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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.

JOSE CORTEZ,

Defendant and Appellant.

2d Crim. No. B280739
(Super. Ct. No. 2014020209)
(Ventura County)

Jose Cortez appeals after a jury convicted him of robbery (Pen. Code,¹ § 211) and found true allegations that he personally used a firearm (§§ 12022.5, former subd. (a)(1), 12022.53, subd. (b)) and committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). In a bifurcated proceeding, the trial court found true allegations that appellant had prior serious felony and strike convictions (§§ 667, subds. (a)(1), (c)(2) & (e)(2)(C), 1170.12, subds. (a)(2) & (c)(2)(C)) and had served two prior prison terms (§ 667.5, subd. (b)). Appellant was sentenced

¹ All further undesignated statutory references are to the Penal Code.

to 40 years to life in state prison. He contends (1) his trial attorney provided ineffective assistance by failing to challenge the expert testimony regarding his gang tattoos; and (2) the evidence is insufficient to support the court's true finding on the prior strike allegations. We affirm.

STATEMENT OF FACTS

The Offense

At about 9:30 p.m. on June 26, 2014, brothers Israel and Natividad Vasquez were walking toward their home in Oxnard when appellant and a woman rode up to them on bicycles. Appellant had a "CO Boys" tattoo above one of his eyebrows, a "CO" tattoo on one hand, and a "CH" tattoo on his other hand. The tattoos led Israel² and Natividad to believe appellant was a member of the Colonia Chiques gang because they knew that the letters "COCH" referred to the gang.

Appellant offered to sell the bicycle he was riding for \$50. Israel and Natividad both declined the offer. After speaking to his companion, appellant offered to sell the bicycle for \$30. The brothers again declined. At that point, appellant displayed the handgun he was carrying in his waistband. He told the brothers he had a "cuete" (Spanish for gun) and two clips for it and ordered them to empty their pockets. Fearing for his life, Israel gave appellant his iPod Touch along with the password for the device. Israel also handed over about \$18 in cash. Natividad did not have anything in his pockets.

Appellant rode into an alley, stopped to put on a black jacket with red lettering on it, then rode away out of sight as his companion rode off in another direction. Israel ran home, got in

² For clarity and ease of reference, we refer to Israel and Natividad by their first names only.

his car, and drove around the area looking for appellant. Israel called 911 as he was driving and described appellant and his tattoos. Natividad also called 911 and stayed in front of his residence until the police arrived.

After speaking to the police, Natividad went to a liquor store near the location of the robbery and asked if he could watch the store's video surveillance recording. As Natividad was still inside the store, appellant approached him and said he wanted to return the property he had stolen from Israel. Appellant told Natividad he wanted to talk to him outside, but Natividad declined. Natividad texted Israel about his encounter with appellant and also reported it to the police.

At about 9:35 p.m. that same night, Oxnard Police Officer Greg Utter was patrolling in the area of the robbery and saw three men and a woman standing in the front yard of a residence. One of the men was wearing a black sweatshirt with red lettering and an orange BMX bicycle was in the driveway. The man saw Officer Utter's patrol car and ran away through the backyard of the house.

The woman was taken into custody on an outstanding warrant. During an in-field showup, Israel identified the woman as having been with appellant at the time of the robbery. Israel also identified the orange BMX bicycle as the one appellant was riding when he committed the robbery. Later that night at the police station, Israel and Natividad both identified appellant from a series of photographs. Natividad also identified appellant as the perpetrator from the liquor store's video surveillance footage.

Gang Evidence

Oxnard Police Officer Carey Everhart, who viewed the video surveillance footage along with Natividad, recognized

appellant as a Colonia Chiques member. Appellant's gang moniker was "Miclo" and he had gang tattoos on his face, neck, and hands. Officer Everhart arrested appellant a few days after the robbery.

Oxnard Police Detective Jose Velazquez testified as the prosecution's gang expert. The Colonia Chiques gang's primary activities include robbery, carjacking, drug sales, and homicide. These crimes build the gang's reputation and instill fear in the community; individual gang members commit the crimes to build their own reputations within the gang.

