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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMARK ROSS et al.,

Defendants and Appellants.

B237007

(Los Angeles County
Super. Ct. No. GA082236)

APPEALS from judgments of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed with modifications.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Demark Ross.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Michael Ross.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellants Demark Ross and Michael Ross appeal from judgments entered against them following their convictions by jury for shooting at an inhabited dwelling (Pen. Code, § 246, count 3),¹ burglary (§ 459, count 4), and assault (§ 245, subd. (a)(1), count 5). On count 2, Demark Ross was convicted of attempted murder (§§ 664, 187, subd. (a)), and Michael Ross was convicted of the lesser included offense of attempted voluntary manslaughter (§§ 664, 192, subd. (a)). Demark Ross was also convicted of possession of a firearm by a felon (§ 12021, subd. (a)(1), count 8). The jury found true various firearm enhancements (§§ 12022, subd. (a)(1); and 12022.53, subds. (c), (d), and (e)(1)). It also found to be true, as to all counts, the gang allegation within the meaning of section 186.22, subdivision (b)(1).

Appellants contend that there was insufficient evidence to support their convictions for burglary and assault, and to support the gang allegations. Demark Ross contends that there was insufficient evidence to support the jury's finding that he committed attempted murder with premeditation and deliberation. Both appellants contend that the trial court erred in denying their motion for a new trial. Both appellants raise a number of sentencing errors and also contend that the trial court failed to award full presentence credit.

We find merit in appellants' sentencing contentions and order the judgments modified in accordance with our findings. In all other respects, the judgments are affirmed.

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

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On August 7, 2010, Michael Ross called his nephew Joseph W. in Lancaster and asked him to come to Pasadena. Joseph W. and his brother Marcus W.² accompanied by Rickey Marcelle Moore and his brother Raymon Roberts, drove to Pasadena and met with appellants at Aaron Coleman's apartment in Kings Village. Michael Ross had been assaulted approximately one month earlier and planned to get even with his attacker. Michael Ross told Joseph W. to drive to Betty Lockett's residence on Claremont Street in Pasadena where they planned to "solve a problem."

Joseph W. parked outside the Lockett residence. Moore, Roberts, Joseph W., and Marcus W. got out of the vehicle. Betty Lockett's daughter, Pamela Lockett, arrived at the house around the same time. Appellants Michael and Demark Ross, were already at the location and were standing by their car, a black Dodge Charger. There were approximately four or five people "hanging out" in the front yard of the house.

Michael Ross walked into the yard and yelled out a name and said that person needed to come outside. Pamela followed Michael Ross into the yard and tried to prevent him from entering the house. Michael Ross pushed the door open and walked inside followed by Moore and Joseph W. Demark Ross remained outside with Roberts and Marcus W. Demark Ross was wearing a dark hoodie and Roberts knew Demark had a gun because he recognized the sound of a semi-automatic weapon being cocked.

Betty Lockett was inside the house with two males. Michael Ross and Moore punched Darrin Lockett who was paralyzed from a car accident and could only use one arm. Joseph W. fought with the other male inside the house. Pamela tried to prevent Michael Ross and Moore from hurting her brother Darrin. She pleaded with them saying "Mike, please don't do this. My mom is 70 something years old." Michael Ross said "he didn't give a fuck."

² Marcus W. was a minor and we refer to him and his brother by first name and last initial to protect his identity in this proceeding. (Cal. Rules of Court, rule 8.401(a)(2).)

Pamela tried to break up the fighting inside the house which lasted for about 10 minutes. Michael Ross left the house and walked outside. Roberts went inside the house and grabbed his brother Moore who was fighting Darrin Lockett. Pamela looked outside into the front yard and saw Demark Ross, whom she knew as “Gun Smoke,” standing outside the gate. He had a gun pointed at the men in the yard and told them not to move. As Michael Ross walked towards his brother Demark Ross, Pamela heard him say “Spray this motherfucker” which she understood to be an order to shoot. Michael Ross got into the driver’s side of the black Charger and both appellants drove away. Moore and Roberts heard gunshots as they ran out the front door of the house and jumped into their car parked on the street. The gunshots appeared to be coming from the area by a tree that was near the front of the house.

Pamela was at the front door and saw both cars leave. Pamela saw a person named “Vern” in the yard shooting in the direction that appellants and the others had gone. The black Charger driven by Michael Ross turned around and came back towards the Lockett residence. Demark Ross sat on the outside of the window of the car “hanging over the roof” and pointed a gun at the house. Michael Ross also had a gun and both appellants shot at the house. Pamela suffered a bullet wound to her stomach and dropped to her knees. Betty Lockett screamed that she had been shot and blood ran from her arm.

Two 9-1-1 calls were received by the police regarding shots fired on Claremont Street. One of the callers stated that shots came from a black car travelling westbound on Claremont Street.³ Pamela Lockett’s son, Jermaine Lockett, also called 9-1-1 and requested help.

Moore, Roberts, Joseph W. and Marcus W. returned to the apartment where they had previously met with appellants and Coleman. Appellants were also there and Roberts noticed that Demark Ross had removed his hoodie and was wearing a white “wife-

³ A compact disc containing an audio recording of the two 9-1-1 calls was played for the jury and admitted into evidence.

beater” style T-shirt. Moore was scared to talk about what happened and after they smoked “two blunts,” he returned to Lancaster with Roberts, Joseph W., and Marcus W.

