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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.

ALFONSO ESPARZA CURIEL,

Defendant and Appellant.

2d Crim. No. B291475
(Super. Ct. No. 1461349)
(Santa Barbara County)

Alfonso Esparza Curiel appeals after a jury convicted him of possession of a controlled substance with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 2) and possession of a firearm by a felon (Pen. Code,¹ § 29800, subd. (a)(1); count 3).²

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

² Appellant was also charged with extortion by fear or force (§§ 518, 519) with attendant gang and prior serious felony enhancement allegations. The jury acquitted him of that charge,

The jury also found that appellant committed the offenses on behalf of a criminal street gang (§ 186.22, subd. (b)(1)). In a bifurcated proceeding, the trial court found true allegations that appellant had suffered a prior strike and serious felony conviction (§§ 667, subds. (a)(1), (e)(1)) and had served a prior prison term (§ 667.5, subd. (b)). The trial court sentenced him to a total term of 19 years and four months in state prison. Appellant contends (1) the evidence is insufficient to support the gang enhancements; (2) the court erred in allowing the prosecution to amend the information to include the prior serious felony allegations; (3) the case must be remanded for the court to exercise its discretion whether to dismiss the five-year prior serious felony enhancement; and (4) he was sentenced in violation of section 654.

We reverse the true findings on the gang enhancement allegations. Appellant was alone when he committed his crimes. Although the evidence overwhelmingly establishes that he is a gang member and that he possessed both methamphetamine and a firearm, it is insufficient to prove beyond a reasonable doubt that he committed the offense with the requisite intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Rios* (2013) 222 Cal.App.4th 542, 563 (*Rios*), citing *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1140–1141 (conc. opn. of Baxter, J.)) In light of our conclusion, the true findings on the prior serious felony enhancements—which are based on appellant’s conviction of gang offenses—must also be reversed. We shall also order that appellant’s sentence on count 3 be stayed pursuant to section

which is based on a different incident than the one upon which his convictions on counts 2 and 3 are based.

654. Appellant's resulting sentence is eight years in state prison. Otherwise, we affirm.

STATEMENT OF FACTS

On August 25, 2015, Santa Maria Police Detective Alex George was working undercover in an unmarked vehicle when he saw appellant driving a white Acura. Detective George recognized appellant and his vehicle from prior contacts and knew there was a warrant for his arrest. The detective reported the incident on his police radio and requested assistance.

Officer Matthew Holton heard the radio call, began following appellant on his police motorcycle, and initiated a traffic stop. Appellant stopped in front of a residence. Officer Holton saw appellant reach toward his right front pants pocket. The officer immediately drew his weapon and ordered appellant to raise his hands. Appellant immediately complied and was handcuffed and searched. Appellant had a loaded semiautomatic firearm wrapped in a handkerchief in his right front pants pocket and a container with 2.249 grams of methamphetamine in another pocket. During a booking search, a small amount of methamphetamine wrapped in cellophane and tissue was found in his left front pants pocket.

Appellant is a documented member of Santa Maria's West Park criminal street gang. Jairo Garcia, a former West Park member, was called to testify for the prosecution as an alleged accomplice to the extortion charge of which appellant was ultimately acquitted.³ Garcia testified that "West Park is a gang

³ The extortion charge was based on an alleged October 2015 incident in which appellant and Garcia extorted "tax" from a clothing store owner on behalf of West Park. In a separate proceeding, Garcia pleaded guilty to extortion by force or fear (§§

that's under the umbrella of the Mexican Mafia basically, we're the soldiers making money for them, collecting everything, taking over the drug trade, everything in our city." West Park is required to make a \$500 monthly payment to the Mexican Mafia, and members of the gang can make money by "[s]elling drugs or extorting people." Garcia also testified that gang members carry guns "[t]o shoot at rivals and protect yourself" and "[t]o protect our little homeys from the rivals." A member of the gang also generates fear and respect "[b]y committing crimes and getting as many . . . rivals as you can."

Santa Maria Detective Michael Parker testified as the prosecution's gang expert. West Park is a criminal street gang whose primary symbols are the letters "W" and "P." The gang's primary activities include assault and robbery. Appellant is a West Park member and has numerous gang-related tattoos.

Detective Parker also testified that a gang member's reputation within the gang is elevated by committing crimes and earning money for the gang. New gang members will commit "low-level" crimes to demonstrate their commitment to the gang, then commit more serious crimes to improve their reputation within the gang. In response to a hypothetical based on the facts offered to prove the extortion charge, Detective Parker opined that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.

