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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRYL LAMONT STATEN,

Defendant and Appellant.

B236234

(Los Angeles County
Super. Ct. No. TA115083)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ronald V. Skyers, Judge. Reversed in part and affirmed in part.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Darryl Staten was convicted of two counts of second degree robbery (Pen. Code, § 211, counts 1-2)¹; possession of a firearm by a felon (§ 12021, count 3); and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1), count 5). Gang and firearm allegations attached to counts 1 and 2 were found true, as were prior conviction allegations. Appellant was sentenced to a total of 43 years eight months in prison.

On appeal, appellant contends that there was insufficient evidence to support the criminal street gang enhancements. He also argues that the trial court erred in denying his request to continue sentencing so that he could present a new trial motion. We find that the gang enhancements were not supported by substantial evidence. We affirm in all other respects.

FACTS

Evidence

On the morning of October 29, 2010, Maria Roman-Malagon was walking with her two children near Maie Avenue and 99th Street in Los Angeles. She saw a suspicious-looking man hiding nearby and, feeling afraid, walked into the street to try to avoid him. The man, appellant, came up behind her and asked her where her money was. When she told him she did not have any money he demanded her cell phone. She initially refused, but after he lifted his shirt and pulled out a gun, she turned her phone over. Appellant left, and Roman-Malagon walked to a nearby senior center to call her husband. Eventually, the police were also called. Later, Roman-Malagon identified appellant from a photographic lineup.

At about 11:00 p.m. that evening, Tyese Pryor was at the train station near 103rd Street and Graham Avenue when appellant approached her. She told him to get away. When he would not, she ran from the train station, terrified.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

Appellant caught Pryor and beat her to the ground. He told her he had a gun. Pryor testified, “He was very violent, very aggressive, and he was serious. I’m surprised that he didn’t kill me. He was very violent in his beating with his fists, both fists. He beat me down to the ground. I asked him not to—a perfect stranger. Once again I’m gonna state I don’t know him from a can of paint. I live all the way in Hawaiian Gardens. He took off running. . . . That’s all I remember. At the time I was pregnant with my daughter that I just had in March.” Before he ran away, appellant took the cell phone and cash that Pryor had in her purse. Pryor suffered injuries to her face.

Officer Oscar Villareal was in the area investigating an unrelated incident, when he was approached by a man on a bicycle who told him that he witnessed a woman get beaten and robbed at the nearby train station. The witness had followed the perpetrator to the rear side of a nearby apartment complex. Officer Villareal and three other officers approached the back of the complex. They saw appellant in the parking area. When he was ordered to stop, appellant turned around, saw the officers, and ran away.

Officer Villareal jumped in his police car. As he was driving, he used the car’s lights to illuminate the street underneath parked cars. As he passed a large truck, he saw appellant hiding underneath it, using a tree branch to try to conceal himself.

Appellant was handcuffed and taken into custody. Shortly after, Pryor identified appellant. A handgun was recovered nearby.

At trial, appellant stipulated that he had previously been convicted of a felony.

Expert Testimony

Los Angeles Sheriff’s Deputy John Ganarial testified as a gang expert.

Deputy Ganarial stated that reputation and respect are vital to a gang. A gang member gains respect by “putting in work,” of which robbery and possessing a loaded firearm are examples. “Putting in work” strengthens and enhances a gang member’s individual reputation and the gang as a whole. If a gang acquires a reputation for being soft or weak, other gangs can move into the territory and the unsuccessful gang will get “punked.”

The significance of having a “turf” or territory is that members of other gangs cannot freely enter. But a member of a strong gang may enter into another gang’s territory based on reputation.

Violence is looked upon favorably within gangs because it instills fear in the community. Gang members can commit crimes in broad daylight without fear of witness testimony or reports to the police. Gang members may elevate their own standing within the gang by using a gun when committing a crime, because it demonstrates their propensity for violence.

Deputy Ganarial opined that appellant is a member of the Mona Park Compton Crips. Appellant has tattoos on his forearms and hands signifying his allegiance to the gang. His gang moniker is “D.”

According to Deputy Ganarial, the Mona Park Compton Crips is a gang that was started in the 1970’s and has about 150 active members. The primary activities of the gang include murder, shootings, robbery, car theft, and possessing weapons and ammunition. The gang is relatively strong and commits crimes outside of its own territory. Neither of the crimes committed by appellant was within the gang’s territory.