Pasadena Police Officer Todd McDonald went to the Lockett residence in response to the 9-1-1 calls. Jermaine Lockett was in the living room and appeared to be uninjured. Darrin Lockett was not there. Pamela Lockett was “on all fours on the kitchen floor bleeding from her stomach area.” Betty Lockett was inside a rear bedroom and had a gunshot wound to her left forearm. Both women were taken to the hospital and Pamela Lockett was hospitalized for several weeks. Pamela suffered damage to her sciatic nerve and limited mobility on the right side of her body.

Officer McDonald observed gunshot damage to the Lockett residence, including bullet holes in the windows in the front of the house, and on the exterior walls. He found eight .40-caliber shell casings on Claremont Street two properties west of the Lockett residence. Forensic investigators determined that all of the casings were fired from the same gun, a .40-caliber Smith & Wesson semi-automatic pistol. Trajectory rods inserted into the bullet holes in the Lockett residence indicated that the shots originated from the area where the casings were found in the street.

Bullet strikes were found on a utility truck parked on the street in front of the Lockett’s neighbor and also on a black Jeep parked further down the street. One bullet was found in the hood of the utility truck and another was recovered from the Jeep. Forensic analysis determined that those bullets were fired from a .38 Special or a .357 Magnum revolver and the trajectory of the bullets striking the vehicles was consistent with having been fired by someone standing in front of the Lockett residence.

On August 10, 2010, a black Dodge Charger was found parked on the street in Altadena and impounded. The primary renter of the car was listed as Carolyn Sue Burns but Michael Ross regularly paid the rental fees. A .40-caliber Smith & Wesson shell casing was recovered under the engine hood of the Charger. A fingerprint expert testified that Demark Ross’ fingerprints matched a print taken from the inside right passenger door handle of the Charger.

On September 9, 2010, the police executed search warrants at various locations including one at the residence of appellants' sister in Lancaster. Ecstasy pills and marijuana were found and Michael Ross and Moore were taken into custody. Demark Ross, Roberts, and Marcus W. were also arrested on the same day as a result of other search warrants in the Lancaster area. Joseph W. turned himself in to the police later that day.

Detective Ara Bzdigian of the Pasadena Police Department conducted a search of a Kings Village apartment in Pasadena. A gray hooded sweatshirt was found behind some crates on an outside patio. Three live .40-caliber bullets were found in a sandwich bag in one of the crates. Crime lab tests revealed the presence of gunshot residue on the sweatshirt. The cuff and neck areas of the sweatshirt was also tested for the presence of DNA and the crime lab determined that Demark Ross was the major contributor of DNA material on the sweatshirt.

On September 9, 2010, Pasadena Police Officer Kevin Okamoto interviewed Joseph W. at the Pasadena Police Department. Officer Okamoto testified that Joseph stated that he drove the vehicle from Lancaster to Pasadena along with his brother Marcus W., Moore, and Roberts. He was aware that his uncle (Michael Ross) had been assaulted approximately a month earlier and that both appellants along with the group arriving from Lancaster were going to retaliate for the assault. They met at Aaron Coleman's house and smoked marijuana. Joseph W. drove to the Lockett residence where he saw appellants arrive in the black Charger. Joseph W. parked and Moore, Roberts, and Marcus W. got out. Moore fought with Darrin Lockett. Joseph W. helped Moore escape from the house and heard gunshots behind him as they both ran to the car. He saw Michael Ross drive away in the black Charger with Demark Ross in the passenger seat. Joseph W. then drove back to the Coleman residence in Kings Village.

At trial, Joseph W. stated that Moore fought with another person in the yard of the Lockett residence on Claremont. He denied making any of the other statements during his interview.

Officer Okamoto interviewed Roberts twice. During the first interview Roberts stated that he went to the Lockett residence with Moore, Joseph W., and Marcus W. Both appellants were already at the location and Michael Ross forced his way into the house and attacked Darrin Lockett.

During the second interview⁴ Roberts stated that Moore and Joseph W. entered the house with Michael Ross whom he referred to throughout as “Big Mike.” Roberts stated that Demark Ross who he referred to as “Gun Smoke” was wearing a gray or black hoodie and was armed with a gun. Roberts ran into the house to get his brother Moore, and heard gunshots as they both ran to the car. He saw both appellants get into the black Charger and Michael Ross was driving. Everyone returned to Coleman’s apartment in Kings Village where they smoked marijuana on the patio. Demark Ross was undressing and had removed the hoodie by the time Roberts returned to the Coleman apartment.

At trial, Roberts denied making the statements to Officer Okamoto and as recorded during his interview. He denied referring to appellants as “Big Mike” and “Gun Smoke” and denied knowing Coleman.

Pasadena Police Detective Keith Gomez, a gang expert, provided lengthy testimony in support of the gang allegations accompanying the charges against appellants. The Pasadena Denver Lane Bloods (PDL) was the largest of 10 gangs that originated in the Pasadena area. There were 320 documented PDL members but he estimated that the number could “exceed 500” because of expansion of the gang into other areas. The primary activities of PDL included murder, attempted murder, assaults with deadly weapons, kidnappings, possession of firearms, possession and sales of narcotics, robberies and carjackings. The Lockett residence and the Kings Village apartments were within PDL territory.

Detective Gomez had known Michael Ross since 2002 or 2003. It was his opinion that Michael Ross, who was known by the moniker “Big Mike,” was a member of PDL.

⁴ A compact disc containing an audio recording was played for the jury and, along with a redacted transcript of the interview, was admitted into evidence.

He based his opinion on field interview cards placing him at known gang locations and in the company of known gang members, his PDL tattoos which included a “C” and a “K” signifying “Crip Killer” with the “C” crossed out indicating disrespect and hatred towards the Crips who are the PDL’s sworn enemy, and self-admission to being a member.

