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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. CHANTHOEURN CHHUON et al., Defendants and Appellants.	B239254 (Los Angeles County Super. Ct. No. KA093016)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant Chanthoeurn Chhuon.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant Srun Ly.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendants and appellants Chanthoeurn Chhuon and Srun Ly guilty in count 1 of home invasion robbery (Pen. Code, § 211),[1] in count 2 of assault with a firearm (§ 245, subd. (a)(2)), and in count 3 of making criminal threats (§ 422). Allegations that a principal used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), and that the offenses were committed for the benefit of a criminal street gang, within the meaning of section 186.22, subdivision (b)(1)(C), were found true with respect to both defendants on all counts. The jury also found, as to all counts, that Chhuon personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). Chhuon admitted he suffered four prior convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and within the meaning of section 667, subdivision (a)(1). Ly admitted that he suffered two prior convictions within the meaning of the three strikes law and section 667, subdivision (a)(1).

Chhuon was sentenced to life in state prison with a minimum parole term of 15 years as to count one, tripled to 45 years to life in prison under the three strikes law, enhanced by 10 years for the personal firearm use allegation, 3 years for the great bodily injury allegation, and 5 years for the prior conviction allegation under section 667, subdivision (a)(1). The trial court imposed and stayed 42 years-to-life terms on counts 2 and 3.

Ly was sentenced to life in state prison with a minimum parole term of 15 years as to count one, tripled to 45 years to life in prison under the three strikes law, enhanced by two 5-year terms for the prior conviction allegation under section 667, subdivision (a)(1). The trial court imposed and stayed 35 years-to-life terms on counts 2 and 3.

Defendants challenge the sufficiency of the evidence supporting the gang enhancements. Chhuon additionally contends the trial court abused its discretion by refusing to strike his prior strike convictions. We affirm the judgment.

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[1] All subsequent statutory references are to the Penal Code, unless otherwise indicated.

FACTS

Tran Nguyen met defendants in June 2010. Nguyen grew marijuana in his house. Ly helped Nguyen obtain a loan to pay for "grow" equipment and electricity, and in exchange, Nguyen agreed to teach Ly how to grow marijuana.

Ly assisted Nguyen with the marijuana plants in Nguyen's house every three to four days for about a month. Ly lost his transportation, and Chhuon began driving him to the house. In August and September 2010, Nguyen gave Ly a key to the house and left the plants in Ly's care while he was out of town. Ly did not take care of the plants as instructed causing tension between Ly and Nguyen. Nguyen wanted his key back but was afraid to insist because he thought Ly would "bring his friends over." Ly threatened Nguyen not to take the key. Ly continued to come to the house sporadically with Chhuon.

In December 2010, Nguyen sent Ly several text messages complaining that Chhuon was ruining the marijuana by picking the fan leaves off the plants. Nguyen made it clear that he did not want Chhuon involved in caring for the plants because he was not an "investor." He told Ly not to allow Chhuon in his house and asked him to at least prevent Chhuon from touching the plants. He texted Ly: "I do not want to fucking deal with no more bullshit. I'm hear [*sic*] to train YOU, not [Chhuon]." Nguyen changed the locks to the house a few weeks after he sent the text messages, so that Ly no longer had access to the marijuana plants.

In January 2011, Nguyen began to notice people coming by his house with a U-Haul truck. At one point, the people driving the U-Haul tried to break into the house by unlocking the door. Nguyen contacted Ly because he wanted information about the men he believed were trying to rob him. He thought Ly would have information because Ly and Chhuon were two of the only people who had been inside the house and were familiar with the set-up. Nguyen had not had other people over to the house because he was concerned he would be robbed.

Nguyen no longer trusted Ly, so he arranged to meet him at Starbucks rather than at the house. Ly texted Nguyen that he would be at Starbucks in 10 minutes, so Nguyen got ready to go meet him. When Nguyen opened the front door, Ly sprang up and pushed him inside to the kitchen. Ly knocked Nguyen to the floor. Chhuon came in behind Ly with a gun. Nguyen kept asking why Ly was doing this. Chhuon told Nguyen that if he was not quiet he would shoot him. Nguyen responded that Chhuon should shoot him because he had nothing to live for. Chhuon then pistol-whipped Nguyen about his head and knee caps while Ly held him down. Ly got Nguyen in a choke hold and pushed him face-down on the floor. Two other men appeared and they bound Nguyen with duct tape. They stuffed a T-shirt in Nguyen's mouth and duct taped it shut. They also covered his eyes with duct tape. Nguyen was dragged into the living room. He was able to rub his face on the floor enough to remove some of the duct tape covering his eyes. He saw that there were four people in the house. A Hispanic man in the group noticed he could see, and re-taped Nguyen's eyes. The men stole some expensive cultivating equipment, including fans, reflectors, carbon filters, and ballasts, Nguyen's cell phone, and several $2 bills. They also took $2000 in new hundred dollar bills from Nguyen's pocket. Nguyen did not see who took the money, but he heard Chhuon say, "We just came up."

After the men left, Nguyen managed to free himself. He feared the men would return with their friends and retaliate against him if he gave information about them to the police, so he did not report the crimes immediately. Instead, he left the house to see if he could find out why defendants had robbed him and to have a friend treat his wounds. Nguyen sustained several gashes to his head during the incident but did not require stitches and did not seek professional medical help. He reported the crimes to the authorities many hours later, at the urging of a friend.

Deputy Toan Duong of the Los Angeles County Sheriff's Department participated in the investigation and testified as an expert witness for the prosecution. He arrested Ly and conducted a search of Ly's house in which officers discovered $1800 in new hundred dollar bills, several $2 bills, and an ounce of marijuana. In the course of his

investigation, Deputy Duong also contacted Ly's brother, Sreang, who told him that he was an active Wah Ching member, and that Ly was an associate of the gang. Sreang had the Wah Ching letters and a dragon tattooed on his back.

Wah Ching is an Asian gang in Los Angeles County. Wah Ching is not territorial, in contrast to other gangs whose members will kill rival gang members within their territory. Associates of a gang do not go through a formal initiation, but they are considered "down with the gang," meaning that they are familiar with gang culture, commit crimes with the gang, and the gang considers them to be trustworthy. The dragon tattoo on Ly's back could indicate Ly was associated with the gang, although it was not a definitive sign of gang membership. There was no prior contact with Ly, and there were no field identification cards of Ly on file, but based on Ly's and Sreang's dragon tattoos, it was Deputy Duong's opinion that Ly was an associate of Wah Ching.

When given a hypothetical question encompassing the facts of this case, Deputy Duong testified that, in his opinion, the crimes would have benefitted the gang. If a person was teaching a Wah Ching associate to grow marijuana in his home and then suddenly stopped and changed the locks, it would be a sign of disrespect. The Wah Ching associate would have "gotten punked" and would have to defend both his own reputation and the reputation of the gang. Because the proceeds of the alleged crimes are often shared among Asian gang members, gang members who commit offenses strengthen the gang's base with stolen money and narcotics. Narcotics could be sold for money, and the stolen money and proceeds from the narcotics could be used to buy more narcotics and firearms, which Asian gangs are known to purchase. Committing the crimes would also benefit the gang because gang members often brag about their crimes later, and word of their activities will spread. Asian gang members often associate with Asians from other gangs and brag about the crimes their members commit, which bolsters the gang's reputation and increases fear in the community. It is common for Asian gangs to target people they know because they believe their victims will be afraid to report them to the police.

Under the given hypothetical, Deputy Duong opined that the crimes were committed at the direction of, or in association with, a criminal street gang. It is typical of Asian gang members or associates of a gang to plan crimes with other members. Planning and sophistication were evident under the facts given in the hypothetical. One of the perpetrators entered the house first and subdued the victim, and then a second perpetrator entered with a gun. This avoided any struggle over the gun with the victim. Additionally, there is generally a division of skills, with one person planning the crime and another providing the physical force to carry it out, as was the case in the hypothetical set of facts presented to the deputy.

Detective Paul Gutierrez, a police officer from the City of Stockton, also participated in the investigation and rendered his expert opinion. Deputy Duong provided Detective Gutierrez with a phone number that he was able to trace back to Chhuon. Detective Gutierrez and other officers arrested Chhuon in his car and then searched his apartment. When they went inside, the officers encountered Sophat Him, Chhuon's stepbrother and a documented Original Bloods member. The officers discovered a photograph depicting Chhuon throwing gang signs when they searched his vehicle.[2] A second photograph recovered from the vehicle depicted Chhuon standing behind someone in a red shirt who was throwing a West Side Bloods sign.

Detective Gutierrez testified that the Original Bloods are a documented street gang in Stockton who are primarily Cambodian, but align themselves with other Blood gangs that have members of other ethnicities, including the West Side Bloods. Chhuon was living in the Louis Park area, within Original Bloods territory in an apartment complex where Detective Gutierrez previously made contact with numerous documented gang members. Chhuon has several tattoos on his back associated with the Original Bloods, including a tattoo of the letters "OB." Based on the evidence described, it was Detective Gutierrez's opinion that Chhuon was a member of the Original Bloods.

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[2] Detective Gutierrez opined the gang signs were associated with the Crips.

