Filed 6/13/12 In re D.M. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re D.M., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	B234811 (Los Angeles County Super. Ct. No. MJ16205)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Frazin, Juvenile Court Referee. Affirmed.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lawrence M. Daniels and Lauren E. Dana, Deputy Attorneys General for Plaintiff and Respondent.

By a petition filed under Welfare and Institutions Code section 602, it was alleged that appellant D.M. committed two counts of robbery, with firearm and gang allegations (Pen. Code, §§ 211, 12022.53, 186.22, subd. (b)(1)).[1] Following a contested jurisdictional hearing, the juvenile court found the allegations true, sustained the petition, and declared D.M. a ward of the court. D.M. was ordered to a long-term camp community placement with a maximum confinement time of 18 years.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

On February 28, 2011, in the early evening, Alejandro, his brother Brandon, and a friend were walking home from school. They were planning to stop by the friend's house so he could get some money from his parents.

As they approached the area behind their friend's apartment building, they saw three boys drinking beer. One of the boys left. Of the remaining two, one was called Toker and the other was D.M., the minor in this case.

Brandon testified the perpetrators "told us to hold up." Toker said "You're getting taxed," which meant they were going to get robbed. Toker "started checking" Brandon by touching his pockets and his backpack. Toker then said, "Oh, you can go," and he started checking Alejandro who "was standing right there." Once Toker's attention shifted to Alejandro, D.M. "came up and [told Brandon to] 'Hold up.' " Then D.M. started checking Brandon with his hands; he patted Brandon's pockets, and then he opened Brandon's backpack and removed his MP3 player.

Meanwhile, Toker approached Alejandro, pulled out a gun, touched Alejandro's stomach with it, and said: "Give me your stuff." Alejandro gave him an MP3 player. Just at that moment, Alejandro's cell phone rang. Toker said, "Give me your phone too,"

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[1] All further statutory references are to the Penal Code unless otherwise specified.

and Alejandro complied. Alejandro also testified he saw D.M. "go into my brother's backpack and taking his stuff." This happened at about the same time Toker was pointing the gun at Alejandro. D.M. did not say anything to Alejandro. Brandon testified he and Alejandro were standing five or six feet apart during the robberies.

Los Angeles Police Detective Christine Moselle interviewed D.M. After initially denying any knowledge of the robberies, D.M. said he was present when Toker "taxed" or robbed some people. Toker came up to D.M. and said, "Look, I just taxed some fools," and showed him a phone and some other property. D.M. admitted he was a member of the Blythe Street gang.

Los Angeles Police Officer Larry Hernandez testified as a gang expert. The robberies had taken place in the heart of Blythe Street territory. The primary activities of the Blythe Street gang were vandalism, robbery, assaults with deadly weapons, murder and drive-by shootings. Hernandez opined D.M. was a member of the Blythe Street gang, as was C.G., who went by the moniker Toker. Based on a hypothetical question, Hernandez testified the robberies had been carried out for the benefit of the gang. He testified that, with regard to gangs, "taxing" means the robber is taking valuables or money for the gang's benefit.

CONTENTIONS

1. There was insufficient evidence to prove D.M. robbed Alejandro.
2. There was insufficient evidence to support the gang enhancement.

DISCUSSION

1. *There was sufficient evidence that D.M. robbed Alejandro.*

D.M. contends that, although the evidence showed he robbed Brandon, there was insufficient evidence to show he also robbed Alejandro. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, 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 federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "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." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The reviewing court is to presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) Even if the reviewing court believes the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the trier of fact's verdict. (*People v. Towler* (1982) 31 Cal.3d 105, 118.) It does not matter that contrary inferences could have been reasonably derived from the evidence. As our Supreme Court said in *People v. Rodriguez, supra,* 20 Cal.4th 1, while reversing an insufficient evidence finding because the reviewing court had rejected contrary, but equally logical, inferences the jury might have drawn: "The [Court of Appeal] majority's reasoning . . . amounted to nothing more than a different weighing of the evidence, one the jury might well have considered and rejected. The Attorney General's inferences from the evidence were *no more inherently speculative* than the majority's; consequently, the majority erred in substituting its own assessment of the evidence for that of the jury." (*Id*. at p. 12, italics added.)

