching" on a fellow or rival gang member is the "lowest" thing a gang member can do.

Based on a hypothetical scenario involving the facts of this case, Officer Maldonado opined that the shooting was committed for the benefit of a criminal street gang. Officer Maldonado explained that when a gang member of high status is disrespected by a member of lower status, for example, by stealing the car of the older

member's brother, the older member has to punish the lower-status member or else lose his respect and status within his gang. Demanding return of a stolen car is "basically ruling with an iron fist," and the older gang member has to back up that demand. By showing that the gang's members are willing to kill their own in disputes, the older gang member elevates the gang's status within the community.

Defense Case

A neighbor who lived a block away from Ravenna Avenue heard four or five shots the day of the murder. A few minutes later, a man jumped over a fence into the neighbor's backyard. The man was wearing a black hoodie. The neighbor did not see a gun on the man. He told the man to leave.

Romero's sister was in court when the recording of her brother's statement to the police was played for the jury. She testified that Romero lied in the recording. In January 2008, she lived at the gang hangout on Ravenna. When the shooting occurred, she was in her backyard. She heard three or four gunshots. She ran to the front of her house and saw the victim lying on the ground. She did not see anyone running away, and did not see her brother. She tried to help the victim, who was gasping. She ran inside when the police arrived. When the police came to her door, she ran out of the back door and jumped over a fence. She was never interviewed before her testimony. The majority of her family members were Westside Wilmas gang members. At the time of trial, she still lived in Wilmington.

Prosecution Rebuttal Evidence

Officer Maldonado opined from the fact that Romero's sister was well-educated "in the gang life and how things work" that she was lying to protect her brother from any retribution for having originally snitched on appellant.

DISCUSSION

Appellant contends there was insufficient evidence to support the jury's true finding on the gang enhancement allegation because there was insufficient evidence that the crime was committed for the benefit of, at the direction of, or in association with a

criminal street gang, or with the specific intent to promote, further, or assist in criminal conduct by gang members. We disagree.

I. Standard of Review and Relevant Law

A defendant raising a claim that the evidence was insufficient to support his conviction bears a “massive burden” because this court’s “role on appeal is a limited one.” (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.) “In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Hoang* (2006) 145 Cal.App.4th 264, 275.) We do not reweigh evidence, reappraise the credibility of witnesses, or resolve conflicts in the evidence, as these functions are reserved for the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) This standard also applies when determining whether the evidence is sufficient to sustain a jury finding on a gang enhancement. (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56.) Reversal is not warranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 186.22, subdivision (b)(1), provides that “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,” shall receive additional punishment. The enhancement therefore has two prongs—the benefit prong and the intent prong. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

II. Substantial Evidence Supports the Jury's True Finding

A. Benefit Prong

The gang expert opined that the shooting benefited appellant's gang. "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 . . . a[] criminal street gang.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 63; see also *People v. Rodriguez* (2012) 55 Cal.4th 1125, 11381139 [section 186.22, subdivision (b)(1) may apply to lone gang member who commits a gang-related crime].)

Contrary to appellant's assertion, the gang expert explained the basis for his opinion. Officer Maldonado testified that respect, earned through violence, is the most important aspect of gang culture and that lower-level gang members must show respect to more senior members. Appellant's statement to the victim not to touch his "homie" showed that appellant, a senior gang member, believed that the victim, a lower-level member, was being disrespectful for beating appellant's brother and failing to obey appellant's directive to return the stolen car. If appellant had allowed the victim to go unpunished, appellant would have shown weakness, which is not tolerated in gang culture. By shooting the victim, appellant showed his own strength. The shooting also benefited the gang by showing the gang's intolerance for disrespect and propensity for violence. As Officer Maldonado explained, "the representative of that gang just shows how violent Westside Wilmas is, they kill their own in disputes." The gang's reputation for being violent would therefore be enhanced in the community and among other gangs.

We reject appellant's argument that the evidence supports only one finding—that the shooting was motivated by personal revenge. Had appellant wanted to avenge his brother's beating and the theft of his vehicle for purely familial reasons, appellant would have gone to Romero's home and killed him the night of the beating. Instead, appellant arranged a meeting with Romero and the victim at the gang's hangout, and killed the victim in broad daylight in front of other gang members. By doing so, appellant sent a message to lower-level gang members that disrespect would not be tolerated.

Additionally, the fact that appellant did not announce the gang's name during the shooting or brag about the shooting afterward is of no import. All three individuals—appellant, the victim, and Romero—were all members of the same gang, and the shooting occurred at the gang's hangout. Thus, there was no need for appellant to state the gang's name or to brag about the shooting. As the gang expert testified:

“Q. Officer [Maldonado], a well-respected gang member in a gang puts out that he wants an item returned, next day in broad daylight on a street that his gang claims, he shoots and kills an individual attempting or in the process of explaining what had happened the night before. [¶] There is no bragging needed in that situation, is there?

“A. No.

“Q. Sends a message, doesn't it?

“A. Yes, it does.”

We are satisfied the evidence shows that the murder benefited appellant's gang.

B. Intent Prong

For the second prong of the enhancement, all that is required is a specific intent “to promote, further, or assist in *any* criminal conduct by gang members.” (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 322, italics added.)

As the gang expert testified, the murder benefitted the Westside Wilmas gang by showing the gang's violence and therefore elevating the gang's status among other gangs and creating fear of the gang in the community. The more the community and other gangs feared the Westside Wilmas gang, the more crimes the gang could commit and the more business they could do. By committing the murder, appellant allowed his gang to more easily commit future crimes. Thus, the jury could reasonably infer that appellant committed the murder with the intent to assist future criminal conduct by his fellow gang members. (See *People v. Vazquez* (2009) 178 Cal.App.4th 347, 353 [“A reasonable jury could infer . . . that appellant intended for the . . . murder to have the predicted effect of intimidating rival gang members and neighborhood residents, thus facilitating future crimes committed by himself and his fellow gang members”].)

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT