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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMONT EDWARD GILLON,

Defendant and Appellant.

B278974

(Los Angeles County
Super. Ct. No. BA428232)

APPEAL from judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed in part, reversed in part and remanded with directions.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Lamont Edward Gillon on one count of murder and two counts of robbery, and it found the robberies were gang-related offenses. On appeal, he contends there was insufficient evidence to support the gang enhancements. Appellant further contends that the matter should be remanded for the trial court to correct several sentencing errors, and for the court to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620) on whether to strike the firearm enhancements imposed. For the reasons stated below, we conclude there was sufficient evidence to support the gang enhancements, and that remand is warranted. Accordingly, we affirm the convictions, vacate the sentence and remand for resentencing.

PROCEDURAL HISTORY

Appellant and codefendants Dewan Ishmil Calloway and Richard James Reed were charged with the murder of Andre Roshawn Threatt, Jr. (Pen. Code, § 187, subd. (a)(1); count 1),¹ and the second degree robbery of Threatt and Maurice Robinson (§ 211; counts 2 & 3). As to all counts, it was alleged that appellant personally used a handgun (§ 12022.53, subd. (d)), that a principal personally and intentionally discharged a handgun causing great bodily injury (GBI) to Threatt (§ 12022.53, subds. (d) & (e)(1)), and that the crimes were committed for the benefit of, at the direction of, and in association with two criminal street

¹ All further statutory citations are to the Penal Code, unless otherwise stated.

gangs, to wit, Playboy Gangster Crips and By Yourself Hustler Crips (§ 186.22, subd. (b)(1)(C)).

A jury found appellant guilty as charged and found the murder to be in the first degree. As to all counts, the jury found true the firearm allegations. As to counts 2 and 3 (robberies of Threatt and Robinson), it found true the gang allegations. The jury acquitted codefendants Calloway and Reed of all charges.

The abstract of judgment reflects that appellant was sentenced to a total prison term of 88 years to life consisting of: as to count 1, 25 years to life for the first-degree murder, plus 25 years to life for the firearm enhancement; as to count 2 (robbery of Threatt), the upper term of 5 years, plus 25 years to life for the firearm enhancement, plus 5 years for the gang enhancement; as to count 3 (robbery of Robinson), the middle term of 3 years. No conduct credits were awarded. The oral pronouncement of sentence on counts 2 and 3 conflicts with the abstract of judgment. The court stated that it would impose firearms enhancements as to counts 2 and 3. The gang allegation would add 10 years “as to count 2, and then one-third the midterm, which would be three years and one-third as to count 3.”

Appellant timely appealed.

STATEMENT OF THE FACTS

A. *The Prosecution Case*

Los Angeles Police Department (LAPD) Sergeant Jeritt Severns testified that on May 14, 2014, he responded to a call of a shooting at the parking lot of a 7-Eleven store on Pico Boulevard in Los Angeles. When he arrived at the location, he observed Threatt lying on the ground next to a silver Nissan. There was a pool of blood under Threatt’s head. Sergeant Severns

interviewed Robinson, who informed the officer that he and Threatt had just been robbed. Robinson stated that the robbers were two black males in an Impala, and that they had fled the scene in the vehicle.

Robinson testified that earlier that evening (May 14), he was hanging out with Threatt and Threatt's girlfriend, Jaren. Threatt told Robinson he was meeting with his friend "P-Tray," so Robinson decided to accompany him. After dropping off Jaren at her house, Threatt informed Robinson that he was going to deliver some 16-oz. bottles of "lean" to P-Tray. Robinson explained that "lean" was the name for a prescription cough syrup people would drink to get high. A 16-oz. bottle of lean could be sold for between \$1,200 and \$1,500. Robinson asked Threatt if he trusted P-Tray, and Threatt answered, "Yeah. He [is] really cool."

Robinson testified that during the drive, Threatt received numerous calls. Robinson overheard a couple of calls from the same caller. The caller said, "Where are you at? Can you hurry?" He also asked Threatt what kind of car he was driving. Based on the questions, Robinson believed that the caller was P-Tray. As they approached the 7-Eleven store located at Fairfax and Whitworth, Threatt informed P-Tray that he was "[j]ust pulling up."