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) It is true "that in general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.] However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

b. *Discussion*.

D.M. argues there was insufficient evidence to prove he had anything to do with the robbery of Alejandro because he did not speak to him, touch him, or take anything from him: "The evidence is that D.M., Toker, and another boy were drinking beer near the gate. There is no evidence D.M. and Toker intentionally approached [Alejandro and Brandon]. There is no evidence of any communication between them. Finally, there is no evidence that D.M. and [Toker] spread out and surrounded [Alejandro and Brandon]. Since Toker had a gun, he had no need of D.M.'s assistance."

We are not persuaded. Although slightly less overt, the facts here are fundamentally similar to what happened in *People v. Campbell, supra*, 25 Cal.App.4th 402. Smith and Campbell walked past the victims Branch and Sester, and then returned to confront them. Campbell announced a robbery. When Branch resisted, Campbell shot and then chased him. After Campbell ran off, Sester tried to back away from Smith, but he grabbed her. The appellate court rejected Smith's contention there was insufficient evidence to prove he had aided and abetted Campbell's attempt to rob Branch: "Smith did not independently happen by the scene of the crime. He had walked by Branch and Sester with Campbell and thus was aware of their isolation and vulnerability at that time and place. Smith then decided with Campbell to return to them. Together they approached Branch and Sester, stopping closely in front of them. Their concerted action

reasonably implies a common purpose, which Campbell immediately revealed when he told Branch this was a robbery and then enforced this purpose with a firearm. During this time, Smith remained in position in front of Sester. Since there is no evidence he was surprised by Campbell's conduct or afraid to interfere with it, the jury could reasonably conclude that Smith assumed his position in front of Branch and Sester to intimidate and block them, divert suspicion, and watch out for others who might approach. Such conduct is a textbook example of aiding and abetting. [Citations.]" (*People v. Campbell*, *supra,* 25 Cal.App.4th at pp. 409-410.)

Although in *Campbell* it was the perpetrators who approached the victims, and it was apparently the other way around here, we do not think this fact requires a different result. The victims here certainly perceived Toker and D.M. as acting together. During their testimony, the victims frequently referred to Toker and D.M. collectively as "they" or "them."[2] D.M. and Toker were fellow Blythe Street gang members carrying out an announced gang "taxing" of the victims. Brandon testified that when he and his brother first encountered the perpetrators, D.M. and Toker "were . . . together." The evidence showed Toker approached Brandon first, patted his pockets and backpack, and then passed him on to D.M., who immediately accosted him verbally and then took his MP3 player. This left Toker free to concentrate on Alejandro. D.M. and Toker then walked away from the crime scene together. The two robberies occurred simultaneously and within five or six feet of each other.

This evidence showed D.M. and Toker were acting in concert, and that D.M.'s presence supported Toker's ability to rob Alejandro, just as Toker's presence supported D.M.'s ability to rob Brandon. The juvenile court could have well concluded it was unreasonable to think D.M. had independently decided to rob Brandon, that it was pure

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[2] For example, when Alejandro was asked, "After you saw the three guys, then what happened?", replied: "Then [*sic*] decided to ask us to give our things to them." Brandon testified, "we went in, and then right there they told us to hold up," and "they told us we're getting robbed."

coincidence D.M. happened to be standing next to Toker when Toker robbed Alejandro, and that D.M. had nothing whatsoever to do with Alejandro's robbery.

The finding that D.M. robbed Alejandro was supported by sufficient evidence.