When given a hypothetical question based on the facts of this case, Deputy Ganarial opined that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. Deputy Ganarial testified that the crimes benefitted appellant’s and the gang’s reputation because “People are gonna find out. He’s committing a violent crime in another gang area. . . . When they commit these crimes word gets around, and that’s what my opinion is based on.” The fact that he committed the crimes using a loaded gun “definitely aids his reputation. It shows that he’s armed and willing to use it, and that has the means to show his violence.”

DISCUSSION

A. Gang Enhancements

Appellant contends that the criminal street gang enhancements were improperly imposed because there was a lack of evidence that the crimes were committed for the

benefit of the Mona Park Compton Crips. The People disagree. We find the jury's true findings were not supported by substantial evidence and therefore reverse those findings.

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]” [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; see also *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329, *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 [applying substantial evidence test to contentions that gang enhancements were unsupported by the evidence].)

A sentence enhancement may be imposed pursuant to section 186.22, subdivision (b)(1), on “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” The enhancement requires “both that the felony be gang related and that the defendant act with a specific intent to promote, further, or assist the gang.” (*People v. Rodriguez* (Dec. 27, 2012, S187680 [2012 Cal. LEXIS 11909], __ Cal.4th __, __.)

Not every crime committed by a gang member is gang related. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Furthermore, a finding that an offense is subject to section

186.22, subdivision (b), cannot be based on a gang expert's testimony alone. (*People v. Ochoa, supra*, 179 Cal.App.4th 650, 657.) "[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762.)

Here, we find a lack of substantial evidence that appellant's crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang. There is no serious dispute that, at the time he committed the crimes, appellant was an active member of the Mona Park Compton Crips, a criminal street gang. The evidence presented, however, was insufficient to support a finding that appellant's crimes were committed for the benefit of anyone but himself.

The case of *People v. Ochoa, supra*, 179 Cal.App.4th 650, involved a matter similar to the one here. The defendant, an active gang member, used a shotgun to threaten and carjack the victim's car. In committing the crime, the defendant made no apparent gang signs or signals, and he acted alone. (*Id.* at p. 653.) After hearing gang expert testimony, the jury found section 186.22, subdivision (b) allegations true.

The Court of Appeal reversed, noting that a number of cases (e.g., *People v. Albarran* (2007) 149 Cal.App.4th 214, 227; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199) have held that a true finding cannot be based solely on a gang expert's unsubstantiated testimony that a gang member defendant committed a crime for the benefit of, at the direction of, or in association with a gang. (*People v. Ochoa, supra*, 179 Cal.App.4th at pp. 657-661.) Specific evidentiary support is required to make such a finding; expert testimony based purely on speculation that a crime was gang related is insufficient. (*Id.* at p. 662-663.)

The appellate court in *People v. Ochoa* recognized that the defendant "did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offenses. There was no evidence of bragging or graffiti to take credit for the crimes. There was no testimony that the victim saw any of defendant's

tattoos. There was no evidence the crimes were committed in [the defendant's gang's] territory or the territory of any of its rivals. There was no evidence that the victim of the crimes was a gang member or a [gang] rival. Defendant did not tell anyone . . . that he had special gang permission to commit the carjacking. [Citation.] Defendant was not accompanied by a fellow gang member.” (179 Cal.App.4th at p. 662, fn. omitted.) The foregoing passage could just as aptly describe the situation in the instant case. Appellant committed the crimes by himself, he did not identify himself as a gang member, either by words, gestures or clothing, and the crimes took place outside of Mona Park Compton Crips territory. There was no evidence that the crimes would benefit the gang's reputation or assets, or provide any other sort of benefit.

In contending that the gang's reputation would benefit from appellant's crimes, the People largely fall back on the argument that appellant sported visible gang tattoos. But, as in *People v. Ochoa*, where such evidence was found insufficient (179 Cal.App.4th at p. 662.), there was no evidence in this case that either the victims or any witnesses to the crimes noticed appellant's tattoos. The People cite to *People v. Martinez*, *supra*, 158 Cal.App.4th at page 1333, in which the court found that visible gang tattoos supported the section 186.22, subdivision (b) enhancement. That case is clearly distinguishable from the instant one, however—the defendant in *People v. Martinez* committed the crime “with a gang confederate.” We are aware of no authority that a lone perpetrator acts for the benefit of, at the direction of, or in association with a gang simply because he commits a crime while sporting gang tattoos that go unseen by the victims.