Robinson testified that when they entered the parking lot of the 7-Eleven store, P-Tray called Threatt and told him that he had to leave and had given the money for the lean to his "little homies." Robinson noticed a man in a red hoodie pacing in front of the 7-Eleven; Robinson later identified the man as appellant. When Threatt pulled into the parking lot, appellant approached Threatt. He asked whether they had the bottles of lean, whether

the bottles were real, and whether they had any guns in the car. Threatt responded that he had the bottles and was not armed. After showing appellant the bottles in the glove compartment, Threatt asked about the money. Appellant stated that there were too many people around to complete the sale and suggested going to a “quieter area.”

Robinson testified that Threatt drove to the 7-Eleven store on Pico. Appellant followed in the Impala, which was being driven by codefendant Reed. After Threatt pulled into a parking space, Reed parked a distance away. Appellant came out and spoke with Threatt, who asked why they were parked so far away. Appellant then called to Reed and told him to park next to Threatt’s Nissan. After being informed that the money was in the Impala, Robinson grabbed the bag containing the bottles of lean and exited the Nissan. As Robinson was entering the Impala, appellant ran up to him with a gun. Appellant told Robinson, “You know what it is,” and ordered him to drop the bag. Threatt climbed over the passenger seat to get out of the car to assist Robinson. Threatt and appellant began “tussling.” Robinson heard a shot and then Threatt fell on top of him. Robinson ran and hid behind a nearby truck. Appellant grabbed the bag with the bottles of lean, entered the Impala and sped away.

Threatt’s girlfriend, Jaren, testified that around 10:40 on the evening of May 14, Robinson called and informed her that Threatt had been shot. He said, “You need to get down here.” Jaren’s sister and nephew drove her to the crime scene where she spoke with the police officers. She told the officers that Threatt had gone to meet with P-Tray that evening, and she identified P-

Tray as codefendant Calloway by selecting Calloway's picture in a photospread.

Threatt died from a single gunshot wound to the head. Surveillance video of the incident from the two 7-Eleven stores was played for the jury. Cell phone records showed numerous calls between codefendant Calloway's cell phone and Threatt's cell phone during the relevant time period.

Austin S. testified that he knew appellant as "TG," and that appellant was "associated and affiliated" with the By Yourself Hustler Crips gang. Austin knew codefendant Calloway as "P-Tray," a Playboy Gangster Crips gang member, and codefendant Reed as "Rick Roc," a member of the By Yourself Hustler Crips.

LAPD Officer Alisha Martinez testified as the prosecution's gang expert. Officer Martinez provided a brief summary of the history, common signs and symbols, territory and primary activities of the By Yourself Hustler Crips and the Playboy Gangster Crips. The primary activities of both gangs included murder, robbery and narcotics.

After being presented with a hypothetical mirroring the facts of the case, Officer Martinez opined that the murder and robberies of the lean drug dealers was committed for the benefit of both the By Yourself Crips and the Playboy Gangsters. She explained that the organizer, shooter and driver all benefitted because they could resell the narcotics and use the proceeds to promote their gang activity, such as purchasing weapons. She also stated that the crimes promoted both gangs because the conduct would cause fear and intimidation, making the gangs "look stronger." With respect to the shooter, Officer Martinez opined that he committed the crimes at the direction of the

organizer, in association with both the organizer and the driver, and for the benefit of the By Yourself Hustler Crips gang.

B. *The Defense Case*

Appellant testified in his own defense. He stated that in eighth grade, he wanted to be a gang member like his older brother and cousins, but his brother did not want him to be in the gang. Appellant knew codefendant Calloway as a Playboy Gangster Crips member with the moniker “P-Tray.” He knew codefendant Reed by his moniker “Rick Roc.” Appellant claimed that Reed used to be a By Yourself Hustler Crips gang member, but was no longer a member of the gang. He also stated that members of the two gangs would hang out together.