Detective Gomez also opined that Demark Ross, whose gang moniker was “Gun Smoke,” was also a member of PDL. Demark Ross’s tattoos included “Pasadena” tattooed across his back with “D” on his left tricep and “L” on his right tricep, the word “Blood” in large letters across his chest, and “Pasadena D.L.B. for life” tattooed on his left arm.

Detective Gomez opined that Roberts and Moore were also PDL members. He testified that Roberts and Moore both admitted to being PDL members. Roberts’s moniker was “Little M Train,” and Moore was referred to as “Little Gun Smoke Deuce.” By taking on a form of an older gangster’s name, Moore’s moniker indicated a “master and the apprentice” relationship between him and Demark Ross. Clothing found at their homes in Lancaster indicated membership in a blood gang. Detective Gomez did not have enough information to opine that Joseph W. and Marcus W. were members of PDL but based on clothing found at their residence he believed them to be associates of PDL. Similarly, he opined that Darrin Lockett associates with PDL but he lacked sufficient basis to opine that he was a member. He was not aware of gang affiliation for Jermain Lockett or the individual referred to as “Vern.”

Detective Gomez explained to the jury the importance of respect based on intimidation and fear within gang culture. An assault on a PDL member within PDL territory is a sign of disrespect and would be met with punishment and retaliation, in the form of violence. Failure to retaliate by that gang member would be a sign of individual weakness and would reflect badly on the gang as a whole. The more violent the gang member is the greater respect he enjoys within the gang.

In response to a hypothetical question based on the facts of the shootings on August 7, 2010, Detective Gomez opined the crimes were committed to benefit the PDL

gang. He opined that any failure to respond to an assault on a PDL member within his own territory would be viewed as “weakness” and would be “extremely negative for a gang member” because their existence is based on “reputation and power and fear.” A gang member would be expected to retaliate and send a message that there would be “deadly consequences” if the gang is challenged, disrespected, or assaulted. The shootings promoted and furthered the interest of the PDL gang because it created fear in the community and increased the reputation of the gang.

Detective Gomez’s opinion did not change when the initial attack was committed by an associate on a “full-fledged member” of PDL. Associates do not have the “green light” to disrespect or assault gang members. An attack by an associate on a member creates issues involving respect, intimidation, and status, and those issues would need to be resolved to benefit the street gang. A violent form of retaliation would increase the status of the individual gang member and the gang.

Defense Evidence

No evidence was presented on behalf of appellants.

Procedural Background

An amended information filed on May 25, 2011, charged appellants in count 2 with the attempted murder of Darrin Lockett (§§ 664, 187, subd. (a)), in count 3 with shooting at an inhabited dwelling (§ 246), in count 4 with burglary (§ 459), and in count 5 with assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)). Demark Ross was charged in count 8 with possession of a firearm by a felon (§ 12021, subd. (a)(1)). Count 1 which charged both appellants with the attempted murder of Jermaine Lockett, and count 6 which charged Michael Ross with possession of a controlled substance were dismissed pursuant to section 1118.1.⁵ On counts 2 and 3, firearm-use enhancements alleged that a principal personally discharged a firearm

⁵ Count 7 charged Rickey Marcelle Moore with possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Moore testified against appellants and is not a party to this appeal.

(§ 12022.53, subds. (c) and (e)(1)), and that a principal personally and intentionally discharged a firearm which proximately caused great bodily injury (§ 12022.53, subds. (d) and (e)(1)). On counts 2 through 5 it was alleged that a principal was armed with a firearm (§ 12022, subd. (a)(1)). Criminal street gang allegations pursuant to section 186.22, subdivision (b)(1) were alleged as to counts 2 through 5, and 8.

Appellants pled not guilty and denied the special allegations.

The jury found Demark Ross guilty on count 2 of the attempted murder of Darrin Lockett, and on count 8 of possession of a firearm by a felon. On count 2, Michael Ross was convicted of the lesser included offense of attempted voluntary manslaughter (§§ 664, 192, subd. (a)). Both appellants were found guilty of shooting at an inhabited dwelling, burglary, and assault (counts 3, 4, and 5). The jury returned true findings on the firearm and gang enhancements.

The trial court denied Demark Ross probation and sentenced him to state prison for life with the possibility of parole plus 50 years to life. For count 2, the court sentenced him to life for the attempted murder, plus 10 years for the gang allegation, and 25 years to life for the section 12022.53, subdivision (d) allegation. For count 4, the court sentenced Demark Ross to a consecutive sentence of 15 years consisting of four years for the burglary, 10 years for the gang allegation, and one year for the section 12022, subdivision (a)(1) allegation. Sentencing on counts 3, 5, and 8, and on all other enhancements was stayed pursuant to section 654.

The trial court denied Michael Ross probation and sentenced him to state prison for 45 years to life. For count 3, the court sentenced him to the mid-term of five years for shooting at an inhabited dwelling, plus 25 years to life for the section 12022.53, subdivision (d) allegation. For count 4, the court sentenced Michael Ross to a consecutive sentence of 15 years consisting of four years for the burglary, 10 years for the gang allegation, and one year for the section 12022, subdivision (a)(1) allegation. Sentencing on counts 2 and 5, and on all other enhancements was stayed pursuant to section 654.

The court ordered appellants to pay restitution and various court fees and each received 411 days of actual custody credit and 61 days of conduct credit for a total of 472 days. Appellants appealed.