DISCUSSION

Gang Enhancements

The jury found that defendants fell within the prohibitions of section 186.22, subdivision (b)(1), which provides: "[A]ny 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . ." Defendants contend there was insufficient evidence to support the jury's findings that the crimes were committed for the benefit of the gang and committed with the specific intent to promote criminal conduct by gang members. Defendants assert that the prosecution's expert witnesses testified to their theories of the case without reference to facts. They argue the expert testimony is based on speculation and is not sufficient to support the jury's findings. Their contentions lack merit.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

Section 186.22 requires that the prosecution prove beyond a reasonable doubt that the underlying crime was committed: (1) for the benefit of, at the direction of, or in association with any criminal street gang; and (2) with the specific intent to promote, further, or assist in any criminal conduct by the gang. (*Albillar*, *supra*, 51 Cal.4th at pp. 63, 65-66.)

To meet the first prong, the crime must be gang-related. (*Albillar*, *supra*, 51 Cal.4th at p. 60.) A crime is not gang-related simply because it is committed by gang members. (*Ibid.*) However, where an expert opines that "particular criminal conduct benefited a gang by enhancing its reputation for viciousness[, this] 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[, subdivision] (b)(1)." (*Id.* at p. 63.)

As to the second prong of the enhancement, "specific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members . . . .'" (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*); see *People v. Villalobos* (2006)145 Cal.App.4th 310, 322 (*Villalobos*).) "'"[C]riminal conduct by gang members" [need not] be distinct from the charged offense, . . . [nor is the prosecution required to] establish specific crimes the defendant intended to assist his fellow gang members in committing.' [Citation.]" (*Albillar*, *supra*, 51 Cal.4th at p. 66, quoting *People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-354.) Gang membership alone cannot prove the requisite specific intent (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624 (*Gardeley*)), but "[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. [Citation.]" (*Villalobos*, *supra*, at p. 322.)

"It is well settled that a trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation. [Citation.]" (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) Here, the jury could have reasonably drawn the inference that Ly was an associate of Wah Ching and Chhuon was a member of the

Original Bloods. Ly's brother, a self-proclaimed Wah Ching member who had Wah Ching and dragon tattoos, told Deputy Duong that Ly was an associate of the gang. Ly also had a dragon tattoo, which can indicate gang membership. Evidence was presented that Chhuon was living in Original Bloods territory in an apartment complex with numerous documented gang members; his stepbrother, who was in his apartment at the time of the arrest, was a documented Original Bloods member; Chhuon had a tattoo with the Original Bloods letters; and a photo of Chhuon throwing gang signs was found along with a photo of him standing behind a man throwing signs associated with the West Side Bloods, who had merged with the Original Bloods.

The record contains sufficient evidence that the crimes would have benefitted the gang. Substantial evidence supports the inference that defendants committed the crimes to defend the gang's reputation after Ly revoked their access to his house. Wah Ching could utilize the proceeds to buy more guns and drugs, and they could capitalize on the fear that rumors of the crimes would create to successfully prey on others in the community without fear of repercussions. The facts also reasonably justify the jury's finding that the crimes were committed at the direction of, or in association with a criminal street gang, because of the level of sophistication and planning involved in quickly and effectively subduing the victim and relieving him of a significant amount of large equipment.

With respect to the second prong, when there is sufficient evidence that a gang member engaged in a crime with another gang member, it is "fairly inferable that he intended to assist criminal conduct by his fellow gang members." (*Morales*, *supra*, 112 Cal.App.4th at p. 1198.) As we discussed, sufficient evidence was presented to support the findings that Ly was a Wah Ching associate, and Chhuon was an Original Bloods member. Deputy Duong testified that associate gang members are familiar with gang culture, commit crimes with the gang, and are considered by the gang to be trustworthy. Although the crimes involve a gang member and an associate of a gang rather than two gang members, the situations are sufficiently analogous to support the inference that

defendants had the requisite specific intent to assist in criminal conduct of other gang members.

The precedent upon which defendants rely does not affect our conclusions. In *People v. Albarran* (2007) 149 Cal.App.4th 214, the Court of Appeal did not consider the sufficiency of the evidence supporting the gang enhancement because the trial court granted the defendant's motion for a new trial on the allegations. (*Id*. at p. 217.) Instead, it determined that the admission of prejudicial gang evidence was not relevant to the underlying charges. (*Id*. at pp. 223-224.) The remaining cases defendants cite are distinguishable. In those cases, the defendant either acted alone, or there was a lack of expert testimony that the specific crime charged would benefit the gang. (*In re Frank S., supra,* 141 Cal.App.4th 1192 [the defendant acted alone and no evidence crime would benefit the gang]; *People v. Ramon* (2009) 175 Cal.App.4th 843 [no evidence crime would benefit the gang]; *People v. Ochoa* (2009) 179 Cal.App.4th 650 [the defendant acted alone and insufficient evidence crime would benefit the gang]; *In re Daniel C.* (2011) 195 Cal.App.4th 1350 [the defendant acted alone].) In this case, however, there is evidence that defendants were a gang member and an associate working in concert, and an expert witness testified as to how the charged offenses would benefit the specific gang at issue.