Appellant testified that he was a friend of a girl named Adori, who had cancer. They drank lean together several times.² On the night of the shooting, he and Adori wanted to purchase some lean. They arranged a deal through codefendant Calloway to purchase \$2,400 worth of lean from Threatt. The parties agreed to meet at the 7-Eleven on Fairfax. Adori drove appellant’s car to the scene. When Threatt arrived, he suggested that they go to another 7-Eleven to complete the sale. At the second location, Threatt and Adori parked next to one another. Appellant exited his vehicle and opened Threatt’s car door, so that Robinson, who was in the passenger seat, could exit and enter appellant’s car to complete the sale. As soon as he sat down in appellant’s car, Robinson pulled out a gun and pointed it at Adori. Appellant grabbed the gun from Robinson. Threatt then came up from behind appellant, and the two men wrestled for control of the gun. During the struggle, the gun went off.

² According to appellant, Adori died prior to trial.

Appellant grabbed a bottle that was on the ground, and he and Adori drove away from the scene.

DISCUSSION

Appellant contends there was insufficient evidence to support the gang enhancements on counts 2 and 3 (robberies of Threatt and Robinson). He further contends the matter should be remanded for the trial court to correct its unauthorized sentences on counts 2 and 3, and for the court to exercise its discretion under SB 620 whether to strike the firearm enhancements as to all counts.

A. *Gang Enhancements*

Section 186.22, subdivision (b)(1) provides a sentencing enhancement for felonies “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.” Thus, the prosecution must prove that the underlying felonies were “gang related” and that the gang-related offenses were committed ““with the specific intent to promote, further, or assist in any criminal conduct by gang members.”” (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) An expert may properly “express an opinion, based on hypothetical questions that track[] the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. ‘Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

To prove the crime was “gang related,” the prosecution need only prove one of three alternatives: the crime was committed “(1) for the benefit of, (2) at the direction of, or (3) in association with a gang.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, italics omitted.) Here, the jury found that the robberies of Threatt and Robinson were gang-related offenses. The jury heard testimony that appellant and his codefendants were gang members: appellant and codefendant Reed were members of the By Yourself Hustler Crips; codefendant Calloway was a member of the Playboy Gangster Crips. Appellant admitted knowledge of his codefendants’ gang membership. He also admitted that his meeting with Threatt was arranged by Calloway. Robinson identified Reed as the driver of the Impala. Finally, the prosecution’s gang expert opined that the robberies of drug dealers would benefit the gangs because the stolen drug could be resold and the proceeds used to fund gang activities. On this record, substantial evidence supported the jury’s finding that the robberies were gang-related offenses.

Appellant contends that because the jury acquitted codefendants Reed and Calloway, there was no evidentiary basis for the jury to conclude he committed the robberies at the direction of Calloway or in association with Calloway and Reed. Thus, appellant argues, there was insufficient evidence to support the finding that the robberies were gang-related offenses. We disagree. A crime that benefits a gang is a “gang-related” offense. As the gang expert explained, the robberies benefitted the gangs because the lean could be resold and the proceeds used to fund gang activities. Thus, even had appellant’s codefendants

not been involved, the robberies still would have served to benefit appellant's gang, the By Yourself Hustler Crips.

As to the second prong of the gang enhancement, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar* (2010) 51 Cal.4th 47, 68; accord, *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime"].) Here, substantial evidence established that appellant was aware of his codefendants' gang membership and acted in concert with them to rob the victims. Thus, the jury could reasonably infer the requisite specific intent.