2. *The gang enhancement was supported by sufficient evidence.*

D.M. contends there was insufficient evidence to support the gang enhancement for two reasons: there was insufficient evidence Toker was a member of the Blythe Street gang; and, even if Toker were a member of the gang, there was insufficient evidence the robberies had been committed for the gang's benefit. This claim is meritless.

a. *Legal principles.*

"Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) The gang statute then requires two further elements: evidence of "a felony committed for the benefit of, at the direction of, or in association with any criminal street gang," *and* evidence the felony was committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).)

b. *Discussion*.

(1) *Sufficient evidence of promote/further/assist element.*

D.M. contends there was insufficient evidence he committed the robberies with the specific intent to promote, further or assist criminal conduct by gang members because the prosecution failed to prove Toker was a member of the Blythe Street gang. This claim is meritless.

D.M. acknowledges the People "established that [C.G.], a Blythe Street member, is known as 'Toker.' The State also established a search warrant was served on [C.G.] with regard to 'a robbery.' However, the State did not establish that [C.G.] was a participant in this robbery. Therefore, since the evidence established only that the crime was committed by one gang member (D.M.) it is insufficient to establish an intent to promote criminal conduct by gang members."

But the prosecution did more than prove C.G. had been arrested in connection with *any* robbery because Detective Moselle specifically testified C.G. had been arrested in connection with the investigation of *this* robbery.[3] As the prosecutor argued to the juvenile court: "[I]t would be an irrational bit of speculation to assume that it just so happens that there was another Toker in Blythe Street gang territory that's a member of Blythe Street gang, that was involved in this particular robbery when a warrant was served by an investigating officer on this case on a Toker . . . . Only reasonable inference to draw is that it is the same Toker."

We agree. Although a reasonable trier of fact might have concluded otherwise, it was not unreasonable for the juvenile court to conclude from this evidence that the Toker involved in the robbery of Brandon and Alejandro was C.G., who was an acknowledged member of Blythe Street. (See *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 12 [where trier of fact's inference from the evidence is no more speculative than contrary inference, reviewing court may not adopt the contrary inference].)

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[3] "Q. In the course of the investigation of this robbery, are you aware if the individual referred to as Toker was arrested at any point? [¶] A. Yes, he was." "Q. And how are you aware that Toker was arrested? [¶] A. I was there at the service of a search warrant at Toker's – his name is [C.G.] – residence, and he was arrested at the time that the search warrant was served."

(2) *Sufficient evidence of benefit/direction/association element.*

D.M.'s alternative claim is that even if the evidence showed Toker belonged to Blythe Street, there was insufficient evidence he committed the robberies for the benefit of, at the direction of, or in association with the gang. He argues the robbers did not "claim" Blythe Street membership during the incident, there was no evidence the victims were aware of the perpetrators' gang membership, and it was unclear how the stolen items could have benefitted the gang.

Although "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang," (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198), the following evidence showed that was not the case here: the robberies were committed by two fellow gang members in gang territory; the gang expert had testified robbery and assault with a deadly weapon were two of the gang's primary activities; Toker announced to the victims that they were being "taxed," which according to the gang expert meant they were being robbed for the gang's benefit. "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) This gang specialized in robberies, a street robbery like this was a typical example of "taxing" people who lived in the gang's territory, and MP3 players can obviously be sold for cash to benefit the gang.

Moreover, D.M. is ignoring the fact this element of the gang enhancement is given in the disjunctive: "for the benefit of, at the direction of, *or* in association with." There was sufficient evidence D.M. was acting "in association with" the Blythe Street gang because he acted in combination with Toker, a fellow gang member. (See *People v. Albillar* (2010) 51 Cal.4th 47, 62 ["defendants came together *as gang members* to attack [the victim] and, thus . . . they committed these crimes in association with the gang"]; *People v. Morales, supra,* 112 Cal.App.4th at p. 1198 ["the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members"].)

There was sufficient evidence to sustain the gang enhancement.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.