Reversal on the ground of insufficiency of the evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support . . .'" the jury's finding. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Here, from the evidence as a whole, jurors could have reasonably concluded that defendants committed the offenses for the benefit of, at the direction of, or in association with the Wah Ching criminal street gang, and that they did so with the specific intent to promote, further, or assist criminal conduct by gang members.

Chhuon's Prior Strike Convictions

Chhuon contends the trial court abused its discretion in failing to strike his prior strike convictions pursuant to section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, because the court based its decision on his criminal conduct without considering any of the relevant mitigating factors. There is no merit in this argument.

Under section 1385, the trial court has discretion to strike a prior felony conviction allegation in furtherance of justice. (*Romero, supra*, 13 Cal.4th 497, 529-530.) In order to do so, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) A trial court must enter a statement of reasons in the minutes of the court when dismissing a prior conviction; however, it is not required to "'explain its decision not to exercise its power to dismiss or strike[.]'" (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).)

This court reviews a ruling upon a motion to strike a prior felony conviction under a deferential abuse of discretion standard. (*Williams*, *supra*, 17 Cal.4th at p. 162.) The defendant bears the burden of establishing that the trial court's decision was unreasonable or arbitrary. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives].) "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling . . . ." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*).) "It is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant's] prior convictions." (*Ibid*.) "[A] trial court does not abuse its

discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

Chhuon admitted that he was convicted of robbery, rape in concert, burglary, and assault arising out of a single incident in 1998. In that incident, Chhuon and four other men broke into a home at 1:00 a.m. Two of the men held down a woman while a third man raped her in front of her family. One of the men involved also pistol-whipped a victim during the home invasion. (*People v. Mom* (1999) 80 Cal.App.4th 1217.) Chhuon was sentenced to ten years in prison for his crimes. He was paroled in 2008. He violated parole and then committed the instant crime less than a year after his release from parole in 2010.

At the *Romero* hearing, Chhuon argued that: (1) his prior convictions were remote in time; (2) he was young when he committed the prior crimes; (3) at his then age of 32, he still had time to reform; and (4) he had minimal association with the victim in the present case prior to the incident. The trial court considered the relevant factors but denied the *Romero* motion, finding that Chhuon fell within the spirit of the three strikes law:

"[T]here is no remoteness in time, . . . because [Chhuon] was not in the community for a good seven, eight years to be able to commit crimes. And then the crime he committed, absent the sex, was a mirror image of the other crime. Home invasion robbery where this time, at least, he was personally armed. And he personally inflicted great bodily injury.

". . . . . .

"Looking at the spirit of the three strikes law, he has two serious or violent felonies. He's not in the community for more than four years where he picked up the new offense . . . . But it's one in which he's recruited and is a willing participant . . . .

". . . . . .

"The man's age has not mellowed him. This man's age has not distanced him from a life of crime. This is [] a man [whose life has been] . . . punctuated by serious felonies . . . .

"For Mr. Chhuon, not in the community that long and he goes back to escalation of what he did before in terms of the personal use allegations and the personal GBI allegations and the gang allegations. This was a brazen crime. It was a planned crime, and it took some effort to relieve the victim of all the items of value in the residence, which indicates considerable planning.

"And, again, this third strike is . . . a violent felony in lieu of the fact it wasn't violent in terms of classification. It is violent because, in fact, violence was used during the crime, and violence was exercised by [Chhuon]. So he clearly comes within the spirit of the three strikes law.

"The court doesn't find any mitigating issues or factors to take into consideration within the meaning of *Williams* and *Romero* such that the court would exercise its discretion to strike one or more of [Chhuon's] priors. The motion to strike [is] denied."

There is nothing irrational or arbitrary about the trial court's decision. As the court discussed at length, Chhuon committed serious violent crimes of a similar nature in the short span of time he spent outside of prison. His personal criminal role escalated in the second incident. Of all the perpetrators involved, Chhuon alone inflicted great bodily injury on the victim, pistol-whipping him on the head and knee caps. Chhuon's considerable prison term did not serve as a deterrent to future criminal activity. He showed no propensity for change with age. Accordingly, we conclude that the trial court acted within its discretion in denying his *Romero* request. (*See Carmony, supra*, 33 Cal.4th at pp. 378-380; *Myers, supra*, 69 Cal.App.4th at p. 310.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.