Colonia Chiques members use common signs and symbols to identify the gang, including tattoos or graffiti of "CO" for Colonia and "CH" for Chiques. "Co Boys" and "ES" (which stands for East Side) are also commonly used. Appellant had previously identified himself to Detective Velasquez as a member of the gang and had several gang tattoos, including "ES" on one sideburn and "CH" on the other. Appellant also has "COCH" tattooed on his neck and hands and has "CO" tattooed on his right arm. Detective Velazquez opined that these types of tattoos were "earned" and indicated that appellant likely earned his tattoos by committing violent crimes on behalf of his gang.

In response to a hypothetical tracking the facts of the case, Detective Velasquez opined that the crime was committed for the benefit of, in association with, or at the direction of the Colonia Chiques gang. The hypothetical robber was essentially a "walking billboard" for his gang due to his tattoos, such that he did not have to verbally identify himself as a member of the gang to others in the community.

After Detective Velasquez testified, the parties stipulated that (1) Colonia Chiques is a criminal street gang with a common name and identifying signs and symbols; (2) the gang's members

have engaged in primary activities set forth in section 186.22, subdivision (e); and (3) the gang's members, acting alone or together, have engaged in the requisite pattern of criminal activity.

Defense

Melissa Rodriguez, who was appellant's girlfriend at the time of the robbery, testified that he was probably with her at the store or her house when the crime occurred. A laser scanning expert who reviewed the video footage from the liquor store opined that the person identified as appellant was 5 feet and 6 inches tall with a one-inch margin of error, while appellant's jail records indicated that he is 5 feet and 8-and-a-half inches tall.

DISCUSSION

Ineffective Assistance of Counsel

Appellant contends his trial counsel provided ineffective assistance by failing to object to Detective Velasquez's testimony that appellant had likely "earned" his gang tattoos by committing crimes on behalf of the Colonia Chiques. He claims this testimony violated the parties' stipulation, which effectively precluded the prosecution from introducing any of appellant's prior convictions to prove that the Colonia Chiques had engaged in a pattern of criminal activity as set forth in subdivision (b) of section 186.22. Appellant further claims that the error was prejudicial. Neither claim has merit.

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's

deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) The failure to raise an unmeritorious objection does not amount to deficient performance. (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24.)

To prove the gang enhancement allegation, the prosecution had to establish that appellant committed the robbery for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, as provided in section 186.22, subdivision (b)(1). A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the [enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" is defined in relevant part as "the commission . . . or conviction of two or more" enumerated offenses within the prescribed time period. (*Id.*, subd. (e).) Moreover, the offenses must have been committed on separate occasions or by two or more persons. (*Ibid.*)

Prior to trial, appellant offered to stipulate that the Colonia Chiques was a criminal street gang. The prosecution objected to the proposed stipulation and stated that it planned to introduce appellant's 2004 prior convictions for robbery and burglary "as pattern offenses for the gang" along with four additional

predicate offenses committed by other Colonia Chiques members. The prosecutor asserted that evidence of these offenses was relevant to prove the gang enhancement and that appellant's proposed stipulation would interfere with his examination of Detective Velasquez. Defense counsel countered that the proposed stipulation would not preclude Velasquez from testifying about appellant's tattoos and their significance and that "[t]he purpose of the stipulation is just to remove the need for the predicates and the two or more people."

The court ultimately ordered a stipulation that (1) Colonia Chiques is a criminal street gang that has a common name and identifying signs and symbols; (2) members of the gang have engaged in the primary activities set forth in section 186.22, subdivision (e); and (3) the gang's members, either individually or collectively, have engaged in a pattern of criminal activity. The court made clear that notwithstanding the stipulation, the prosecution still had to prove that appellant was a Colonia Chiques member and that his crime was committed for the benefit of his gang. The court also stated that the stipulation would be revisited if it interfered with the prosecution's presentation of its case.

At trial, Detective Velasquez opined that appellant's numerous tattoos rendered him "kind of like a walking billboard. He's promoting the gang." The prosecutor subsequently asked, "[C]an anybody just walk in and say, I want a Colonia Chiques tattoo across my chest?" The detective replied, "I try to use the analogy of Boy Scouts. There are pins. Like Boy Scouts, they have ribbons for the good deeds that they commit like community service [In the] gang subculture, . . . the more violent crimes you commit on behalf of the gang, you earn your tattoos. So if somebody were to get a tattoo of this nature, you have to earn

that tattoo. You can't just show up any day with a COCH on your throat or on your chin. And that's what obtaining a tattoo of that nature [does], you gain more respect amongst your peers and you instill more fear and intimidate rival gang members."

Appellant contends his trial counsel provided ineffective assistance by failing to object to this testimony because it violated the court-ordered stipulation. We disagree. As characterized by appellant's trial counsel, the stipulation was intended to preclude the admission of appellant's prior convictions to prove that his gang had engaged in the requisite pattern of criminal activity. Counsel expressed his understanding that the stipulation would not prevent Detective Velasquez from offering opinions regarding the meaning and significance of appellant's tattoos. Counsel also acknowledged that "it is permissible and I anticipate that the gang expert will be asked and will reply that people in Colonia have done everything from murder on down . . . and [the expert is] permitted, I think, to discuss that."

Because the challenged testimony did not violate the stipulation, counsel's failure to object to that testimony did not amount to deficient performance. (*People v. Solomon, supra*, 49 Cal.4th at p. 843, fn. 24.) Moreover, the testimony was highly relevant and probative of whether appellant committed the crime to benefit his gang. (See *People v. Albillar* (2010) 51 Cal.4th 47, 62 [expert witness testified that gang tattoo on defendant's face "shows that the individual has a lot of love for that gang and is continually representing the gang and his affiliation with it"].)

Even if counsel should have objected, the error would be harmless. There was ample independent evidence that appellant committed the charged offense, that he is a member of the Colonia Chiques gang, and that he committed the offense for the

benefit of that gang. Because it is not reasonably probable that appellant would have achieved a more favorable result had counsel objected to the challenged testimony, appellant's claim of ineffective assistance also fails for lack of prejudice. (*People v. Mai, supra*, 57 Cal.4th at p. 1009.)

Proof of Strike Priors

Appellant claims the evidence is insufficient to support the court's true finding on the allegations that he was convicted of two strike priors in 2004. He offers that the prison packet admitted to prove the allegations contained references to both "Jose Cortez" and "Jose Cortes" and conflicting references to the defendant's year of birth (i.e., 1984 and 1985). He also claims that one of the photographs offered to establish that both names refer to him—which due to his distinctive tattoos "leave[s] little doubt that he is the individual" depicted therein—is insufficient to establish his identity as "Jose Cortes" because it "lacks any indicia of reliability" and among other things "appears to . . . have been copied and compiled with a separate sheet of paper stamped with the words, 'BEST COPY AVAILABLE' on the side of the page." He goes on to offer that the signature on his 2004 plea agreement (a printed version of "Jose Cortes") and the cursive signature on the image of his driver's license (which states his name as Garibay Cortez Jose Luis) "do not (to the layman's eye) resemble one another." Finally, he complains that "[t]he prosecution did not call a fingerprint expert to compare Jose Cortes' fingerprints to those of appellant."

Appellant's claim of insufficient evidence fails. As he acknowledges in his reply brief, he essentially claims that the photograph and other evidence offered to prove the truth of his strike priors was admitted without proper foundation or authentication. Because he did not object on such grounds below,

he forfeited these objections on appeal and cannot simply recast his claim as one of insufficient evidence. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 655 [a criminal defendant “ordinarily cannot obtain appellate relief based upon grounds that the trial court might have addressed had the defendant availed himself or herself of the opportunity to bring them to that court’s attention”].) In any event, the proffered evidence was plainly sufficient to prove appellant’s identity as both Jose Cortez and Jose Cortes, and that he was convicted of two strikes (robbery and burglary) on August 25, 2004.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Charles W. Campbell, Jr., Judge
Superior Court County of Ventura

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