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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.

ANDRES GONZALEZ,

Defendant and Appellant.

2d Crim. No. B275213
(Super. Ct. No. LA080066)
(Los Angeles County)

Andres Gonzalez appeals his conviction by jury of shooting at an inhabited dwelling (Pen. Code, § 246)¹ and assault with a firearm (ADW; § 245, subd. (a)(2)) with gang and firearm enhancements. (§§ 186.22, subds. (b)(1)(B), (b)(4); 12022.5.) The trial court sentenced appellant to 25 years to life state prison. Appellant contends that the trial court erred in granting the prosecution leave to add the ADW count and gang enhancements

¹ All statutory references are to the Penal Code.

before jury selection, that the conviction is not supported by the evidence, and that the trial court erred in not striking the gang enhancement at sentencing. We affirm.

Facts & Procedural History

In 2014, appellant befriended Jarrell Johnigan and Emely Fernandez. Appellant told Johnigan he was from MacArthur Park and a member of the West Side 18th Street gang. Appellant hung out with Johnigan and purchased drugs from him but the relationship soon soured. Appellant was angry about Johnigan's treatment of Fernandez and believed that Johnigan had cheated him on drug purchases.

In December 2014, appellant and Fernandez entered Johnigan's apartment and tagged his bedroom wall. Fernandez wrote her nickname ("Beloved") and appellant wrote gang letters ("WSXV3") and the abbreviation for the Cyclones gang (an 18th Street clique from MacArthur Park) on the wall.

A few days later, appellant threatened Johnigan. Appellant stood outside Johnigan's apartment, screaming his name. When Johnigan refused to answer the phone, appellant drew a 9-millimeter handgun from his backpack and pointed it at the apartment. Fernandez told him not to do anything stupid and shook her head when appellant asked "should I?" Appellant fired two shots. One bullet went through Johnigan's bedroom window and hit the ceiling.

Appellant and Fernandez ran. About 30 minutes later, appellant left a voicemail on Johnigan's phone that the shots were "warning shots."

Appellant committed a second shooting the next day at his apartment complex, in an area controlled by the North Hollywood Locos gang. When appellant moved in, he quarreled

with his neighbor, Gonzalo Rodriguez (aka Tito), about parking issues. Appellant told Rodriguez that he was a member of the 18th Street gang, that his name was “Smiley,” and that he carried a handgun. In November 2014, appellant tried to run Rodriguez over with a van.

On January 3, 2015, appellant and Rodriguez exchanged words outside the apartment laundry room. Rodriguez said, “What are you looking at? This is my hood” and “You’re not supposed to be here.” Appellant replied, “18th” and called Rodriguez a “pussy.”

Rodriguez said “Fuck your hood.” Appellant drew a 9-millimeter handgun from his backpack and shot at Rodriguez who was 35 to 50 feet away. Rodriguez ducked and “felt” the bullet whiz by.

Appellant returned to his apartment and dropped the handgun and backpack on the floor. Fernandez asked what he had done. Appellant smiled and replied, “Nothing” and “he started it.”

A few minutes later, Rodriguez threw a metal bar at appellant’s window. Rodriguez banged on the apartment door and yelled for appellant to come out and fight. Fernandez put appellant’s handgun and a fake Coca Cola can in her backpack. She tried to leave the apartment.

Officers detained Fernandez, seized the backpack and handgun, and arrested appellant. The handgun had a live round in the chamber and nine rounds in the magazine. The Coca Cola can had 11 rounds of ammunition. Officers found a spent 9-millimeter shell casing on the ground where appellant shot at Rodriguez.

In a *Miranda* interview (*Miranda v. Arizona* (1966) 384 U.S. 436), appellant said that Rodriguez got crazy. Appellant warned Rodriguez not to “fuck with me” and fired a warning shot. Appellant denied that he was a member of the Westside 18th Street gang but admitted that he hung out with the gang and carried a handgun for protection.