DISCUSSION

I. Sufficiency of Evidence to Support Demark Ross’s Conviction for the Willful, Deliberate, and Premeditated Attempted Murder of Darrin Lockett

A. Contention

Demark Ross contends there was insufficient evidence to support the finding that the attempted murder was willful, deliberate and premeditated and that the finding was therefore in violation of due process. He contends the conviction should be reduced to unpremeditated attempted murder.

B. Relevant Authority

“We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. [Citations.]” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462–1463, fn. 8, disapproved on another ground in *People v. Mesa* (2012) 54 Cal.4th 191, 199.) “Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate [attempted] murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]” (*People v. Perez* (1992) 2 Cal.4th 1117, 1124 (*Perez*).)

There are three basic, but not exhaustive, categories of evidence that will sustain a finding of premeditation and deliberation: (1) planning activity; (2) motive; and

(3) manner of the killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*); see also *Perez, supra*, 2 Cal.4th at p. 1125.) All three factors need not be present to sustain a finding of premeditation and deliberation. (*People v. Pride* (1992) 3 Cal.4th 195, 247.) The *Anderson* factors are merely categories of evidence to be used as a framework in the analysis of the sufficiency of the evidence of premeditation and deliberation. (See *Perez, supra*, at p. 1125; *People v. Thomas* (1992) 2 Cal.4th 489, 517.)

In reviewing the sufficiency of the evidence of premeditation and deliberation, we do not substitute our judgment for that of the jury. Rather, we draw all reasonable inferences in support of the verdict and affirm the judgment if any rational jury could find premeditation and deliberation beyond a reasonable doubt. (*People v. Pride, supra*, 3 Cal.4th at p. 247; *Perez, supra*, 2 Cal.4th at p. 1124.) Premeditation and deliberation may be shown by circumstantial evidence. (*Anderson, supra*, 70 Cal.2d at p. 25.)

C. Analysis

The evidence in this case was consistent with all three of the *Anderson* factors.

There was planning activity in that appellants and their four cohorts arrived at the home of the intended victim in two separate cars. Michael Ross called out for an individual to come outside. Demark Ross, who had a firearm, chambered a round, which showed that deadly force was contemplated. (See *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [finding sufficient evidence of planning activity, in part, because defendant was carrying a loaded gun at the time of the incident].)

There was also evidence of motive. Darrin Lockett, an associate of the PDL had physically assaulted Michael Ross, a fully fledged member. The gang expert testified that gang members must retaliate for such an act of disrespect. Furthermore, in gang culture, retaliating for a physical assault with the use of deadly force increases the gang member's status by showing he is capable of extreme violence.

The manner of killing, with Demark Ross sitting on the windowsill of the car and pointing the gun over the roof, while his brother drove by the Lockett residence, shows a preconceived design. Based on the bullet holes observed in the windows of the Lockett

residence and the recovered shell casings, Demark Ross fired at least eight shots in the direction of the house which showed a deliberate intent to kill. (See *Anderson, supra*, 70 Cal.2d at pp. 26–27; *People v. Morris* (1988) 46 Cal.3d 1, 23.)

Demark Ross contends that the attempted murder was “executed in the heat of passion” and that the shooting was an “unconsidered or rash impulse” reaction to being shot at by Vern. But the evidence is contrary. Both Demark Ross and his brother Michael had driven away from the Lockett residence, and then turned around and returned to the residence. Demark Ross sitting in the passenger seat, had contrived to put himself in such a position that he could aim and shoot over the roof of the car at the house. Officer McDonald testified that there were bullet holes in the windows and gunshot damage to the exterior of the house. The evidence in this case supports the inference that the attempted murder of Darrin Lockett was committed with deliberation and a weighing of considerations.

II. Sufficiency of Evidence to Support Appellants’ Convictions for Assault with Force Likely to Produce Great Bodily Injury

Appellants contend that there was insufficient evidence to support their convictions for assaulting Darrin Lockett with force likely to produce great bodily injury. Appellants focus on the lack of evidence of Darrin Lockett’s injuries and argue that because Darrin Lockett did not testify and none of the witnesses indicated whether he was injured, the jury had to speculate on the issue of force in order to reach its verdict. We disagree.

Section 245, subdivision (a)(1) “prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury. While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.’ [Citation.] ‘[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the

determination of the jury based on all the evidence, including but not limited to the injury inflicted. [Citations.]” (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065–1066.)

In determining the sufficiency of the evidence to support a conviction under section 245, subdivision (a)(1), “the relevant question is 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.] ‘[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Taylor* (2004) 118 Cal.App.4th 11, 18.)

The evidence showed that after Michael Ross was assaulted by Darrin Lockett, a violent retaliation was necessary, not only to maintain Michael Ross’s reputation within the PDL, but also the reputation of the PDL itself. Moore, Joseph W. and Michael Ross, who was known as “Big Mike,” forced their way into the Lockett residence. Moore and Michael Ross assaulted Lockett while Joseph W. engaged in a fight with another occupant of the house. Moore testified that he saw Michael Ross punching Darrin Lockett and then he “got into the fight, too” and punched Darrin Lockett. Pamela Lockett testified that the fight lasted approximately 10 minutes and she tried to intervene to prevent her brother from getting injured. Darrin Lockett had the use of only one arm because the other had been paralyzed in a car accident.

