Filed 10/16/18 In re Q.B. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Q.B., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B283027 (Super. Ct. No. TJ21461) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. Q.B., Defendant and Appellant.	

Q.B. appeals from the juvenile court's order that declared him a ward of the court under Welfare and Institutions Code section 602. The court found true allegations that Q.B. committed three counts of second degree robbery (Pen. Code,[1] §§ 211, 212.5, subd. (c)), one count of possession of a firearm by a minor (§ 29610), and one count of possession of ammunition by a

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

minor (§ 29650). It also found true allegations that Q.B. committed the robberies for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). It ordered him suitably placed at Rites of Passage, Sierra Ridge, subject to terms and conditions of probation.

Q.B. contends: (1) insufficient evidence supports his robbery convictions because the victims' identifications were unreliable, and (2) the juvenile court prejudicially erred when it admitted testimonial hearsay of his gang moniker (see *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)). We affirm.

FACTUAL AND PROCEDURAL HISTORY

A group of young African-American men approached cousins De.J., J.A., and Da.J. on a February afternoon. One of them, Q.B., said to De.J.: "What's brackin'?"[2] and "On Harlem Crips. Stop or you'll be fucked up." Another, X.B., said "On 6-Deuce Brims."[3] They asked the cousins if they claimed any gang affiliation. The cousins said they did not. Q.B. said to J.A.: "I know you're not the one from Nap, but tell anybody you know from there that K.B. from 6-Deuce Brims robbed you, and they [*sic*] the reason why you all getting robbed because you all Naps kill innocents."[4]

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[2] Gangs affiliated with the Bloods say "What's brackin'?" instead of "What's crackin'?" because they do not use words that begin with the letter C.

[3] The 6-Deuce Brims (short for the 62 Harvard Park Brims) are affiliated with the Bloods.

[4] The 6-Deuce Brims refer to the Neighborhood or Harlem Crips as "Naps."

Q.B. took Da.J.'s phone, earphones, money, and school identification, plus J.A.'s phone and one of his shoes. X.B. took J.A.'s other shoe and De.J.'s phone, identification, money, library card, ear phones, shoes, and bicycle. A third person took J.A.'s speaker.

When Q.B. and his accomplices left, the cousins went to Da.J.'s house. Da.J. told his father what happened. De.J.'s mother and stepfather arrived. Someone searched Facebook to see if the cousins could identify the robbers. Q.B.'s photograph appeared. All three cousins recognized him as the person who robbed them. Da.J. also saw a photograph of X.B. on Facebook. Later that evening, De.J. told a police officer that a person approached him and said: "On Harlem Crips. If you don't give me your shit, I'll fuck you up." The officer wrote in his report that three or four people robbed the cousins.

A few days later, De.J.'s mother saw X.B. wearing her son's stolen shoes. Police arrested him and found J.A.'s speaker in his backpack. Police interviewed each of the cousins separately and showed them six photographs of potential suspects. All three of the cousins identified Q.B. as one of the robbers. All three said the robbers used the term "6-Deuce Brims." Two of them said Q.B. had a gun in his waistband during the robbery.

Police interviewed the cousins again a week later. They showed the cousins a six-pack array that included Q.B.'s photograph. Each cousin again identified him as one of the robbers.

Police searched Q.B.'s house and found a shoebox with gang graffiti related to the 6-Deuce Brims under his bed. Inside the box were a red bandana and two notebooks with gang

graffiti. Police found additional notebooks with gang graffiti in a dresser drawer. They found a stolen firearm with live rounds in the closet, and two more live rounds in a car parked in the driveway. Police did not find any of the property taken during the robbery.

The three cousins testified at Q.B.'s trial. De.J. testified the robbery occurred around 4:30 p.m. J.A. said it occurred between 3:30 and 3:45. Da.J. said it was around 3:15.

De.J. and J.A. each said that seven young men robbed them. Da.J. said it was three. All three cousins identified Q.B. in court as one of the robbers. J.A. had seen him around the neighborhood several times.

De.J. described Q.B. as between 19 and 21 years old, 5'8" tall, and 140 pounds, with light skin and blond, curly hair. J.A. described him as 16 to 18 years old with light skin and a dark, curly Afro. Da.J. said none of the assailants had blond hair.

Officer Allen Hsiao testified as a gang expert. Officer Hsiao said that Q.B. admitted that he was a member of the 6-Deuce Brims in August 2015 and that his gang moniker was "Q." Officer Hsiao said Q.B. remained an active gang member. The moniker listed on Q.B.'s field identification (FI) card was "K.B." Officer Hsiao learned of that moniker when he spoke with other members of the 6-Deuce Brims.

Officer Hsiao had previously encountered Q.B. several times in the area where the robbery here occurred. It is 6-Deuce Brims territory. He has seen several photographs of Q.B. making 6-Deuce Brims hand signs or hand signs disrespecting the Harlem Crips. Q.B. was wearing clothes associated with the 6-Deuce Brims in many of the photographs.

X.B. and several other associates of Q.B. have also admitted to Officer Hsiao that they are members of the 6-Deuce Brims.

Officer Hsiao opined that a hypothetical robbery similar to the one here would be committed for the benefit of the 6-Deuce Brims. He said that the robbers had the specific intent to benefit the gang because they yelled the gang's name when they robbed the cousins.

Q.B.'s father testified that he was with Q.B. in drug court until 2:30 or 2:45 p.m. on the day of the robbery. They then went to a cousin's house. They arrived home between 7:00 and 8:00 that evening.

Q.B.'s cousin testified that Q.B. was at his home from 3:30 to 4:00 p.m. on the day of the robbery.

DISCUSSION

Sufficiency of the evidence

Q.B. contends there was insufficient evidence to sustain his robbery convictions because the victims' identifications of him were unreliable. We disagree.

We uphold a conviction based on an identification if supported by substantial evidence. (*People v. Cuevas* (1995) 12 Cal.4th 252, 257.) We view the evidence in the light most favorable to the prosecution, and determine whether the juvenile court "'could find [Q.B.] guilty beyond a reasonable doubt.' [Citations.]" (*Id.* at pp. 260-261.) We review the entire record, and do not focus on discrete pieces of evidence. (*Id.* at p. 261) We neither evaluate witness credibility nor resolve conflicts in the evidence. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87 (*Manibusan*).) Reversal is unwarranted unless the cousins' identifications were so unreliable that they "constitute[d]

practically no evidence at all." (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493 (*Lindsay*).)

The cousins' identifications of Q.B. were not so weak that they constituted no evidence at all. All three cousins picked Q.B. out of a six-photograph lineup within days of the robbery. All three identified Q.B. as one of the robbers when police interviewed them again a week later. And all three identified Q.B. as one of the robbers at trial. The identifications alone provide sufficient evidence of Q.B.'s identity as the perpetrator of the robberies here. (*People v. Boyer* (2006) 38 Cal.4th 412, 480 (*Boyer*).)

The prosecution also provided additional, independent evidence that corroborated the cousins' identifications. During the robbery, Q.B. said he was from 6-Deuce Brims. He had previously admitted this gang affiliation to Officer Hsiao. And police later discovered materials related to the gang in his bedroom. When police arrested one of Q.B.'s accomplices, he was wearing De.J.'s shoes and had J.A.'s speaker. Such evidence reinforces that the cousins' identifications of Q.B. were sufficiently reliable. (*People v. Sanders* (1995) 11 Cal.4th 475, 509.)

That each cousin's description of Q.B. varied slightly does not change our conclusion. "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters [that] go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the [juvenile court] in the first instance." (*Lindsay*, *supra*, 227 Cal.App.2d at

pp. 493-494; see also *People v. Allen* (1985) 165 Cal.App.3d 616, 623 ["inconsistencies in eyewitness testimony are matters solely for the" trier of fact].) Nor does the cousins' later recall of additional characteristics of their assailants. (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) To reject the cousins' identifications, "there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on another ground by *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) Here, there was neither.

