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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JAISON ARMSTRONG,

Defendant and Appellant.

B281829

(Los Angeles County
Super. Ct. No. SA091904)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Remanded for resentencing.

Pamela J. Voich, 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, Susan Sullivan Pithey and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Jaison Armstrong was convicted after a jury trial of second degree robbery. On appeal Armstrong, who conceded at trial he had participated with two other men in the theft of merchandise from an electronics store, contends there was insufficient evidence to support the jury's finding the theft was accomplished by means of force or fear and, therefore, a robbery. Armstrong also challenges the sufficiency of the evidence to support the jury's findings a principal had used a firearm during the commission of the offense and the robbery was committed for the benefit of, or in association with, a criminal street gang. We affirm the conviction and true findings on the enhancement allegations, but remand for the trial court to exercise its discretion whether to strike or dismiss the firearm-use enhancement pursuant to newly amended Penal Code section 12022.53, subdivision (h).¹

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

An information filed February 16, 2016 charged Armstrong, Angel Franco and Sergio Alexander Carbajal with committing second degree robbery (§§ 211, 212.5, subd. (c)) by taking personal property from the possession of, and from the person or immediate presence of, Khaja Ifhanuddin, "by means of force and/or fear." The information also specially alleged a principal had personally used a firearm in the commission of the offense (§ 12022.53, subds. (b), (e)(1)) and that the offense was committed for the benefit of, or in association with, a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)).

¹ Statutory references are to this code.

Franco and Carbajal reached negotiated plea agreements with the People prior to the start of trial.

2. The Evidence at Trial

On December 17, 2015 Armstrong, Franco and Carbajal entered an electronics store in a mini-mall at the corner of South La Cienega Boulevard and Sawyer Street in Los Angeles. Ifhanuddin was working in the store with Rene Mojarro and Desiree Sevillano. Ifhanuddin and Mojarro had seen Carbajal in the store for a brief time earlier in the day. After the three men entered the store, Armstrong and Franco began taking small electronic devices from the shelves and putting the merchandise into pillowcases. Carbajal stood nearby with his hands on his hips.

Ifhanuddin walked over to the three men, asked if they needed anything and requested they put the merchandise they had taken back on the shelves. Carbajal pulled up his shirt, briefly displaying what appeared to Ifhanuddin to be the black handle of a handgun in Carbajal's waistband. Carbajal announced, "I know you better back up before you get knocked the fuck out." Armstrong then approached Ifhanuddin and stated, "No. This is our neighborhood. We can take whatever we'd like, and you can't stop us."² Ifhanuddin was frightened for his own safety and the safety of others in the store, so he stepped back and left the men alone.

Mojarro first noticed the incident when a customer told him some men were stealing merchandise. Mojarro then saw Ifhanuddin surrounded by three men and overheard some of the

² Ifhanuddin initially testified only Carbajal spoke to him. On cross-examination Ifhanuddin corrected himself, saying both Carbajal and Armstrong spoke to him.

words that were exchanged. Mojarro thought Ifhanuddin appeared frightened. Mojarro was frightened too and did not intervene. The three men left the store unimpeded, carrying the stolen merchandise.

Surveillance cameras recorded the incident, and the police identified Armstrong, Franco and Carbajal as suspects. Officers searched Franco's apartment, where they found two of the electronics items stolen from the store and a black BB gun.

Los Angeles Police Officer Jina Roh testified as a gang expert. Roh described Down Insane Mexican Familia (DIM 13) as a gang claiming territory in the area of the electronics store where the theft occurred and Playboy Gangster Crips (PBG) as a gang that claimed territory nearby. According to Roh, the two gangs are associated with each other. Roh testified she was familiar with Armstrong as a PBG member and with Carbajal and Franco as members of DIM 13. In response to a hypothetical question about a crime matching the facts in this case, Roh opined the crime was committed in association with, and for the benefit of, criminal street gangs. Roh also opined based on the hypothetical that the perpetrators committed the crime with the intent to promote their gangs by instilling fear and claiming territory.

Armstrong did not testify or present any witnesses in his defense.

3. *The Verdict and Sentence*

The jury found Armstrong guilty of second degree robbery and found true the special allegations a principal had personally used a firearm in the commission of the robbery and Armstrong had committed the crime for the benefit of, or in association with, a criminal street gang. The trial court sentenced Armstrong to a 12-year prison term, consisting of the lower term of two years for robbery and a consecutive term of 10 years for the use of a firearm by a principal during the commission of a crime for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b).³

DISCUSSION

1. *Standard of Review*

To determine whether the evidence is sufficient to support a conviction, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every

³ The court also imposed and stayed execution of an additional 10-year term for the criminal street gang enhancement pursuant to section 12022.53, subdivision (e)(2), and *People v. Brookfield* (2009) 47 Cal.4th 583, 590. (See Cal. Rules of Court, rule 4.447(a) [if imposition of an enhancement is prohibited by law or exceeds limitations on the imposition of multiple enhancements, the court properly stays execution of the part of the term that is prohibited or exceeds the application limitation].)