It is well-established that the use of hands or fists alone, without any separate weapon, may support a conviction for an assault “by ‘any means of force likely to produce great bodily injury.’” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *People v. Roberts* (1981) 114 Cal.App.3d 960, 965 [kicks to head and torso of “largely defenseless” man on the ground resulting in bruises and welts sufficient to support finding of force “likely to produce great bodily injury” within the meaning of Pen. Code, § 245]; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person,

§ 36, p. 660 [requisite “force quite often consists of blows of the fist, kicks, or other acts without use of any weapon”].)

The jury chose to believe Moore and Pamela Lockett and, where reasonably based, we must defer to its conclusion. Their testimony was sufficient evidence that appellants assaulted Darrin Lockett by means of force likely to produce great bodily injury.

III. Sufficiency of Evidence to Support Appellants’ Convictions for Burglary

Appellants contend that there was insufficient evidence to support their convictions for burglary. This argument is premised upon the theory underlying the previous contention, i.e., that there was insufficient evidence to support their convictions for assault with force likely to produce great bodily injury.

Burglary involves the act of unlawful entry accompanied by the specific intent to commit grand or petit larceny or any felony. (Pen. Code, § 459; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.)

The intent element must be present at the time of entry. (*People v. Sparks* (2002) 28 Cal.4th 71, 85, fn. 17; *People v. Riel* (2000) 22 Cal.4th 1153, 1204.) The intent element ““is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence.” [Citation.]’ [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 669.) The intent element is proved “[w]here the facts and circumstances of a particular case and the conduct of the defendant reasonably indicate his purpose in entering the premises is to commit larceny or any felony” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.) “Whether the entry was accompanied by the requisite intent is a question of fact for the jury.” (*Ibid.*)

The evidence shows that appellants who were self-admitted PDL members went to the Lockett residence to retaliate for a previous assault on Michael Ross. If appellants did not retaliate in a violent manner they and the PDL gang would be seen to be weak. The evidence shows that Michael Ross called out to somebody, presumably Darrin

Lockett, to come outside. When Darrin Lockett failed to come forth, Michael Ross, Moore, and Joseph W. forced their way into the house and assaulted Darrin Lockett.

Viewing all of the evidence in the light most favorable to the verdict, a reasonable jury could have found, beyond a reasonable doubt, that Michael Ross burst into the Lockett residence on August 7, with the intent to commit a felony, i.e., to retaliate in a violent manner against Darrin Lockett for a previous assault. Accordingly, appellants' burglary conviction is supported by substantial evidence.

IV. Sufficiency of Evidence to Support the Gang Enhancement Allegations

A. Appellants' Contentions

Appellants contend the gang enhancements were not supported by substantial evidence. They argue that appellants' membership in PDL was insufficient to establish that the crimes were committed for the benefit of the gang with the specific intent to promote, further or assist in any criminal conduct by gang members. Appellants further contend that Detective Gomez's expert opinions are "generalized" and "far-fetched" and were insufficient to show that the crime was committed for the benefit of a gang as opposed to being committed for personal motives. Appellants characterize the matter as "a family helping one of its members settle a personal score." We disagree.

B. Relevant Authority

A gang enhancement finding is reviewed under the substantial evidence standard. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*)). To establish a gang enhancement, the prosecution must prove two elements: (1) that the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang," and (2) that the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1)). The crime must be "gang related." (*People v. Gardeley* (1996) 14 Cal.4th 605, 622, 625, fn. 12; *People v. Castaneda* (2000) 23 Cal.4th 743, 745 [gang enhancement statute "increases the punishment for some gang-related crimes"]; *People v. Mendez* (2010) 188

Cal.App.4th 47, 56 [gang enhancement statute “applies when a crime is gang related”].) A defendant’s mere membership in the gang does not suffice to establish the gang enhancement. (*People v. Gardeley, supra*, at pp. 623–624.) Rather, “[t]he crime itself must have some connection with the activities of a gang.” (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.) “[T]o prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047–1048.)

C. First Element: For the Benefit of and in Association with a Gang

The first element of the gang enhancement may be satisfied by showing any one of the following—the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd.(b)(1).) In this case, sufficient evidence supported two of those three requirements.

1. For the Benefit of the PDL Gang

Here, the testimony of Moore and the gang expert, Detective Gomez, provided ample evidence that the crimes were committed for the benefit of the PDL gang. (See *People v. Albillar* (2010) 51 Cal.4th 47, 63 [“[e]xpert opinion that particular criminal conduct benefitted a gang by enhancing its reputation for viciousness 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)”].)

Detective Gomez explained the importance of respect in gang culture and testified that when a PDL member such as Michael Ross had been assaulted it would be incumbent upon him to retaliate against his assailant. Retaliation was necessary not only for appellant to maintain his status within the gang but to maintain or increase the reputation of the gang and show that it had “a strong hold” on its territory. Failure to retaliate would be a sign of weakness on the part of the gang. If the gang was not feared they would lose respect which would lead to a loss of territory, whereas a violent crime such as occurred here, instilled fear and intimidation into the community.

Four of the six individuals who participated in the retaliatory beating of Darrin Lockett were members of PDL. Both appellants, Moore, and Roberts admitted membership and had tattoos indicating their allegiance to the gang. Red clothing indicative of membership in a Blood gang along with PDL graffiti was found in the home of Joseph W. and Marcus W. The assault on Darrin Lockett took place within PDL territory.

From this evidence, it was reasonable to infer that Darrin Lockett was attacked by appellants to punish him for assaulting Michael Ross and to intimidate rival gangs and residents in the area, thereby enhancing the status of the PDL. Thus, there was substantial evidence of the “benefit of” prong of the enhancement.

