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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID CHARLES MACON, Defendant and Appellant.	B293429 (Los Angeles County Super. Ct. No. TA144396)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sean D. Coen, Judge. Affirmed.

Wallin & Klarich and Stephen D. Klarich for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

David Charles Macon committed two robberies. He challenges the evidence supporting the gang enhancements and raises an instructional issue. We affirm. Code references are to the Penal Code.

I

We recount facts favorably to the winning side at trial. The jury convicted Macon of robbery and carjacking at a gas station on January 28, 2017 and of robbery at a tire store on February 19, 2017.

First was the mini-bike robbery. The owner of the mini-bike was at a gas station with his friend, sitting on the mini-bike, which was a bicycle with a gas engine. Macon showed up and told the owner and his friend to get off the mini-bike. The friend obeyed but the owner refused. Macon escalated matters: he grabbed the friend, snatched his neck chain, and took the owner's neck chain too. The owner finally gave Macon the mini-bike when Macon's henchman showed a gun. The mini-bike owner identified Macon from photos. The jury convicted Macon of robbery and carjacking.

Second was the tire store robbery. Dennis Smith and his girlfriend were by a tire store when Macon and others pulled up. Macon got out of the car, pointed a gun at Smith, and said to empty his pockets. Smith pushed the gun away from his face, so others from the car attacked him. Macon hit Smith with his gun. They took Smith's neck chains, cell phone, and identification. Smith and his girlfriend identified Macon as the gunman. The jury convicted Macon of robbing Smith.

The prosecution introduced trial evidence about Macon's membership in the Hoover Criminals gang. The jury found gang enhancements true (§ 186.22).

II

The court increased Macon's sentence for each count because the jury found the gang allegations true. Macon argues this sentence is improper because no substantial evidence supported the gang findings. This argument fails.

We summarize this gang evidence. The prosecution put on a gang expert to establish Macon belonged to Hoover Criminals, which had a pattern of criminal gang activity, meaning it had committed two predicate offenses. (§ 186.22, subd. (e).) This expert testified about these offenses. First, on October 24, 2015, Larry Laniel carried a concealed gun and later was convicted of this enumerated crime. On April 28, 2017, Markalle Ray committed a robbery for which he too later was convicted. These two offenses established the requisite pattern — if the crimes could be linked to the Hoover Criminals. The expert testified to his personal knowledge that Laniel and Ray belonged to Hoover Criminals.

Macon makes a timing argument. He protests that no evidence showed Laniel's and Ray's entry into Hoover Criminals *predated* the dates of these offenses. In other words, Macon suggests Laniel and Ray committed these crimes *before* they joined Hoover Criminals, and therefore their crimes cannot be ascribed to a gang they joined only later. Macon thus argues it is possible Laniel and Ray were not yet gang members when they committed these two crimes and so the prosecution failed to meet its burden of proof.

This speculative argument runs aground on the standard of review. We affirm the gang enhancements if substantial evidence supports them. Under this deferential standard, we indulge all inferences in support of the verdict. (*People v. Garcia*

(2016) 244 Cal.App.4th 1349, 1366.) These inferences annul Macon's argument.

Substantial evidence supports the gang enhancements. The expert testified he started work with the police about five years before the day he testified, which was July 23, 2018. That is, the expert began work as an officer in summer 2013. The crime dates were 2015 and 2017 — well after the expert became an officer. The reasonable inference is the expert learned of Laniel's and Ray's gang membership during the course of his police duties, which began before the 2015 and 2017 crimes, which means those crimes were by gang members, meaning Macon's gang enhancements were proper.

The expert had many grounds for concluding Laniel and Ray belonged to Hoover Criminals.

The expert had interacted with Laniel dozens of times. Laniel had stated his Hoover Criminals membership directly to the expert many times. The expert had seen Laniel's gang tattoos and had seen Laniel wearing gang attire in gang territory.

It was the same with Ray. The expert had a dozen contacts with Ray before Ray went to prison for the predicate robbery. Ray was sentenced to prison on December 28, 2017. Ray also told the expert he was a Hoover Criminal. The expert had seen Ray's gang tattoos when Ray was at known gang locations.

It is reasonable to infer the expert's contacts with Laniel and Ray were between his start date in 2013 and the date of his testimony in 2018, and that at least some of these were before 2015. It is unreasonable to draw an inference against the verdict, as Macon urges us to do.

Macon invalidly suggests the expert's contacts with Laniel and Ray must have been only after January 2017, when the expert had been specifically assigned to work with gangs as a gang enforcement detail officer. The evidence was the expert had gang contacts before January 2017: before he became a gang enforcement detail officer, this expert had worked in three divisions that were "heavily gang impacted." He had hundreds of contacts with gang members.

In sum, Macon unsuccessfully attempts to contradict a reasonable inference in favor of the verdict, meaning the gang enhancements were proper.

Macon makes a passing reference to *People v. Sanchez* (2016) 63 Cal.4th 665 but provides no record citations to anchor the argument, which he thereby has forfeited. (Cf. *Centex Homes v. St. Paul Fire & Marine Ins. Co.* (2018) 19 Cal.App.5th 789, 796–797 [reviewing courts may treat point as forfeited when counsel fails to provide record citations supporting appellant's contentions].)

III

Macon argues the jury instructions were bad for two reasons. First, he argues the instructions did not say his intent to take the mini-bike had to exist before or during his use of force. Second, he argues no instruction defined "motor vehicle." These arguments err. The court properly instructed the jury.

We independently review claims of instructional error. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.)

Macon's first argument is groundless. The carjacking statute applies whenever there is a confrontation between the carjacker and the victim. It does not matter whether the use of force or fear was before, during, or after the moment when the

carjacker seized the vehicle. (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1133 (*O'Neil*).) *O'Neil* demolishes Macon's argument.

Macon's second argument is about defining "motor vehicle." Macon notes the mini-bike had a mechanical problem of some sort. Macon says a motor vehicle that is not running right is not a motor vehicle. By Macon's surprising logic, it would not be carjacking to confront a motorist standing by a car with an empty tank, to force the motorist to surrender the gasless car, and to tow it away. But a temporarily inoperable vehicle remains a vehicle. (*Arellano v. Moreno* (1973) 33 Cal.App.3d 877, 882.) This mini-bike was a vehicle with a gas motor. A vehicle with a motor is a motor vehicle, as a matter of law. This is question of law, not fact.

There was no instructional error.

IV

Macon contends he was denied notice of the charges against him because the Third Amended Information had the words "attempted second degree robbery" but he was convicted of and sentenced for robbery.

Macon lost his power to object to a variance between the pleading and jury instruction by failing to raise the objection in the trial court. (*People v. Maury* (2003) 30 Cal.4th 342, 427.)

Macon's forfeiture was in the face of repeated actual notice of the charges. The court and the prosecution described count 2 — the tire store robbery involving Dennis Smith — as a count for robbery. This occurred repeatedly. Macon never objected. Penal Code section 211 is for robbery. Count 2 was described as a violation of Penal Code section 211 during the preliminary hearing, in the prosecution's July 18, 2018 trial brief, and in the

Third Amended Information. The prosecution named robbery as the crime alleged for this count in closing argument and the court instructed the jury that the count charged robbery. The jury verdict for the count stated the jury found Macon guilty of the crime of "SECOND DEGREE ROBBERY OF DENNIS SMITH, in violation of Penal Code Section 211 . . . ." The clerk read those words aloud when announcing the jury verdict. Macon never objected. He forfeited the issue.

V

Macon argues the trial court deprived him of due process through the cumulative errors. There were no errors.

DISPOSITION

The judgment is affirmed.

WILEY, J.

We concur:

BIGELOW, P. J.

STRATTON, J.