fact the jury could reasonably have deduced from the evidence. [Citation.] “Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’ the jury’s verdict.” (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; accord, *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

We apply the same substantial evidence test to determine whether the evidence is sufficient to support true findings on the firearm-use and criminal street gang enhancement allegations. (See *People v. Wilson* (2008) 44 Cal.4th 758, 806 [firearm-use allegation]; *People v. Albillar* (2010) 51 Cal.4th 47, 68 [criminal street gang allegation]; *People v. Weddington* (2016) 246 Cal.App.4th 468, 483 [criminal street gang allegation].)

2. *Substantial Evidence Supports the Finding Armstrong and His Confederates Used Force or Fear When Stealing Property from the Electronics Store*

“Robbery is ‘the taking of personal property of some value, however slight, from a person or the person’s immediate presence by means of force or fear, with the intent to permanently deprive the person of the property.’” (*People v. Jackson* (2016) 1 Cal.5th 269, 343.) A taking consists of both gaining possession of the property and asporting or carrying it away. (*People v. Gomez* (2008) 43 Cal.4th 249, 256 [“a taking is not over at the moment of caption; it continues through asportation”]; *People v. Cooper*

(1991) 53 Cal.3d 1158, 1165 “[t]he taking element of robbery itself has two necessary elements, gaining possession of the victim’s property and asporting or carrying away the loot”].) A robbery is not complete until the perpetrator carrying the stolen property reaches a place of temporary safety. (*Gomez*, at p. 256.)

A taking is accomplished by means of force or fear, as necessary to constitute a robbery, when the perpetrator uses force or fear either in gaining possession of the property or in carrying it away. (*People v. Gomez, supra*, 43 Cal.4th at pp. 255-256.) “[A] robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away.” (*Id.* at p. 256.)

The evidence at trial established that Anderson and his confederates took merchandise off store shelves and placed it in pillowcases without threatening anyone until Ifhanuddin confronted them and asked them to put the items back. At that point, as Ifhanuddin testified, Carbajal lifted his shirt, revealing a handgun in his waistband, and warned, “I know you better back up before you get knocked the fuck out.” Armstrong then stated, “No. This is our neighborhood. We can take whatever we’d like and you can’t stop us.” Ifhanuddin, perceiving these words and actions as threatening, was frightened, stepped back and did not intervene further. This evidence is sufficient to support the finding that Armstrong and his associates used fear to allow them to carry away the stolen merchandise unimpeded.

Armstrong argues that other evidence demonstrates Ifhanuddin’s testimony was inaccurate. Other witnesses did not overhear the statement “[t]his is our neighborhood” and did not see a handgun. Armstrong also points out that Ifhanuddin testified he asked the perpetrators to put the merchandise back a

second time after Armstrong had stated “[t]his is our neighborhood,” suggesting that continuing to ask the perpetrators to return the merchandise was inconsistent with a state of fear.

Any purported conflict in the evidence does not render the evidence insufficient to support the robbery verdict. The jury, not this court, determines the credibility of witnesses and resolves any evidentiary conflicts. (See *People v. Zamudio, supra*, 43 Cal.4th at p. 357.)

3. *Substantial Evidence Supports the Finding a Principal Used a Firearm During the Offense*

A person uses a firearm in the commission of a felony within the meaning of section 12022.53, subdivision (b), if he or she displays a firearm in a menacing manner in order to facilitate the commission of the crime. (*People v. Thiessen* (2012) 202 Cal.App.4th 1397, 1405; see CALCRIM No. 3146.) “Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies.” (*People v. Bland* (1995) 10 Cal.4th 991, 997.)

Challenging the jury’s finding a principal had personally used a firearm in the commission of the robbery, Armstrong argues Carbajal did not display the gun in a menacing manner to facilitate the crime, but only displayed it incidentally or passively. However, Ifhanuddin testified, after he had asked the men to put the merchandise back, Carbajal lifted his shirt, revealing what appeared to Ifhanuddin to be the handle of a handgun, and stated, “I know you better back up before you get

knocked the fuck out.”⁴ Based on this testimony the jury could reasonably conclude beyond a reasonable doubt that Carbajal, a principal in the commission of the crime, displayed the gun, however briefly, in a menacing manner, to facilitate the commission of the robbery, constituting personal use within the meaning of section 12022.53, subdivision (b).

4. *Substantial Evidence Supports the Finding the Robbery Was Committed for the Benefit of a Criminal Street Gang*

To obtain a true finding on an allegation of a criminal street gang enhancement, the People must prove the crime at issue was “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.” (§ 186.22, subd. (b)(1).) A “criminal street gang” is defined as an organization that has as one of its primary activities the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and whose members have engaged in a “pattern of criminal gang activity” by committing two or more of such “predicate offenses” on separate occasions or by two or more persons within a three-year period.

⁴ Contrary to Armstrong’s argument, Ifhanuddin did not testify he believed Carbajal had a gun in his waistband only because the store was in a dangerous neighborhood. Rather, when asked why he believed what he saw when Carbajal lifted his shirt was the handle of a gun, Ifhanuddin replied, “Well, it’s your first instinct. I mean when you are in a rough neighborhood like that where I worked you—,” and then continued, “I mean I’ve seen guns. So I know what a gun looks like, whether it be a real gun or a toy gun. I know what a gun looks like.”

(§ 186.22, subds. (e), (f); *People v. Loeun* (1997) 17 Cal.4th 1, 9; see *People v. Weddington*, *supra*, 246 Cal.App.4th at p. 484.)

Armstrong contends the evidence at trial does not support the jury's findings the robbery of the electronics store was gang-related (that is, committed for the benefit of, or in association with, a criminal street gang) and with the specific intent to promote, further or assist in criminal conduct by gang members, arguing in particular that Officer Roh's expert opinion alone is insufficient to support those findings.

Officer Roh testified Armstrong had admitted to her he had been a PBG member since the age of 13. Armstrong's body bore tattoos demonstrating his allegiance to the gang, and Roh had personally observed him on several occasions associating with PBG gang members in the gang's claimed territory. Roh also testified Franco had admitted to her he was a DIM 13 member, and Carbajal's tattoos and field identification cards indicated Carbajal was a DIM 13 member as well. Based on information available to her as a gang officer, as well as her personal observations, Roh expressed her opinion Armstrong was an active member of PBG on the date of the robbery and Franco and Carbajal were active members of DIM 13.

Officer Roh also gave her opinion as a gang expert, in response to a hypothetical question tracking the facts in this case, that the crime described in the question was committed in association with, and for the benefit of, criminal street gangs. Roh explained gang members often work together to commit crimes and, when they join together to commit a robbery, it elevates their status within the gang and earns money to fund other gang activities. Roh further opined a statement to the

effect that this is their neighborhood and they can take what they want instills fear in the community and facilitates other crimes.

A qualified gang expert may express an opinion, based on a hypothetical question tracking the evidence in the case, whether the hypothetical crime was gang-related. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045.) Such evidence is not only admissible but also can be sufficient to support a finding the defendant's crime was gang-related. (*Id.* at p. 1048; *People v. Albillar, supra*, 51 Cal.4th at p. 63 [“[e]xpert opinion that particular criminal conduct benefited a gang . . . can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1)”].) Here, Officer Roh's testimony that all three perpetrators were active gang members, her opinion based on a hypothetical question the robbery was gang-related, and Ifhanuddin's testimony that Armstrong had expressly referred to “our neighborhood” when asserting his right to steal merchandise, when considered together, constituted substantial evidence supporting the finding that the robbery was gang-related.

Regarding the “specific intent” requirement, “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.”⁵ (*People v. Albillar, supra*, 51 Cal.4th at p. 68; see

⁵ The specific intent required by section 186.22, subdivision (b)(1), “applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal

People v. Garcia (2016) 244 Cal.App.4th 1349, 1367

[“[c]ommission 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”).) Thus, the evidence that Armstrong committed the robbery with other known gang members adequately supports the jury’s finding he had the specific intent to promote, further or assist criminal conduct by those gang members.

5. *Armstrong Is Entitled to a New Sentencing Hearing*

On October 11, 2017, while this appeal was pending, the Governor signed Senate Bill No. 620, effective January 1, 2018 (Stats. 2017, ch. 682, § 2), amending section 12022.53 to give discretion to the trial court to strike a firearm enhancement in the interest of justice. (See § 12022.53, subd. (h) [“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”].)⁶

Armstrong and the Attorney General agree remand is appropriate to permit the trial court, which previously exercised its discretion to impose the low term of two years for robbery, to

conduct underlying the offense of conviction sought to be enhanced.” (*People v. Albillar, supra*, 51 Cal.4th at p. 66.)

⁶ Former section 12022.53, subdivision (h), provided, “Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”

exercise its new sentencing discretion on the firearm enhancement. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425.)⁷

DISPOSITION

Armstrong's conviction is affirmed, and the matter remanded for the trial court to consider whether to dismiss or strike the firearm-use enhancement in accordance with newly amended section 12022.53, subdivision (h).

PERLUSS, P. J.

We concur:

SEGAL, J.

WILEY, J.*

⁷ If the court exercises its discretion to dismiss or strike the firearm-use enhancement imposed pursuant to section 12022.53, subdivision (e)(1), it will also need to decide whether to strike the previously stayed criminal street gang enhancement pursuant to section 186.22, subdivision (g) (court may strike the additional punishment for enhancements provided by section 186.22 if the interests of justice would best be served by that disposition).

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.