Appellant contends the jury's finding that he acted with the specific intent to promote, further or assist criminal conduct by gang members is inconsistent with its acquittal of his codefendants. However, the jury's acquittal of appellant's codefendants did not preclude it from considering evidence of the codefendants' gang membership and participation in the crimes. *People v. Palmer* (2001) 24 Cal.4th 856 is instructive. There, the appellant was convicted of conspiring to murder the victim, but his coconspirator was acquitted of the same crime. (*Id.* at p. 859.) Appellant argued that he could not be convicted of conspiracy in light of his coconspirator's acquittal. Our Supreme Court rejected the argument. (*Id.* at p. 860.) The court held that although the conspiracy verdicts were inconsistent, both verdicts could be

given effect. It explained: “The law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence.” (*Ibid.*) “An inevitable result of this system, and one that society accepts in its quest to avoid convicting the innocent, is that some criminal defendants who are guilty will be found not guilty. This circumstance does not, however, mean that if one person receives lenient treatment from the system, all must.” (*Id.* at p. 865.) Rather, an individual defendant’s conviction must be independently assessed in light of the evidence presented at trial. (*Id.* at p. 863 [“Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. [Citations.] This review should be independent of the jury’s determination that evidence on another count was insufficient.”].) Thus, whether appellant acted with the requisite specific intent must be determined based on all the evidence properly admitted at trial. As explained above, that evidence was sufficient for the jury to infer that appellant committed the robberies with the specific intent to promote, further or assist the criminal conduct of gang members. In sum, substantial evidence supported the jury’s true finding on the gang enhancements.

B. *Sentencing Errors as to Counts 2 and 3*

The abstract of judgment reflects that appellant was sentenced to 35 years to life on count 2 (robbery of Threatt) and 3 years on count 3 (robbery of Robinson).

Appellant contends the sentence on count 2 is unauthorized, as section 654 bars separate punishment for the robbery of a murder victim where the robbery is the sole basis for a felony-murder finding. (See *People v. Hensley* (2014) 59 Cal.4th 788, 828 [sentences for the “robberies and the attached firearm use enhancements [that] formed the basis for the first degree felony-murder convictions” must be stayed].) Respondent concedes the point, but argues that the jury was presented with two theories of liability -- felony-murder and premeditated murder -- and thus could have found appellant guilty of first-degree murder under either theory. Respondent misreads the record. The sole theory of first-degree murder on which the jury was instructed was one of felony-murder. Because the jury necessarily based its finding of first-degree murder on a felony-murder theory, any sentence and enhancements imposed on count 2 must be stayed.³

As to count 3, the abstract of judgment reflects a three-year sentence. At the sentencing hearing, however, the court orally pronounced a sentence of “three years and one-third as to count 3.” Respondent argues that the matter should be remanded for sentencing on count 3 because the sentence orally pronounced is unclear and possibly unauthorized. For example, if the sentence on count 2 is imposed but stayed, the sentence on count 3 cannot

³ In closing argument, contrary to the agreed upon jury instructions, the prosecutor argued both felony-murder and premeditated murder. The court denied defense counsel’s motion for a mistrial, but instructed the jury that the sole theory of first-degree murder was felony-murder.

be calculated at one-third the full-term sentence. We agree and remand the matter for resentencing.⁴

C. *Firearm Enhancements*

Section 12022.53 provides sentence enhancements for the use of firearms in the commission of felonies. Prior to the enactment of SB 620, a trial court could not strike these enhancements. (See former § 12022.53, subd. (h) [“Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”].) However, effective January 1, 2018, SB 620 replaced the prohibition on striking the firearm enhancement with the following: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§ 12022.53, subd. (h).) Respondent concedes that SB 620 applies retroactively to nonfinal judgments, such as appellant’s.

Here, the trial court apparently imposed firearm enhancements on all three counts. Accordingly, we vacate the sentence and remand the matter for the trial court to exercise its discretion whether to strike the firearm enhancements. We express no opinion how the court should exercise its discretion on remand.

⁴ Appellant also contends he is entitled to 776 days of actual custody credits. Respondent does not dispute the calculation.

DISPOSITION

The convictions are affirmed, the sentence is vacated, and the matter is remanded for resentencing. The superior court shall exercise its discretion whether to strike any firearm enhancements imposed. Once the court has exercised its discretion as to the firearm enhancements, any sentence and attendant enhancements imposed as to count 2 must be stayed. On count 3, the court shall recalculate the sentence in accordance with applicable law. The court also shall award presentence custody credits.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.