518, 519) and active gang participation (§ 186.22, subd. (a)). Pursuant to his plea, he agreed to testify truthfully in this matter and two other criminal cases.

DISCUSSION

Sufficiency of the Evidence – Gang Enhancements (§ 186.22, subd. (b))

Appellant contends the gang enhancement findings must be reversed for insufficient evidence. We agree.

“In considering a challenge to the sufficiency of the evidence 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. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’” (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*).) “[S]peculation, supposition and suspicion are patently insufficient to support an inference of fact.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951 (*Franklin*).)

“Section 186.22, subdivision (b)(1), enhances the sentence 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.’” (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170 (*Livingston*).) A gang enhancement under section 186.22, subdivision (b)(1) has two elements or

prongs—the gang-related crime prong, and the specific intent prong. (*Albillar, supra*, 51 Cal.4th at pp. 60, 65.)

Under the first prong, the prosecution must show the underlying crime was gang-related, i.e., committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Albillar, supra*, 51 Cal.4th at p. 67.) “Not every crime committed by gang members is related to a gang”; even when gang members commit a crime together, that crime may not be gang-related. (*Id.* at p. 60.) Mere membership in, or association with, a criminal street gang does not suffice to support the gang-related prong. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657, 665.)

Under the second prong, the prosecution must show the defendant acted with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*Livingston, supra*, 53 Cal.4th at p. 1170.) Specific intent “is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.” (*Rios, supra*, 222 Cal.App.4th at pp. 567–568.) Although the specific intent prong may be met where the defendant acted alone, expert testimony that the defendant intended to benefit a gang, in the absence of underlying facts to support the opinion, is insufficient to prove the specific intent prong of the enhancement. (*Id.* at p. 575; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [“[T]he typical close case is one in which one gang member, acting alone, commits a crime”].)

There is an ever-growing body of caselaw in which reviewing courts have reversed gang enhancement findings against defendants who did not act with other gang members in

committing their crimes.⁴ *Rios, supra*, 222 Cal.App.4th 542 is particularly instructive here. In that case, officers impounded a stolen car driven by the defendant and found an unregistered revolver under the front passenger seat. (*Id.* at pp. 547–548.) The defendant was subsequently charged with vehicle theft and carrying a loaded firearm in a vehicle with attendant gang enhancement allegations. At trial, the prosecution’s gang expert opined that the defendant was an active gang member based on, inter alia, his prior admissions, his tattoo, and gang-related apparel retrieved from the stolen car. (See *id.* at pp. 551–553.)

In response to a hypothetical question, the expert also opined that the defendant committed the crimes with the specific intent to promote, further, or assist in criminal conduct by gang members. (See *Rios*, at pp. 573–574.) With respect to the vehicle theft, the expert stated that a stolen vehicle allowed gang

⁴ (See, e.g., *Franklin, supra*, 248 Cal.App.4th at p. 950 [insufficient evidence where crime of false imprisonment was carried out in both gang and non-gang territory and defendant’s fellow gang members were unaware of the crime]; *People v. Ramirez* (2016) 244 Cal.App.4th 800, 819 [insufficient evidence where no gang signs were displayed by the defendant, no gang names called out, and no gang attire worn, nor other evidence tying dispute to gang]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [insufficient evidence where there was no evidence defendant carrying a knife was in gang territory or planned to use knife in gang-related offense]; *People v. Perez* (2017) 18 Cal.App.5th 598, 613–614 [evidence gang member with tattoos shot students at party insufficient to show specific intent]; *People v. Ochoa, supra*, 179 Cal.App.4th at pp. 663-665 [insufficient evidence to prove gang enhancement where gang member committed carjacking alone and expert testimony alone connected the crime to the gang].)

members to circumvent “perimeter[s]” set up by law enforcement to catch them as well as to “assist other gang crimes” such as drive-by shootings. (*Id.* at p. 574.) With respect to the firearm charge, the expert offered that firearms “protect [the gang’s] drug sales territory and other gang members,” “make[] it easier for gang members to commit crimes,” and “boost[] the fear in the community.” (*Id.* at p. 573.)