We find no merit to appellants’ contention that Detective Gomez’s expert opinion was not based on facts and lacked evidentiary value. At the time of the trial, Detective Gomez had in excess of 11 years experience as a police officer for the City of Pasadena where the PDL gang was active. He had been assigned to special task forces investigating gang activity for approximately 10 years and had spent approximately eight years investigating gang related homicides and assaults as part of the Pasadena Police Department’s gang unit during which he had extensive contact with gang members. The prosecutor’s hypothetical questions were rooted in the facts shown by the evidence and were not based on “assumptions of fact without evidentiary support.” (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.) “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.) Detective Gomez, an expert on gang culture in general and the PDL gang in particular, was qualified to explain how criminal conduct could enhance the gang’s reputation or benefit the gang. (*People v. Ward* (2005) 36 Cal.4th 186, 209–210.)

2. In Association with a Gang

Active participation is defined as “involvement with a criminal street gang that is more than nominal or passive.” (*People v. Castaneda, supra*, 23 Cal.4th at p. 747.) It does not require that “a person devot[e] ‘all, or a substantial part of his time and efforts’ to the gang. [Citation.]” (*Id.* at p. 752.) Evidence establishing that the crime was committed with another gang member will support a finding that it was committed in association with a gang. (*Ochoa, supra*, 179 Cal.App.4th at p. 661.)

We reject appellants’ contention that the crimes were personal and family related, and not gang related. The facts are undisputed that both appellants along with Moore and Roberts, are self-admitted members of the PDL gang. In interviews, Roberts whose moniker was “Little M Train” referred to Michael Ross as “Big Mike,” and to Demark Ross as “Gun Smoke.” Moore was referred to as “Little Gun Smoke Deuce.” The jury was entitled to draw the inference that the assault of Darrin Lockett was gang-related in view of the ample evidence of gang indicia. (See *People v. Albillar, supra*, 51 Cal.4th at p. 62 [when “presented with the competing inferences, [jury] entitled to credit the evidence that the attack on Amanda M. was gang related, not family related”].)

D. Second Element: Specific Intent

Sufficient evidence established that appellants acted with “the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd.(b)(1).) (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Because substantial evidence supports a finding that the crimes benefitted the gang, reversal cannot be justified by the possibility that the evidence might have been reconciled with a finding that appellants acted only for personal reasons. (See *People v. Albillar, supra*, 51 Cal.4th at p. 60.)

There was ample evidence to show that the charged offenses occurred because Darrin Lockett had assaulted a PDL member and retaliation by the gang was necessary to avoid the appearance of being weak or fearful and unable to protect their territory. But, even if appellants were correct that the evidence was insufficient to show that the crimes

benefitted the gang, their contention fails. “There is no further requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*.” (*People v. Albillar, supra*, 51 Cal.4th at p. 67.) Appellants discussed their plans to retaliate against Darrin Lockett with Moore, Roberts, Joseph W. and Marcus W. and coordinated their arrival at his residence. Roberts was aware that Demark Ross was armed with a gun because he heard him chamber a round while they waited outside the Lockett residence. Michael Ross accompanied by Moore and Joseph W. entered the house and attacked Darrin Lockett. These facts combined with Detective Gomez’s opinion that appellants were gang members, support the jury’s finding that appellants associated with each other and assisted in the criminal activity.

V. The Trial Court Properly Denied Appellants’ Motion for a New Trial

Appellants contend the trial court erred in denying their motion for a new trial because the newly discovered evidence “bore directly and significantly upon the credibility of the prosecution’s sole witness.” We find no error.

““The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” [Citations.] “[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background.” [Citation.] [¶] In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: “1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.” [Citations.]” (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) “In addition, ‘the trial court may consider the credibility as well as materiality of the

evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.” (*Id.* at p. 329.) “A motion for new trial on the ground of newly discovered evidence is looked upon with disfavor. [Citation.] The granting or denial of such a motion is within the sound discretion of the trial court and, absent a clear showing of abuse of discretion, will not be reversed on appeal.” (*People v. Hernandez* (1971) 19 Cal.App.3d 411, 416.)

Demark Ross moved for a new trial based in part, on the grounds of newly discovered evidence.⁶ The newly discovered evidence was based on a conversation his trial counsel had with Jennifer Bolden, and a signed declaration by Heather Napel. Trial counsel for Demark Ross submitted a declaration in which he stated that he met with Jennifer Bolden in his office on August 20, 2011 (more than two months after the verdicts were reached) and Bolden stated that Pamela Lockett, who is her cousin, told her that Vernon shot her during the incident at her mother’s residence on August 7, 2010. The declaration by Heather Napel stated that on August 20, 2011, she overheard Pamela Lockett tell Jennifer Bolden “I don’t know who shot me,” and “Vernon did something that night that was real scandalous.”

During a hearing on the motion, Demark Ross’s attorney argued that the jury “relied heavily” upon Pamela Lockett’s testimony and this newly discovered information “raze[d]” her credibility. Michael Ross’s attorney argued that the shooter who fired towards the street also “directed gunfire back towards the house” injuring Pamela Lockett and her mother. The prosecutor noted that Napel was the girlfriend of one of the defendants. He argued that the evidence showed that the shots that entered the house and struck the victims came from the street. The court stated that it did not doubt that Bolden made the statements to counsel but that Bolden’s and Napel’s relationship to appellants would be considered. The court denied the motion and found that a different result would

⁶ Michael Ross joined in the motion and joins in the argument here on appeal advanced by Demark Ross.

not have occurred because there was “ample corroboration” of Pamela Lockett’s testimony.

