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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN MARTINEZ,

Defendant and Appellant.

B237105

(Los Angeles County
Super. Ct. No. BA381813)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Jonathan Martinez appeals from the judgment entered following a jury trial which resulted in his conviction of assault (Pen. Code, § 240), committed for the benefit of, at the direction of, and in association with a criminal street gang (Pen. Code, § 186.22, subd. (d)), and his admissions that he previously had suffered a conviction for a serious felony committed for the benefit of a street gang (Pen. Code, § 186.22) and which qualified as a strike for purposes of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b)). The trial court sentenced Martinez to four years in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

At approximately 11:20 p.m. on March 4, 2011, 17-year-old Aaron M. was in the area of 240 North Breed Street in Los Angeles working with his mother as a street vendor. They made and sold pancakes and crepes from a stand.

As Aaron M. was sitting down, waiting for his mother to pack up so they could go home, Martinez and another young man approached Aaron M. and asked him “where [he] was . . . from” and if he “was a gangbanger.” Aaron M., who had never seen Martinez before, told Martinez that he was “not from nowhere,” then got up and walked away. As he left the pancake stand, Aaron M. felt himself get “hit in the back of the head.” Aaron M. “reacted. [He] started fighting back.” He had taken boxing lessons and he used his “boxing techniques to defend” himself from the two men. He started fighting more with Martinez than with Martinez’s companion and, although Martinez was “punching [him] in the head,” Aaron M. managed to strike Martinez and “knock[] him

down.” As he fought with Martinez, Aaron M. noticed that Martinez had tattoos. One tattoo, on the back of Martinez’s head, read “TB.”

Aaron M.’s mother attempted to break up the fight. She continuously told the young men to “stop, stop.” Eventually, Martinez and his companion walked away. Aaron M. and his mother then left the area. As they were leaving, Aaron M.’s mother noticed that Aaron M. had been stabbed on the left side of his chest. Aaron M. did not remember being stabbed; “everything was just happening too quickly” and “[he] was just getting hit from all over [his] body.” However, blood was “squirting” out from the wound. Aaron M. later went to a doctor, who cleaned the cut and closed it with two or three stitches.

Guadalupe Becerril is Aaron M.’s mother. At approximately 11:20 on the evening of March 4, 2011, she was collecting her things from her pancake stand and packing them into the trunk of her car. As she was doing so, she heard someone speaking slowly to her son, Aaron M. Aaron M. then told the person to “leave [him] alone.”

Becerril turned around to see “this young guy” and a companion “hitting” Aaron M. The three young men were fighting in the street and Becerril went over and pulled on one of them. She yelled at the other one, telling him to stop hitting her son and to “leave him alone.” According to Becerril, “[t]he three of them were struggling really hard.” However, after continuing the fight for a time, the two men “suddenly . . . got up” and “left.” When Aaron M. then took off his shirt, Becerril noticed “he had a lot of blood” on his left breast, near his armpit.

After the two men had gone, Becerril was looking around when she saw a small knife “on the ground behind a truck.” She picked up the knife, which was in an “open” position, and placed it in her apron pocket. She later gave the knife to a police officer.

Aaron M. and his mother went to the police station. After having been given an admonition, Aaron M. was shown a group of six photographs, or a “six-pack.” He circled the photograph of Martinez, the man represented in slot No. 4, because “that’s the one that attacked [him].”

At a separate time and out of the presence of Aaron M., Becerril also viewed a six-pack of photographs. She, too, circled the photograph of Martinez, photograph No. 4, because, she said, “that’s the guy [that was] in front of [her], and [she] got a good look at him.” Beneath the photograph, Becerril wrote: “The person in photo number 4 was fighting with my son. And [there was] another [boy]. They were two of them. And afterwards I found a knife. And my son had a cut on his chest. Afterwards, I took him to the police station.” When an officer asked her if she had noticed whether the young man who had been fighting with her son had any tattoos, Becerril motioned toward the back of her head and responded, “It ha[d] two letters. A big T and a B.”

On March 5, 2011, Los Angeles Police Officer Richard Cotignola was assigned to the Hollenbeck Division. The officer was on patrol when he and his partner received a call, directing them to report to 344 North Savannah Street. Martinez was there and they took him into custody. When Martinez asked why he was being placed under arrest, Cotignola simply advised him that there had been “a crime report . . . a couple days [earlier.]” At that point, Martinez broke free of Cotignola’s grip and began to run.

Cotignola, however, caught up with Martinez in an alley, took him back into custody and transported him to the station.