In reversing the gang enhancement findings for insufficient evidence, the Court of Appeal reasoned among other things that “the prosecution could have presented evidence that another gang member had directed defendant to steal a car to use in a robbery, or that defendant was transporting the loaded gun from one gang member to another to use in a robbery or drive[-]by shooting. There was no such evidence. . . . [D]efendant never admitted that he stole the car or transported the gun to promote, further, or assist in any criminal conduct by gang members.” (*Rios, supra*, 222 Cal.App.4th at pp. 572–573.) The court further noted there was no evidence the defendant had brandished the firearm, called out or displayed gang signs, or that he had used the stolen vehicle to transport fellow gang members or with the intent to commit, promote, or facilitate other gang-related activity. (*Id.* at pp. 572–574.)

Here, the evidentiary showing as to the gang enhancements is even weaker. Appellant was found in possession of approximately two grams of methamphetamine and a firearm. The prosecution did not charge him with possessing the methamphetamine for sale and presented no evidence that he did so, much less on behalf of his gang. The record is also devoid of any evidence that appellant brandished or otherwise displayed the firearm, that he wore gang clothing, flashed gang signs, or

uttered gang slogans, or that he made any statements or engaged in any other behaviors that would support a finding that the committed crimes were gang offenses.

Moreover, the prosecution's expert did not offer any opinions whether the crimes charged in counts 2 and 3 were gang offenses. The expert was merely asked a hypothetical question based on the facts offered to prove count 1, the extortion charge of which appellant was ultimately acquitted. Although the People note that their expert also offered testimony regarding gang members in general, that testimony was substantially similar to the expert testimony found lacking in *Rios*. (See also *In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199 [reversing gang enhancement where "the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue" of whether the crime was committed for the benefit of, at the direction of, or in association with a gang].) Garcia's testimony that West Park members carry guns for gang-related purposes and that members of the gang can earn money by selling drugs is similarly unavailing.

The People make no effort to distinguish *Rios* or the other cases cited by appellant in which gang enhancements against lone actors have been reversed for insufficient evidence. Instead, they merely refer to the aforementioned generic, nonspecific testimony regarding gang culture and the behaviors and motivations of gang members in general. In their arguments below and on appeal, the People have also essentially conflated the two prongs set forth in subdivision (b)(1) of section 186.22. Although a showing that a defendant committed a crime *in association with other gang members* may be sufficient to support

a finding that the crime was also committed with the specific intent to promote, further, or assist in criminal conduct by gang members (*People v. Leon* (2008) 161 Cal.App.4th 149, 163), appellant acted alone.

To uphold the gang enhancement findings in this case, we would essentially have to conclude that the gang enhancement may be applied to any gang member who unlawfully possesses methamphetamine and a firearm. “Such a holding would convert section 186.22(b)(1) into a general intent crime. The statute does not allow that. [Citations.] [Citation.]” (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1364.) Accordingly, the gang enhancement findings must be reversed.

Because the court’s true findings on the prior serious felony allegations are premised upon appellant’s conviction of gang offenses (§§ 667, subd. (a)(1), 1192.7, subd. (c)(28)), those findings must also be reversed. Retrial of these allegations is barred by double jeopardy principles. (See *People v. Seel* (2004) 34 Cal.4th 535, 550 [double jeopardy clause bars retrial of premeditation allegation based on insufficiency of the evidence].)⁵

§ 654

In sentencing appellant on count 3 (possession of a firearm by a felon), the court ordered that the term run consecutive to the principal term imposed on count 2 (possession of a controlled substance with a firearm). Appellant contends, and the People concede, that the sentence on count 3 should have been stayed

⁵ In light of our conclusion, appellant’s additional contentions regarding the prior serious felony enhancements are moot. The People’s claim that the abstract of judgment must be corrected to reflect that the prior serious felony enhancement was imposed under subdivision (a)(1) of section 667 rather than subdivision (d)(1), is also moot.

pursuant to section 654 because his convictions on both counts were based on a single possession of a firearm. (*People v. Jones* (2012) 54 Cal.4th 350, 357.) We shall order the judgment modified accordingly.

DISPOSITION

The true findings on the gang and prior serious felony allegations are reversed and the sentence enhancements imposed pursuant to those findings are stricken. The sentence on count 3 is ordered stayed pursuant to section 654. The abstract of judgment is modified to reflect these changes, which result in a total state prison term of eight years on count 2 and a stayed 16-month term on count 3. The superior court clerk shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Michael J. Carrozzo, Judge

Superior Court County of Santa Barbara

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