Independent of Pamela Lockett’s testimony that appellants drove away but then turned around, came back, and shot at the house from the street, was evidence of the following: gunshot damage to the exterior walls of the Lockett residence and bullet holes in the front windows; eight .40-caliber shell casings found on the street west of the Lockett residence and determined to have been fired from the same gun, a .40-caliber Smith & Wesson semi-automatic pistol; trajectory rods inserted into the bullet holes in the Lockett residence which indicated that the shooter was positioned in the area where the casings were found on the street; a single .40-caliber Smith & Wesson shell casing recovered under the engine hood of the black Dodge Charger linked to Michael Ross; live .40-caliber ammunition recovered along with a gray sweatshirt that had gunshot residue on it and DNA matching Demark Ross; and a 9-1-1 caller who indicated that shots were fired from the “black car.”

In addition to the substantial evidence which supported the conclusion that Pamela and Betty Lockett were injured from shots which originated from the street there was no evidence that the shooter at the front of the house directed any shots back towards the house. To the contrary the evidence indicated that the shots were directed towards the street where appellants and their companions had fled. Moore testified that the shots that rang out as he and his brother were running out of the yard originated from “where that tree was” by the house. Moore testified that the bullets continued to ring out in his direction as he and his brother ran up the sidewalk. Moore fell and was not sure if he had been shot but heard further gunshots being fired in his direction. He got up quickly and “dived in the car window.” Several bullet strikes were found on two different vehicles parked on the street and a bullet was recovered from one of them. The trajectory of the bullets striking the vehicles on the street was consistent with having been fired by someone standing in front of the Lockett residence.

None of the cases appellants cite where new trials were warranted because ““the newly discovered evidence”” contradicted the ““strongest evidence”” introduced against the defendants resemble the instant case. (See e.g., *People v. Randle* (1982) 130 Cal.App.3d 286 [after defendant convicted of forcible oral copulation, newspaper article published about crime and naming victim resulted in 17 individuals in nearby city submitting declarations detailing instances of victim’s dishonesty and commission of public sex acts]; *People v. Henry* (1956) 142 Cal.App.2d 114 [rape case where prosecutor neglected to ask victim whether defendant was the person she had sexual intercourse with and new evidence was victim affidavit stating defendant was not the man].)

The thrust of appellants’ argument is that Pamela Lockett was the only witness who “pointed the finger” at them and her testimony played a crucial role in the jury’s assessment of the case. Appellants cite *People v. Williams* (1962) 57 Cal.2d 263 (*Williams*) for the proposition that it is the nature and quality of the impeaching evidence and the importance of the witness against whom it is offered that justifies a new trial. In *Williams*, the court found an abuse of discretion in the denial of a motion for new trial on the basis of the “very unusual facts” of the case. (*Id.* at p. 275.) The sole evidence of the defendant’s guilt had been the uncorroborated testimony of a single witness. In support of his motion for new trial, the defendant offered the affidavits of several unbiased witnesses who provided a complete defense, and the People filed no counter affidavits in opposition. (*Id.* at pp. 271–272.) The newly discovered evidence refuted the main witness’s “story in its entirety.” (*Id.* at p. 271.) Moreover, the affidavits “disclose[d] a deliberate scheme to produce false evidence and to abuse and subvert the process of the court for the purpose of bringing about the conviction of an innocent man.” (*Id.* at p. 275.)

Unlike the situation in *Williams*, the newly discovered information here does not refute Pamela Lockett’s “story in its entirety” and her testimony was not the sole evidence of appellants’ guilt as her testimony was corroborated by other witnesses and the forensic evidence.

The trial court did not abuse its discretion in denying appellants' motion for new trial because there was no reasonable probability that the result of the trial would have been different due to the newly discovered evidence.

VI. Sentencing Issues

Appellants contend and the People agree that the trial court made several sentencing errors which we address in turn.

A. Demark Ross's Sentence on Count 2 (Attempted Murder)

Demark Ross contends the trial court erred when it sentenced him to life for the attempted murder, plus 10 years for the gang allegation, and 25 years to life for the firearm allegation. Appellant is correct.

In conjunction with the attempted murder count (§§ 664, 187, subd. (a)) for which appellant was convicted, the trial court imposed a consecutive 10-year gang enhancement under section 186.22, subd. (b)(1)(C). Section 186.22, subdivision (b)(1)(C) provides for a 10-year enhancement when the defendant commits a violent felony for the benefit of a criminal street gang. If, however, the defendant is convicted of a felony punishable by life imprisonment, section 186.22, subdivision (b)(5) requires an alternative: that the defendant must serve a minimum term of 15 years before being paroled. Because Demark Ross was sentenced to an indeterminate life term on his conviction for attempted murder, the 15-year parole eligibility provision of section 186.22, subdivision (b)(5) applied to that count rather than the 10-year enhancement term of section 186.22, subdivision (b)(1)(C). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

The judgment therefore must be modified to strike the 10-year enhancement imposed on the attempted murder count pursuant to section 186.22, subdivision (b)(1)(C), and to impose in its place a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). The correct sentence is life in prison (§ 664, subd. (a)) with a minimum 15-year term (§ 186.22, subd. (b)(5)) plus a consecutive 25 years to life under section 12022.53, subdivision (d).

B. Demark Ross's Sentence on Count 3 (Shooting at an Inhabited Dwelling)

Demark Ross contends the trial court erred when it sentenced him to five years for shooting at an inhabited dwelling, plus 15 years for the gang allegation, and 25 years to life for the firearm allegation.⁷ Appellant is correct because the five-year term was improperly imposed.