Adrian Parga is a police officer for the City of Los Angeles. On March 7, 2011, he was working as a detective assigned to “Hollenbeck Gangs.” At approximately noon that day, Parga, after admonishing Aaron M. in English and Becerril in Spanish, showed each one a set of photographs. Both Aaron M. and Becerril selected the photograph of Martinez, photograph No. 4, as that of one of the men who had attacked Aaron M. Other photographs of Martinez showed his “half profile,” his head and his hand. Photographs of his hand and the back of his head showed Martinez’s tattoos indicating he belonged to the “Tiny Boys” gang.

According to Parga, Tiny Boys is one of the gangs which operates in the Hollenbeck Division. They have “[o]ver a hundred documented members” and their common sign, or symbol is the letters “TB.” The Tiny Boys have been known to participate in numerous criminal activities, including “murder,” “assaults,” “[g]rand theft auto,” “[r]obbery,” the “[s]elling of narcotics,” and the “[p]ossession of weapons.” Parga believed Martinez was a member of the Tiny Boys based on the fact that he had admitted as such, that he had “TB” tattooed on the back of his head and that he had “been arrested and detained in Tiny Boys territory with other Tiny Boys gang members.” The Tiny Boys’s territory extends on the East to Breed Street.

In general, gang members gain respect and enhance their reputation by committing crimes against members of other gangs as well as “nongang members.” “By committing crimes against nongang members, [the gang] instills a sense of fear and intimidation

within the community” and “discourages nongang members, citizens, from reporting crimes against them or testifying against them in court.” When a gang member approaches another individual, he frequently asks that person the question, “ ‘Where are you from[?]’ ” Depending upon the response, the gang member can tell whether the person is “a possible rival gang member or a threat.” In the present case, Martinez’s question to Aaron M. was definitely asked to promote the Tiny Boys Street Gang. “[I]t enhanced their reputation and it gained the respect from not only the other gang members in the Tiny Boys gang, but from the other rival gangs.” Parga continued, “Tiny Boys has three gangs that border them on all sides. So by committing this act of violence, the word gets out, and the rival gang members hear, and it will instill fear in that gang and gain their respect at the same time.” “It has even more significance . . . [that the event occurred] just on the other side of Breed Street So the fact that it occurred on Breed Street is sending a loud and clear message to [the] Breed Street [gang], saying we’re not afraid to encroach [on] your territory, and basically we’re a gang to be reckoned with.”

2. Procedural history.

In an information filed May 16, 2011, Martinez was charged with assault with a deadly weapon, a knife, in violation of Penal Code section 245, subdivision (a)(1). It was further alleged pursuant to Penal Code section 186.22, subdivision (b)(1)(B), that the assault was committed “for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. Said act also caused the above offense to become a serious felony pursuant to Penal Code section 1192.7[, subdivision] (c)(28).”

It was further alleged pursuant to Penal Code sections 1170.12, subdivisions (a) through (d) and 667 subdivisions (b) through (i), the Three Strikes law, that Martinez had suffered a prior conviction for assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1) on January 24, 2007 and a prior conviction for carrying a concealed weapon in violation of former Penal Code section 12025, subdivision (a)(2) on October 6, 2008. Finally, it was alleged that a prison term had been served “as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.”

Martinez entered a plea of not guilty to the alleged offenses and decided to go to trial. Before determining whether he would testify, the trial court and counsel held an Evidence Code section 402¹ hearing to determine whether his prior convictions involved moral turpitude and would, accordingly, be admissible to impeach him. The prosecutor indicated that, were Martinez to take the stand, he would attempt to impeach him with three 2006 juvenile sustained petitions, one for petty theft, one for vandalism and one for assault with a vehicle, and one 2008 “adult conviction for possession of a concealed

¹ Evidence Code section 402 provides in relevant part: “(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. [¶] (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests. [¶] (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereof; a separate or formal finding is unnecessary unless required by statute.”

firearm for the benefit of a criminal street gang.” Martinez had also suffered “some arrests,” including one for “evading” and one for “driving without a license.” The prosecutor indicated that, were Martinez to testify, he would attack Martinez’s credibility with “the assault and the evading.”

Defense counsel argued that most of the priors, in particular those committed while Martinez was a juvenile, had minimal probative value. However, counsel was concerned about the assault with a vehicle. Defense counsel stated: “Right now it was charged as a 245[, subdivision] (a)(1), which is the charge that we have here. And reading the police report . . . , the conduct seems to be that he was swerving and crashed into a car with no one in it. [¶] I’m not quite sure factually how the assault was arrived at. It is extremely prejudicial to have that charge come in as impeachment. Not probative of much. And it would probably be confused by the jury as propensity. Which is of course prohibited by 1101 (a).² [¶] If the court were to allow that, I would request that it somehow be sanitized, saying it’s a sustained petition for a felony offense. [¶] . . . [¶] . . . I am of course concerned about the adult conviction as well. I don’t know, though, what is the least of my worries. Whether petty theft is a crime of moral turpitude for impeachment purposes. [¶] I know grand theft is[.]”