Officer Alfredo Rico, a gang expert, testified that appellant was a member of the 18th Street gang, a criminal street gang that had about 35,000 members in the United States, El Salvador, Mexico, and Spain. The gang had 3,000 to 4,000 members in the San Fernando Valley (“North Side”), 10,000 members on the West Side, and included small cliques that controlled entire city blocks. The North Hollywood Locos gang and the 18th Street gang were rivals. In response to a hypothetical that included case-specific facts, Officer Rico opined that the shootings benefited the 18th Street gang and promoted the criminal conduct of other gang members.

Amended Information

Appellant contends that the trial court abused its discretion in permitting the prosecution to add the ADW count and gang enhancements before jury selection. Appellant’s trial attorney complained it was “late in the process” but acknowledged that the prosecution had the right to amend the information up until the jury was sworn. But he did not object to the amendment. Appellant forfeited the alleged error by not objecting. Nor did he file a section 995 motion to set aside the amended information. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 179; *People v. Bartlett* (1967) 256 Cal.App.2d 787, 792.) This is also a forfeiture of the alleged error.

On the merits, section 1009 provides that an information can be amended to add charges or enhancements supported by the preliminary hearing evidence, providing the new charge is transactionally related to the crimes on which defendant was held to answer. (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1531.) “[I]f there is some evidence in support of the [amended] information, the reviewing court will not inquire into its sufficiency. [Citations.]” (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226.)

Appellant was held to answer for shooting at Johnigan’s apartment (§ 246) and the attempted premeditated murder of Rodriguez (§§ 664/187, subd. (a)). The trial court reasonably concluded that the ADW was transactionally related to the attempted murder charge. At the preliminary hearing, evidence was received that appellant reached into his backpack and pointed and fired the handgun at Rodriguez. Rodriguez said that appellant “was aiming towards my face.”

Appellant argues, without authority, that the prosecution was required to “negate” the issue of self-defense at the preliminary hearing. Self-defense is not an element of ADW and was not raised at the preliminary hearing. (See § 866, subd. (a) [defendant may offer evidence at preliminary hearing reasonably likely to establish an affirmative defense; CALCRIM No. 875 (2016 ed.) Bench Notes, p. 590 [self-defense not an element of the offense but is to be given “[i]f there is sufficient evidence of self-defense or defense of another”].) The preliminary hearing testimony established reasonable and probable cause to believe that a gang-related ADW was committed. (§ 995, subd. (a)(2)(B); *People v. Burnett, supra*, 71 Cal.App.4th at pp. 165-166.)

Substantial Evidence

Appellant argues that the convictions are not supported by the evidence. As in any sufficiency of the evidence appeal, we review the record in the light most favorable to the judgment and presume the existence of every fact the jury could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not reweigh the evidence or reassess the credibility of the witnesses. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

In order to convict for ADW, the prosecution had to prove an assault accompanied by the use of a firearm. (§ 245, subd. (a)(2).) “An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) Assault is a general intent crime and requires an intentional act and actual knowledge of facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another. (*People v. Williams* (2001) 26 Cal.4th 779, 790; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1190 [defendant need only be aware of what he is doing; foreseeability of the consequences is judged by objective “reasonable person” standard].)

Benjamin Ortega, Rodriguez’s cousin, stated that appellant aimed straight at Rodriguez and fired. Appellant claimed it was only a warning shot but the jury discredited the testimony. The jury acquitted on count 1 for attempted premeditated murder and returned a guilty verdict on the ADW count. It took no leap of logic for the jury to find that appellant shot the handgun with the knowledge that it would directly and probably result in the application of force to someone.

(CALCRIM No. 875; *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1357.) “[A]ssault criminalizes conduct based on what *might* have happened - and not what *actually* happened” (*People v. Williams, supra*, 26 Cal.4th at p. 787.)

The conviction on count 2 for shooting at an inhabited dwelling is supported by substantial evidence. Section 246 makes it a felony to maliciously and willfully discharge a firearm at an inhabited dwelling. It is a general intent crime. (*People v. White* (2014) 230 Cal.App.4th 305, 316,) “[S]ection 246 is not limited to [the act of] shooting *directly* at an inhabited or occupied target. Rather, it proscribes shooting *either* directly at *or* in close proximity to an inhabited or occupied target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it.” (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1355-1356.)

Appellant quarreled with Johnigan, stood outside his apartment, and demanded that he be let inside. Angry, appellant pointed the handgun towards the apartment, and asked Fernandez whether he should shoot. Fernandez told appellant not to do anything stupid, turned away, and heard two gunshots. One bullet went through Johnigan’s window and left a hole in the ceiling. Appellant phoned Johnigan and said the shots were “warning shots.” At trial, appellant claimed that he fired just one shot.

Appellant argues that he was intoxicated and that it was a random, accidental shot. The evidence shows that the shooting was willful and with the intent to disturb, annoy or injure someone else. (CALCRIM No. 965.) The “willful” discharge of a firearm is satisfied by evidence that the shot was

intentional, as opposed to accidental. (*People v. Clem* (2000) 78 Cal.App.4th 346, 350-351; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1439.) Appellant drew a loaded handgun, asked Fernandez whether he should shoot, and fired two shots in the direction of the apartment.

Gang Enhancement

Appellant contends that the evidence does not support the gang enhancements on counts 2 and 3. To establish a gang enhancement, the prosecution has to prove that (1) the crime was “committed for the benefit of, at the direction of, or in association with any criminal street gang”; and (2) the defendant had “the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) The crime must be gang related (*People v. Albillar* (2010) 51 Cal.4th 47, 60) and “have some connection with the activities of a gang” (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.)

Appellant was proud to be an 18th Street gang member and told others about his gang affiliation. Before shooting at Johnigan’s apartment, appellant tagged the bedroom wall with 18th Street gang symbols and drew a down arrow. Officer Rico testified that the down arrow is used to claim gang territory, to say “this is my hood” and that “we run this whole area right here.” It is a sign of disrespect and a warning to rival gangs. Officer Rico stated that the tagging and shooting showed that the 18th Street gang had “a member on the ground” and would continue “this criminal conduct out in the streets, promoting fear and intimidation to any victim, regardless where they’re from.” It enhanced the gang’s reputation and promoted and furthered the criminal conduct of other gang members.

Appellant's reliance on *People v. Albarran* (2007) 149 Cal.App.4th 214 is misplaced. It is not a substantial evidence case. There, the prosecution introduced gang evidence that was inflammatory and had no connection to the charged offenses. (*Id.* at p. 227.) Here, the gang evidence was directly connected to the charged offenses. Appellant tagged Johnigan's bedroom with gang symbols, bragged about his gang affiliation, and shot into an occupied apartment. Appellant committed an ADW the next day based on the belief that Rodriguez disrespected the 18th Street gang, was associated with the North Hollywood Locos, and had asked some "big homies" to take appellant out. The shootings were in furtherance of the predicate crimes that the 18th Street gang was known for: murders, shootings, aggravated assault, extortion, possession of narcotics, and possession of concealed firearms.

Appellant argues that the shootings were not gang-related and involved personal matters about parking, drugs, and Johnigan's treatment of Fernandez. The jury reasonably inferred that a dispute that starts off as personal can end being gang related. (See, e.g., *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.) Officer Rico stated that appellant's personal friction with the victims did not alter his opinion that the shootings were gang related and benefited the 18th Street gang. The location of the shootings was significant, just a few blocks from 18th Street gang territory. Appellant pledged his allegiance to the 18th Street gang and corrected a detective when asked "Are you from East Side 18th Street?"

Appellant argues that the shootings were not intended to promote, further, or assist criminal conduct by gang members. Officer Rico explained that the gang taunts, the act of

tagging Johnigan's apartment, and the use of deadly force to instill fear and intimidation in the community furthered the criminal conduct of other gang members. The use of a loaded firearm and the presence of appellant's girlfriend was no accident. Officer Rico stated that it was common for gang members to bring girls to crimes because "girlfriends are a lot less likely to be stopped by police." A gang member could commit a shooting and "give the gun to his girlfriend and she can run off with it and conceal it." This was corroborated by Emely Fernandez who testified that she often carried the handgun for appellant when they were roaming around. "[I]f for some reason we got stopped, . . . I'm a female so they wouldn't really search me, especially if it was two boy cops." Substantial evidence supported the finding that appellant committed the shootings for the benefit of the 18th Street gang and harbored the specific intent to promote the gang and the criminal activities of its members. (See, e.g., *People v. Albillar*, *supra*, 51 Cal.4th at p. 63 [expert opinion that criminal conduct benefited gang's reputation for violence sufficient to raise inference that the conduct was committed for the benefit of a criminal street gang]; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 208 [same].)

Appellant contends that the evidence on the ADW count was too weak to sustain the gang enhancement. The taunts and assault were clearly gang related. Appellant stared at Rodriguez with a mean face and provoked him. Rodriguez said, "What's the problem? Why are you staring at me?" "This is my hood You're not supposed to be here." Appellant said something about the "18th," prompting Rodriguez to say "[S]crew your hood." Appellant brandished the handgun and fired.

The evidence supported the finding that the shooting was committed for the benefit of a criminal street gang, with the specific intent to promote, further, or assist criminal conduct by gang members. Officer Rico explained that “fear and intimidation . . . plays a big-time role in committing crimes out on the street, because [gang members] know that members of the community will see them. So if they can keep control and keep the fear, and everyone keep[s] their heads laying low, [and] they’ll be able pretty much run free in their own hood.”

Motion to Strike Gang Enhancement

Appellant argues that the trial court abused its discretion in not striking the gang enhancements at sentencing.² The trial court declined to strike the gang enhancement on count 2 (shooting at an inhabited dwelling) and said it was giving appellant “a break” on count 3 (ADW) by imposing a low term. “[D]efendant shot in the air. But it’s still an assault. . . . [H]e pointed the weapon at the victim and he used the firearm.”

Section 186.22, subdivision (b)(4)(B) provides for a sentence of 15 years to life where the violent felony (i.e., home invasion robbery, carjacking, or shooting at an inhabited dwelling) is committed for the benefit of a criminal street gang. The trial court, however, may strike the gang enhancement “in an unusual case where the interests of justice would best be served” (§ 186.22, subd. (g).) Whether a case is “unusual”

² The trial court sentenced appellant to 15 years to life on count 2 (shooting at an inhabited dwelling with a gang enhancement), plus a consecutive 10 years on the ADW count (low term of two years plus three years on the firearm enhancement (§ 12022.5, subd. (a)) and five years on the gang enhancement (§ 186.22, subd. (b)(1)(B).)

and whether the interests of justice would be served by striking the gang enhancement are matters for the trial court's sound discretion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) The trial court may consider the circumstances of the offense and whether defendant's background takes the case outside the spirit of the sentencing statute. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Appellant makes no showing that the sentence was arbitrary, capricious or resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Appellant was an active member of the 18th Street gang, carried a loaded handgun on a daily basis, and used the handgun and his gang status to terrorize members of the community. Two gang-related shootings within 24 hours are remarkable and could have easily resulted in death or injury to others. Appellant's violent conduct is clearly the type of street gang criminal activity that the Legislature sought to eradicate. (See, e.g., *People v. Albillar*, *supra*, 51 Cal.4th at p. 55; *People v. Prunty* (2015) 62 Cal.4th 59, 74.)

Disposition

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Joseph A. Brandolino, Judge

Superior Court County of Los Angeles

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