Moreover, in explaining the basis for his opinion that (under the posed hypothetical) the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, Deputy Ganarial did not rely on the fact that appellant had gang tattoos. Instead, Deputy Ganarial testified that the crimes benefitted appellant's and the gang's reputation because “People are gonna find out. He's committing a violent crime in another gang area. . . . When they commit these crimes word gets around, and that's what my opinion is based on.” This testimony was purely conjectural. Other than his belief that word of “these crimes . . . gets around,” Deputy

Ganarial identified no basis for his opinion that the gang's reputation would be enhanced. There was no evidence that either of the victims had any knowledge of appellant's gang affiliation (Pryor did not "know him from a can of paint"), or that anyone with such knowledge was aware of the crimes. Similarly, there was no evidence that in committing the crimes, appellant sought to make his gang affiliation known. The idea that appellant committed the crimes for the benefit of the gang was purely speculative. The jury's true finding on the section 186.22, subdivision (b) allegation, therefore, was not supported by substantial evidence.

B. Denial of Continuance and Trial Transcript

Appellant next contends that the trial court erred when it denied his requests to continue sentencing and for a trial transcript so that he could prepare a new trial motion. We find appellant's argument is not well taken. A summary of the trial court proceedings helps to explain why.

The trial lasted over a total of two days. On August 2, 2011, both parties gave opening statements, the prosecution presented its evidence, and both parties rested. The parties gave closing arguments on August 3, 2011, and the jury returned with its verdicts the same day. After the verdict was read, appellant agreed to have the court trial on prior conviction allegations and sentencing both heard on August 22, 2011.

When appellant arrived at court on August 22, he said that he was not prepared for sentencing because he thought the hearing was on August 29. The court stated that it would continue the sentencing hearing, and requested a convenient date. Appellant responded that he wished for the hearing to occur on August 25.

At the August 25 hearing, appellant immediately announced that he had a motion that he wanted to be heard. The court indicated it had just received a motion from appellant to continue the hearing and for a transcript. The court noted that the motion was late, but decided to consider it anyway. The court then told appellant that it was denying the continuance "because we had set this before, and it was continued for you," and the court found a lack of good cause for why sentencing should not take place that day. It then ruled on the prior conviction allegations and sentenced appellant.

Section 1050, subdivision (e) provides: “Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause.” The granting or denial of a continuance rests within the sound discretion of the trial judge, and when a continuance is denied, the burden is on the defendant to establish an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) “A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court’s denial of a continuance was so arbitrary as to deny due process.” (*People v. Doolin* (2009) 45 Cal.4th 390, 450.)

Appellant is unable to establish that the trial court’s denial of his continuance motion was arbitrary. A defendant seeking to continue a hearing must file and serve written notice at least two court days before the hearing sought to be continued. (§ 1050, subd. (b).) No such notice was filed by an appellant. Section 1050, subdivision (d) does provide that a party need not comply with the notice requirement if the party shows good cause for the failure to comply. Appellant, however, presented absolutely no explanation for failing to comply with the notice requirement. The trial court, therefore, did not abuse its discretion in denying appellant’s motion for a continuance. (See *People v. Leavel* (2012) 203 Cal.App.4th 823, 830 [continuance motion properly denied when defendant gave trial court no reason for delayed notice].)

Having properly denied the requested continuance, there was no need for the trial court to order that appellant receive a trial transcript. A defendant seeking to obtain a transcript in the trial court must show that the requested transcript is necessary to effectively prepare a motion for new trial. (*People v. Bizieff* (1991) 226 Cal.App.3d 1689, 1702.) A motion for new trial must be made and determined before judgment. (§ 1182.) Because there was no possibility that appellant could prepare a new trial motion before judgment, appellant had no need for the trial transcript prior to his appeal.²

² Even if appellant’s motion for continuance were timely, appellant fails to explain how a trial transcript would have assisted him in drafting a new trial motion. In his

DISPOSITION

The true findings on the gang enhancements are reversed and the gang enhancements stricken. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to send a certified copy of the same to the Department of Corrections and Rehabilitation.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.

opening brief, appellant simply points out that his request for a transcript was denied. He does not indicate what, if anything, would have been the basis for a new trial motion or how the transcript would have been useful.