Citing social science research studies, Q.B. counters that the cousins' use of Facebook to identify their robbers—in the wake of a stressful event, without law enforcement safeguards in place—tainted their identifications. But while these studies detail the potential unreliability of eyewitness identifications *in general*, they do not show that the identifications *here* were unreliable. More significantly, Q.B. did not present these studies as evidence at trial, and did not call expert witnesses to describe the potential unreliability of eyewitness identifications. We cannot consider this evidence for the first time on appeal. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1249.)

Even if we could, the cousins' credibility and the accuracy of their identifications were for the juvenile court to determine. (*Boyer*, *supra*, 38 Cal.4th at p. 481.) Q.B. had the opportunity to cross-examine the cousins "about all aspects of the identification process" (*ibid.*), including seeing his photograph on Facebook, identifying him in photo arrays, and identifying him at trial. Because he had those opportunities, the court's

determination that Q.B. robbed the cousins is binding on us. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

Q.B. also claims the alibi evidence from his father and cousin further undermines the cousins' identifications. But the juvenile court determined otherwise, and we do not resolve evidentiary conflicts on appeal. (*Manibusan*, *supra*, 58 Cal.4th at p. 87.) "[I]t is not our function to reevaluate the evidence to conclude whether the [court] should have reached a different result on the theory that the evidence was close." (*People v. Prince* (2007) 40 Cal.4th 1179, 1281.)

Sanchez *error*

Q.B. contends the juvenile court prejudicially erred when it admitted Officer Hsiao's testimony of the gang moniker listed on his FI card. We agree the court erred. But the error was harmless.

The juvenile court erred when it admitted Officer Hsiao's testimony of Q.B.'s gang moniker because members of the 6-Deuce Brims provided that information to officers who completed Q.B.'s FI card outside Officer Hsiao's presence. It is case-specific hearsay. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1176, review granted March 22, 2017, S239442 (*Meraz*).) And we will assume the content of the FI card was testimonial. (*Sanchez*, *supra*, 63 Cal.4th at pp. 697-698; *Meraz*, at p. 1176.) We must therefore determine "whether it is clear beyond a reasonable doubt" that the court would have found true the robbery and gang allegations absent the admission of Officer Hsiao's testimony of Q.B.'s gang moniker. (*People v. Loy* (2011) 52 Cal.4th 46, 69-70; see *Sanchez*, at p. 698.) Our inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty

verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

It was. The evidence corroborating J.A.'s in-court identification of Q.B. was overwhelming.[5] J.A. had seen Q.B. around the neighborhood several times. He picked Q.B. out of a photo array—twice. So did De.J. and Da.J. De.J. and Da.J. also unequivocally identified Q.B. in court. One of Q.B.'s accomplices had J.A.'s speaker in his backpack and was wearing De.J.'s shoes. The true findings on the robbery allegations were thus "surely unattributable" to the erroneous admission of Q.B.'s gang moniker. (See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 538; *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1376-1377; *People v. Gatch* (1976) 56 Cal.App.3d 505, 511.)

So, too, were the true findings on the gang enhancements. Q.B. admitted to Officer Hsiao that he was a member of the 6-Deuce Brims. He committed the robbery here in 6-Deuce Brims territory with other members of the 6-Deuce Brims. During the robbery, he asked the cousins' gang affiliations, said the gang's name, and said that he was robbing the cousins because a rival gang killed innocent people. This evidence overwhelmingly suggests that Q.B. acted with the specific intent to benefit the 6-Deuce Brims. (See, e.g., *Sanchez*, *supra*, 63 Cal.4th at pp. 698-699 [evidence of gang membership and commission of crimes in gang territory suggests that a person with the intent to benefit the gang]; *Meraz*, *supra*, 6 Cal.App.5th at p. 1177, review granted [committing crimes with fellow gang members in gang territory after asking victims their gang affiliation suggests the specific intent to benefit a gang].)

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[5] Q.B. does not challenge De.J.'s or Da.J.'s identification.

We thus conclude that the erroneous admission of Q.B.'s gang moniker was harmless beyond a reasonable doubt.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Christopher J. Smith, Judge

Superior Court County of Los Angeles

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