² Evidence Code section 1101, subdivision (a) provides: “Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specific occasion.”

After hearing argument the trial court stated: “[W]hat I think is that possession of a firearm by a felon is a crime of moral turpitude. Possession of an illegal firearm is a crime of moral turpitude. It seems to me that analogously, possession of a concealed firearm for the benefit of a criminal street gang would have similar characteristics to those two in terms of the definition of moral turpitude. [¶] In fact, . . . even more so [¶] With respect to the assault and the evading, there are published cases that say that assault with a deadly weapon is a crime of moral turpitude. And I’m assuming that’s what this was charged as” With regard to the “evading,” the trial court indicated that “flight from a peace officer is. So I think that’s got to be similar to evading.” The trial court indicated that, since it appeared that “the things for which Mr. Martinez ha[d] been convicted or petitions that [had] been sustained all involve[d] crimes of moral turpitude[,] . . . the issue [became] one of 352.”³ The trial court continued, “Assuming I let them all in[,] . . . what are you asking for in terms of sanitizing?” The following colloquy then occurred: “[Defense counsel]: I would say for the assault, it could be sanitized to include such language as a sustained juvenile petition for a felony offense. [¶] The Court: But not the evading and the 10851? [¶] [Defense Counsel]: You could just call it a sustained juvenile petition. . . . [¶] The Court: Then it looks like there are six potential, either sustained petitions or convictions that the People are seeking to use. They are all, with the exception of the vandalism, less than five years old. . . . [¶] It . . .

³ Evidence Code section 352 provides in relevant part: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

doesn't appear that Mr. Martinez has spent much time being free from criminal conduct. Either as a juvenile or as an adult. All of that weighs, in my opinion, towards admissibility rather than against it. [¶] . . . [¶] And I understand that may affect his decision to testify, but I also don't think that if he chooses to testify, he gets to testify without the jury knowing that for the vast portion of his adult life, that he has been willing to engage in this kind of conduct."

The following day, Martinez's counsel informed the trial court that Martinez had decided not to testify.

Following a discussion regarding jury instructions, after which the trial court determined, over defense counsel's objection, that it would instruct with CALCRIM No. 403,⁴ "the natural and probable consequences instruction," and, over the prosecutor's objection, that it would instruct on "self-defense," the trial court brought the jury into the

⁴ CALCRIM No. 403 provides in relevant part: "To prove that the defendant is guilty of [Assault with a Deadly Weapon as an aider and abettor], the People must prove that: [¶] 1. The defendant is guilty of [simple assault]; [¶] 2. During the commission of [the simple assault] a coparticipant in that [simple assault] committed the crime of [Assault with a Deadly Weapon]; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the [Assault with a Deadly Weapon] was a natural and probable consequence of the commission of the [simple assault]. [¶] A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the [Assault with a Deadly Weapon] was committed for a reason independent of the common plan to commit the [simple assault], then the commission of [Assault with a Deadly Weapon] was not a natural and probable consequence of [simple assault]." (Italics in original.)

court room. After listening to the instructions and closing argument, the jury retired to deliberate.

While the jury was deliberating, the trial court addressed Martinez and informed him that, should the jury return a guilty verdict, “other allegations” would then have to be decided. The People had charged “prior conviction allegations, both pursuant to [Penal Code section] 1170.12[, subdivisions] (a) through (d) — . . . what’s commonly referred to as [the Three Strikes law]—and also with respect to Penal Code section 667.5[, subdivision] (b), which is [a] prison prior, and [Penal Code section] 667[, subdivision] (a)(1), which is a five-year prior [conviction].” The trial court continued: “You have [the] right to have . . . this jury determine the truth of those allegations. I would be determining the identity of the person that is in those charges, but you would have the right to have the jury determine the validity of those allegations as charged. [¶] [However,] [y]our attorney . . . has indicated . . . that you wish to . . . give up your right to have the jury make that determination, and instead submit all of the issues with respect to the prior conviction allegations to the court. [¶] Is that what you wish to do, Sir?” Martinez responded, “Yes.” After some further discussion regarding his right to have the jury determine the legitimacy of the prior convictions and prison terms, Martinez again indicated that he wished to have that issue decided by the trial court.

Several hours after it had retired to the jury room, the jury informed the trial court that it had reached verdicts. After counsel and Martinez had returned to the courtroom, the foreperson handed the verdict forms to the bailiff, who then handed them to the court clerk. The clerk read the verdict forms as follows: “ ‘We, the jury in the above-entitled

action, find the defendant, Jonathan Martinez, guilty of the crime of assault upon Aaron [M.], in violation of Penal Code section 240, a felony, a lesser included offense than that as charged in Count 1 of the information. [¶] [¶]We further find the allegation that said defendant Jonathan Martinez committed the offense for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members within the meaning of Penal Code section 186.22[, subdivision] (d) to be true.’ ”

After the jurors left the courtroom, the trial court addressed counsel and stated: “So two things that I just want to clarify. I didn’t notice it before, but the lesser said a felony, which it isn’t, but it becomes a felony by virtue of the gang allegation. I was trying to figure out what to do. But it seems that there’s no real issue because it becomes a felony by virtue . . . of the gang allegation.” Both counsel agreed that this presented “an irregularity [which was not] material.” Second, the jury failed to find Martinez not guilty of the greater offense of assault with a deadly weapon before finding him guilty of the lesser count of simple assault. Both counsel again agreed that this did not amount to material error. The trial court then asked defense counsel: “So would you agree, [counsel], that there does have to be a resolution with respect to the priors under 667.5[, subdivision] (b) and [Penal Code section] 1170.12[, subdivisions] (a) through (d)? However, not [Penal Code section] 667[, subdivision] (a).” Defense counsel responded, “Correct.”

With regard to Martinez's prior convictions and prison terms, defense counsel requested that the matter be continued for three or four weeks. After the prosecutor agreed that this was a reasonable request and a date was set, the trial court addressed Martinez and said: "Mr. Martinez, Sir, you do have the right to have your trial not have a significant break. But given the fact that it's going to be a court trial with respect to the priors, is it agreeable with you to put it over . . . ?" Martinez responded, "Yes." Both counsel then joined in the waiver.

At proceedings held on November 1, 2011, Martinez indicated that he was prepared to "admit to the prior allegations." The trial court addressed Martinez and stated: "It is alleged that you have a prior conviction in case number BA342875 for violating Penal Code section 12025[, subdivision] (a)(2)[, carrying a concealed firearm,] and Penal Code section 186.22[, participating in a pattern of criminal gang activity, which you acquired] on October 6, 2007, in Los Angeles County Superior Court. [¶] It's alleged pursuant to two different provisions of the Penal Code, that is, Penal Code section[s] 1170.12[, subdivisions] (a) through (d) and 667[, subdivisions] (b) through (i), [that you have what is] commonly known as a prior strike. [¶] It's also alleged pursuant to Penal Code section 667.5[, subdivision] (b), [that you have what is] commonly known as a prison prior." The trial court then explained that, were he to have a trial on the prior convictions, the People would be required to prove those priors beyond a reasonable doubt. In addition, Martinez would have the right to confront and cross-examine the witnesses against him, the right to use the subpoena power of the court to have witnesses come and testify in his defense and the "privilege against self-incrimination." Were he to

choose to admit the prior convictions, he would be waiving those rights. The court continued: “If you choose to admit these priors, the consequence will be that it would either double any state prison sentence you would receive—that’s because of the strike part of the prior allegation—or in the alternative, add one year to any prison sentence you would receive. [¶] If you are sentenced to state prison and the strike prior is found to be true, you will receive credit at a rate of 20 percent for good time and work time. That’s it.”

Martinez chose to admit the prior allegations. After waiving his right to a trial, and each of the rights which go with it, Martinez admitted having previously been convicted of “violating [former] Penal Code sections 12025[, subdivision] (a)(2) and 186.22[.]” Counsel joined in the admissions and waivers of rights, and agreed that there was a factual basis for each of the pleas. The trial court then, based upon Martinez’s admissions, found true the allegations made pursuant to Penal Code sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), the Three Strikes law.

The trial court sentenced Martinez to the mid-term of two years in state prison, then doubled the term to four years pursuant to the Three Strikes law. The court struck the Penal Code section 667.5, subdivision (b) enhancement in the interest of justice. In support of the term it had imposed, the trial court indicated that, although Martinez’s prior convictions were both “recent” and “significant,” it was “respecting the jury’s finding in this matter concerning” Martinez’s participation in the crime.

Martinez was awarded presentence custody credit for 241 days actually served and 120 days of good time/work time for a total of 361 days. He was ordered to pay a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a suspended \$200 parole revocation restitution fine (Pen. Code, § 1202.45), a \$40 court security fee (Pen. Code, § 1465.8, subd. (a)(1)) and a \$30 criminal assessment fee (Gov. Code, § 70373). Within 10 days of his release, Martinez was to register “as a street gang participant with the local law enforcement agency.” (Pen. Code, § 186.30.)

Martinez filed a timely notice of appeal on November 3, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed April 4, 2012, the clerk of this court advised Martinez to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P. J.

ALDRICH, J.