Based on the jury's finding that Demark Ross had shot at an inhabited dwelling for the benefit of a criminal street gang, the trial court enhanced the mid-term of five years for that offense by 15 years pursuant to section 186.22, subdivision (b)(4). But, when a violation of section 246 is committed for the benefit of a criminal street gang, section 186.22, subdivision (b)(4)(B) applies; and the defendant is subject to an alternate penalty of 15 years to life, rather than the term normally prescribed for the underlying conviction and the gang enhancement for a serious felony. (See *People v. Jones* (2009) 47 Cal.4th 566, 571–572.)

The judgment therefore must be modified to replace the sentence imposed on Demark Ross on count 3 with an indeterminate term of life in prison with a minimum parole eligibility of 15 years. Because Demark Ross personally discharged a firearm resulting in great bodily injury to Pamela Lockett the court also imposed a sentence of 25 years to life for the firearm enhancement. The correct sentence is life in prison with a minimum 15-year term (§ 186.22, subd. (b)(4)(B)), plus a consecutive 25 years to life under section 12022.53, subdivisions (d) and (e)(1).

C. Michael Ross's Sentence on Count 3 (Shooting at an Inhabited Dwelling)

Michael Ross also contends that his five-year sentence on count 3 was improperly imposed. Appellant is correct.

With respect to Michael Ross the jury found that a principal intentionally discharged a firearm causing great bodily injury. Michael Ross was sentenced to the mid-term of five years, plus 25 years to life for the firearm and gang allegations. When a

⁷ The sentence was stayed pursuant to section 654.

defendant commits a felony violation of section 246 to benefit a criminal street gang, the offense is “a ‘felony punishable by . . . imprisonment in the state prison for life’ within the meaning’ of subdivision (a)(17) of section 12022.53.” (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.) But, “when another principal in the offense uses or discharges a firearm but the defendant does not, there is no imposition of an ‘enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to’ section 12022.53. [Citation.]” (*Id.* at p. 590.)

The trial court must impose “the provision that will result in a greater sentence.” (*People v. Brookfield, supra*, 47 Cal.4th at p. 596.) The judgment therefore must be modified to delete the five-year term. Michael Ross should be sentenced to 25 years to life under section 12022.53, subdivision (d).

D. Appellants’ Sentence on Count 5

Appellants were sentenced to the midterm of three years for the assault on Darrin Lockett, plus one year for the firearm allegation, and three years for the gang allegation.⁸ Appellants contend the three-year sentences for the gang allegation should have been imposed pursuant to section 186.22, subdivision (b)(1)(A), instead of subdivision (b)(1)(C).

Appellants were convicted of section 245, subdivision (a)(1) which is not listed as a violent felony pursuant to section 667.5, subdivision (c). Therefore, section 186.22, subdivision (b)(1)(A) applies and authorizes a term of two, three, or four years for persons convicted of felonies committed for the benefit of a criminal street gang. During sentencing, although the court imposed the proper sentence it did not identify the specific section of the gang enhancement statute. The minute orders and the abstracts of judgment for both appellants reflect the incorrect provision of the statute and must be corrected.

⁸ The sentences were stayed pursuant to section 654.

E. Appellants Should be Awarded One Additional Day of Custody Credit

Appellants received 411 days of actual custody credit and 61 days of conduct credit for a total of 472 days. Appellants contend, and the People concede, that they are entitled to one additional day of actual custody credit.

Pursuant to section 2900.5, subdivision (a), a defendant convicted of a felony is entitled to credit against a state prison term for actual time spent in custody before commencement of the prison sentence, including the day of sentencing. (§ 2900.5, subd. (a); *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Generally, an appellant may not appeal an error in the calculation of presentence custody credit unless the claim is first presented in the trial court, which did not occur here. (§ 1237.1.) However, the Court of Appeal may address a presentence custody credit issue if other claims are also raised on appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100–1101; *People v. Acosta* (1996) 48 Cal.App.4th 411, 420–421.)

As a general rule, the time credited includes the date of arrest, the date of sentencing, and every day in between. (*People v. Smith, supra*, 211 Cal.App.3d at p. 526 [“Since section 2900.5 speaks in terms of ‘days’ instead of ‘hours,’ it is presumed the Legislature intended to treat any partial day as a whole day”].) The probation report states that appellants were arrested on September 9, 2010, and were sentenced on October 25, 2011, a span of 412 days. Because the trial court awarded appellants 411 days of actual custody credit, and 61 days of conduct credit, the abstract of judgment must be amended to reflect 412 days of actual custody credit, and 61 days of conduct credit, for a total award of 473 days.

DISPOSITION

The judgment of Demark Ross is modified as follows: on count 2, to strike the 10-year enhancement imposed pursuant to section 186.22, subdivision (b)(1)(C); on count 3, to delete the five-year term imposed; on count 5, to reflect that the three-year sentence for the gang allegation is imposed pursuant to section 186.22,

subdivision (b)(1)(A); and to amend the abstract of judgment to reflect 412 days of actual custody credit, and 61 days of conduct credit, for a total award of 473 days.

The judgment of Michael Ross is modified as follows: on count 3, to delete the five-year term imposed; on count 5, to reflect that the three-year sentence for the gang allegation is imposed pursuant to section 186.22, subdivision (b)(1)(A); and to amend the abstract of judgment to reflect 412 days of actual custody credit, and 61 days of conduct credit, for a total award of 473 days.

The superior court is directed to prepare corrected sentencing minute orders and corrected abstracts of judgment to reflect these modifications. The trial court shall forward a copy of the corrected abstracts of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST