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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVION LAMAR HARRIS et al.,

Defendants and Appellants.

B290687

(Los Angeles County
Super. Ct. No. TA145067)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael Shultz, Judge. Affirmed in part and reversed in part.

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

Vincent W. Davis, under appointment by the Court of Appeal, for Defendant and Appellant, Phillip Ridge.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

On July 18, 2016, a man standing on the sidewalk was shot in a drive-by shooting involving two cars. He survived. The police used surveillance video to connect the cars to defendants Davion Harris and Phillip Ridge. Defendants were taken into custody, and the police secretly recorded them talking about their involvement in the shooting.

A jury convicted defendants of attempted murder and related charges and enhancements arising from the shooting. On appeal, defendants contend the trial court should have granted their motions to suppress their cell phone records. We conclude any error in denying those motions was harmless. Harris also contends the gang allegations were not supported by sufficient evidence. We agree with Harris that there was insufficient evidence that he intended to benefit his gang in connection with his flight from the police, and reverse on that enhancement portion of the sentence. We leave intact the gang enhancements as to the other counts, and otherwise affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The shooting took place within the confines of a public housing development called Nickerson Gardens which the Bounty Hunter Bloods gang claims as territory. One mile away, another public housing development, Jordan Downs, is home to a rival gang, the Grape Street Crips.

On July 18, 2016, at approximately 3:00 p.m., the police responded to a report of shots fired on a street in Nickerson Gardens. The man who was shot, Justin Hamer, was taken to the hospital. At the crime scene, officers recovered 38 bullet casings from three different semiautomatic weapons.

The shooting was partially caught on surveillance cameras that showed a white sedan with a black top and a dark-colored

sedan pass by Hamer who was then shot. After the shooting, a police officer reported two vehicle descriptions to Detective Daniel Pearce: a dark-colored BMW and a white Mercedes with a black top. Pearce went to Grape Street Crips territory to investigate because there had recently been several shootings between the rival gangs. He saw a white Mercedes with a black top parked at a residence, and waited for the driver to return.

Video surveillance showed that Harris, a Grape Street Crips member, had parked the white Mercedes right after the shooting. Later on in the evening, approximately five hours after the shooting, he returned to the car and drove off. Harris was pursued by the police and led them on a car chase. He drove into oncoming traffic, and sped through several stop signs and red lights. Video showed that an object, resembling a gun, was thrown out of the Mercedes during the chase; it was never found. Harris eventually pulled over, exited the car, and ran off. The police discovered him nearby hiding under a car, and took him into custody.

At the police station, Harris asked Pearce to retrieve his cell phone from the Mercedes. Pearce found five cell phones in the car. Harris identified one of the phones as his. Pearce obtained the phone number for Harris's phone by dialing 911 on the phone and asking the operator to identify the number. The police released the phone to Harris's mother several days later.

Approximately two hours after the shooting, a police officer observed Ridge, a Grape Street Crips member, driving a gray BMW. The officer contacted Detective Pearce and asked him whether to stop Ridge. Although the gray BMW was a vehicle of interest and Pearce knew Ridge as a Grape Street Crips member, Pearce told the officer to let Ridge go so that the officer could

“remain in the area in case th[e] white Mercedes left.” Ridge became a suspect in Hamer’s shooting, and was arrested one month later. He was the registered owner of the BMW. Ridge’s cell phone was confiscated upon his arrest, and Pearce used the same 911 technique to identify its phone number.

The police then obtained search warrants for the call detail records for Harris’s and Ridge’s phones. The records showed a seven-minute phone call between the phones at the time of the shooting. An analysis of that seven-minute call showed that minutes before the shooting both phones were in the Jordan Downs area. The phones then traveled to the Nickerson Gardens area, before both phones returned to Jordan Downs at the end of the seven-minute call.

At the county jail, Harris and Ridge were handcuffed to a bench together, and their conversation recorded by a hidden device. Harris told Ridge he had been shown pictures by the police: “[T]hey show our cars turning back around, turning in the Nickersons, and then riding past the young nigga, and then, um, our cars face the freeway and then shots right back towards that way, but they never show no car shooting, you feel me? So, you can’t let them play you, you feel me? You can’t let them put yourself on that scene.” Ridge told Harris the police took his phone, to which Harris replied: “My number is not in your phone. It was?” Ridge stated, “Son of a bitch! Bullshit. I’m a need a deal.”

Defendants were charged with attempted murder (Pen. Code, § 664/187), conspiracy to commit a crime (Pen. Code, § 182, subd. (a)(1)), and shooting at an occupied vehicle (Pen. Code,

§ 246).¹ Harris was also charged with fleeing a peace officer while driving recklessly (Veh. Code, § 2800.2). As to all counts, it was alleged that defendants committed the charged offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). A firearm enhancement was alleged as to the attempted murder count (§ 12022.53, subds. (b), (c) & (d)). Finally, the information alleged that defendants had served several prior prison terms (§ 667.5, subd. (b)).

A jury found defendants guilty of all charges, and all but one of the special allegations to be true. The trial court sentenced Ridge to 40 years to life for the attempted murder with the firearm enhancement. Harris was sentenced to 40 years to life for the attempted murder and firearm enhancement, and a consecutive 7-year term for fleeing a peace officer (a three-year term plus four years for the gang enhancement). The court stayed Harris's and Ridge's sentences for the conspiracy and shooting at an occupied motor vehicle counts. The prior prison allegations were stricken. Defendants timely appealed.

DISCUSSION

1. Any Error in Denying the Motions to Suppress Was Harmless

Prior to trial, the court denied defendants' motions to suppress evidence obtained through Detective Pearce's 911 calls on their cell phones. Defendants contend the 911 calls constituted warrantless searches under the Fourth Amendment and the resulting evidence was inadmissible. The trial court found that the two 911 calls were unlawful searches, but concluded the vast majority of the evidence associated with cell

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

phone records was admissible under the inevitable discovery and independent source doctrines. (See *People v. Robles* (2000) 23 Cal.4th 789, 800-801.)

On appeal defendants argue that the trial court correctly found the 911 calls to be searches. Respondent does not address the issue, effectively conceding the point, at least in this case. There is little appellate authority on whether a 911 call initiated by police on a suspect's phone without a warrant or consent is a search.² Nevertheless, as the parties seem in agreement on the unlawfulness of the search, we will not address it. We will also assume without deciding that the other cell phone evidence admitted would not have been inevitably discovered. Thus, for present purposes, we accept that there was a Fourth Amendment violation, and the trial court should have excluded all evidence derived from defendants' cell phones.

² In *Riley v. California* (2014) 573 U.S. 373, the Supreme Court generally addressed cell phone searches incident to arrest, concluding the substantive portion of its opinion with the oft quoted, "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." (*Id.* at p. 403.) The court did not consider whether 911 calls by police under the circumstances present here were searches. At least one court, the Court of Appeals of Georgia, has found that a police 911 call on a suspect's cell phone was not an unconstitutional search. (*State v. Hill* (2016) 789 S.E.2d 317, 318 ["Because Hill had no reasonable expectation of privacy in the information at issue—his own name, date of birth, and phone number—we agree with the state that there was no search under the Fourth Amendment . . ."]; see also Jacobsen, *Let's Get Physical, Physical: Answering What Constitutes a Search of a Cell Phone after Riley Through a "Use-Based" Approach* (2017) Vol. 53, No. 4, Crim. Law Bulletin Art. 3.)

Nevertheless we conclude any error was harmless beyond a reasonable doubt. (*Chapman v. Cal.* (1967) 386 U.S. 18, 24; see *People v. Moore* (2011) 51 Cal.4th 1104, 1128–1129.)

Even without the cell phone data, ample evidence supported defendants' convictions. Harris and Ridge were known Grape Street Crips gang members. At the time of Hamer's shooting, there had recently been a spate of shootings between their gang and the rival gang which claimed the Nickerson Gardens development as territory. Harris drove a white Mercedes with a black top registered to his mother; Ridge drove a gray BMW registered to him. Two cars matching those descriptions were captured by surveillance video driving through Nickerson Gardens together, and then passing by Hamer seconds before he was shot.

Surveillance video showed Harris parking his Mercedes minutes after Hamer's shooting. An hour later, Ridge was seen driving his gray BMW. Several hours after the shooting, Harris led the police in a car chase and then fled on foot. When Harris and Ridge were arrested and handcuffed together in jail, they engaged in an incriminating conversation, admitting their participation in the shooting. Harris told Ridge there was video of their cars driving past the victim and shots being fired but that the video had not captured "no car shooting." Harris then warned Ridge not to admit he was at the crime scene. When Ridge and Harris realized Harris's info was in Ridge's phone, Ridge exclaimed that he needed to cut a deal with the prosecutor.

In light of this strong evidence of defendants' guilt, we conclude any error in failing to suppress the cell phone data was harmless beyond a reasonable doubt.

2. *The Gang Enhancements*

The jury found that Harris committed the attempted murder, shooting at an occupied vehicle, and fleeing a police officer counts for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The court did not impose the gang enhancement as to the attempted murder count, stayed the sentence on the shooting count, and imposed a four-year gang enhancement as to the flight count. Harris now argues the prosecution failed to prove that the Grape Street Crips gang is a criminal street gang as defined in section 186.22, subdivision (f) because there was insufficient evidence the gang’s “primary activities” included criminal acts enumerated in the statute. He also contends there was no substantial evidence he intended to benefit his gang when he fled the police. We address each contention in turn.

A. *The Law*

The California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20 et seq.) provides for enhanced punishment for “any person 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.” (§ 186.22, subd. (b)(1).) “There are two prongs to the enhancement. [Citation.] First, the prosecution is required to prove that the underlying felonies were ‘committed for the benefit of, at the direction of, or in association with any criminal street gang.’ [Citation.] Second, there must be evidence that the crimes were committed ‘with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ [Citations.]” (*People v. Rios* (2013) 222 Cal.App.4th 542, 561.)

Section 186.22, subdivision (b)(1) also requires the prosecution to establish the existence of a “criminal street gang.” As is relevant here, to qualify as a “criminal street gang,” one of the gang’s primary activities must be the commission of one or more of certain crimes listed in the gang statute. (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322 (*Sengpadychith*)). “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony [Citation.]” (*Ibid.*)

We review a challenge to the sufficiency of the evidence to support an enhancement under the substantial evidence standard. (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

B. Substantial Evidence Supports the “Primary Activities” Finding

Harris argues the prosecution did not provide sufficient evidence of the Grape Street Crips’s primary criminal activities because the gang expert (1) did not testify as to “how frequently gang members engaged in the crimes he listed,” and (2) evidence of only several crimes is insufficient to show a large gang’s primary activities. We conclude substantial evidence supports the finding that the Grape Street Crips’s primary activities included the crimes enumerated in section 186.22, subdivision (e).

At trial, the prosecution’s gang expert opined that defendants were members of the Grape Street Crips, which had approximately 2,500 members total. According to the expert, the Grape Street Crips’s primary activities were “possession of firearms, sales of narcotics, burglaries, robberies, assaults, criminal threats, [assaults with a deadly weapon], shootings,

attempt[ed] murders, [and] murders.” Based on court dockets of two criminal convictions, the expert opined that those crimes were committed by Grape Street Crips members. When presented with a hypothetical situation similar to Hamer’s shooting, the expert opined that the attempted murder benefitted the gang by bolstering its reputation and intimidating potential witnesses.

In support of the argument that this was insufficient evidence of the gang’s primary activities, Harris relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 in which the Court of Appeal held that evidence of two criminal convictions by gang members, “without more,” did “not provide substantial evidence that gang members had ‘consistently and repeatedly . . . committed criminal activity listed in the gang statute.’” (*Id.* at p. 614.) *Alexander L.* is distinguishable: in that case, the gang expert did not opine as to what the gang’s “primary” activities were. (*Ibid.*) Here, by contrast, the expert testified that the gang’s primary activities included murders and other crimes enumerated by the gang enhancement statute.

This was substantial evidence of the “primary activities” element of the definition of a criminal street gang. (See *People v. Prunty* (2015) 62 Cal.4th 59, 82 [gang expert’s testimony the defendant’s gang engaged “in various criminal practices, including homicide, assault, and firearms offenses” was “likely sufficient” to establish “primary activities” element]; *Sengpadychith, supra*, 26 Cal.4th at p. 324 [the “primary activities” element may be satisfied by an expert testimony that the defendant’s gang “‘was primarily engaged in . . . statutorily enumerated felonies’ ”].)

C. There is No Substantial Evidence Harris Acted with Intent to Benefit the Grape Street Crips When He Fled the Police (Count 6)

The jury found true that Harris fled from a peace officer with the specific intent to promote the Grape Street Crips. Harris now argues that evidence he fled the police and threw a gun out of the car during the chase was insufficient to show he acted with such intent. We agree there is no substantial evidence to support the jury's finding that Harris acted with the intent to promote the gang when he fled the police. Like anyone trying to escape apprehension by the police, Harris was trying to preserve his personal freedom.

When the gang expert was presented with a hypothetical mirroring Harris's flight from the police on the day of the shooting, the expert opined that Harris's actions benefited his gang. "By fleeing from the police and tossing out a possible firearm that was used in the commission of a crime, and the firearm itself not being recovered, it could delay the crime being solved or . . . charges being put against that person. The delay helps the driver and the gang as well[—] . . . if he's not being prosecuted for crimes that he's committed, he's able to maintain and stay active within the gang."

While the expert opined that Harris's flight benefited the gang, the testimony did not support a reasonable inference that Harris acted with the specific intent to benefit his gang. There were also no facts from which the expert could base an opinion whether Harris was acting on his own behalf or on behalf of Grape Street. There was no evidence Harris's passenger was another gang member. Although Harris was in the gang's territory, it also appears he was near his home. Harris did not

call out a gang name, or display gang signs while committing the offense. There is no suggestion that Harris sought refuge in a gang hideout or fled in order to warn gang members that police were in the area. Nor do we see how Harris's act of throwing the gun out of the car constitutes substantial evidence of an intent to benefit the gang.

DISPOSITION

Ridge's judgment is affirmed.

With respect to Harris's judgment, the gang enhancement as to count 6 (flight from a peace officer; Veh. Code, § 2800.2) is reversed. The trial court is directed to prepare a new abstract of judgment that deletes the enhancement on that count. We otherwise affirm Harris's judgment.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

MOOR, J.