Filed 8/9/12 P. v. Herrera CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. EDGARDO HERRERA, Defendant and Appellant.	B231774 (Los Angeles County Super. Ct. No. BA363975)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick N. Wapner, Judge. Affirmed.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Edgardo Herrera appeals his convictions for robbery (Pen. Code,[1] § 211) and the associated gang enhancements (§ 186.22, subd. (b)(1)(C)). He alleges on appeal that the evidence was insufficient to establish identity; that there was insufficient evidence to support the gang enhancement allegations; and that specific language in a jury instruction directed the jury to convict him. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2009 Mario Frias, Jesus Nunez, Arturo Frias, and Victor Vasquez were walking to a party when they were approached by two men. One asked Mario Frias where he was from, and he responded, "Nowhere," signifying that he was not a gang member. The man demanded that Mario Frias give him the contents of his pockets. Mario Frias refused and slapped the man's hand away when he reached for Frias's pocket. The man hit Mario Frias in the head with a pistol. He went through Nunez's pockets and hit Nunez in the head with the gun.

Mario Frias ran across the street, but two men jumped from a nearby car, demanded his possessions, then attacked him when he claimed to have nothing to give them. Herrera was the driver of the car; he remained in the car and gave orders to the assailants, including an instruction to be sure to take the men's possessions. Herrera was holding a shiny, rounded object that was shaped like a bat and that made a sound like a gun being loaded. The Frias brothers and Nunez were beaten and robbed. Three of the attackers left in the car Herrera drove.

Herrera was convicted of three robberies, with gang and firearm enhancement allegations (§ 12022, subd. (a)(1)) found true. The jury was unable to reach verdicts as to his two co-defendants. Herrera appeals.

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

DISCUSSION

I. Sufficiency of the Evidence of Identity

Herrera contends that the convictions must be reversed because there was insufficient evidence that he was a participant in the robbery. Specifically, Herrera asserts that multiple inconsistencies and contradictions in the description of the suspects provided by the prosecution witnesses, as well as a flawed identification procedure used by the police, demonstrate that the evidence of identity at trial was not substantial. "In reviewing a claim for sufficiency of the evidence, we must determine 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 or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.) "'Apropos the question of identity, to entitle a reviewing court to set aside a jury's finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all.' [Citation.]" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 521.)

Viewed in the light most favorable to the prosecution, we conclude that the evidence is sufficient to sustain Herrera's conviction. At trial, Arturo Frias positively identified Herrera as the driver of the car involved in the robberies. He had previously identified Herrera as the driver from a photographic six-pack in the days after the

robbery. Moreover, Herrera implicitly acknowledged his involvement in the crimes: in jail, three months after the robbery, he wrote a letter to an associate expressing confidence that "most likely I[']m getting the gun enhan[ce]ment dismissed [be]cause I had no gun." He wrote that a private investigator was going to prompt "that fool"—the victim who had identified him—"to say that I hit him up in a party a month before the rob[b]ery and hopefully he does because I was busted a month before and if he does say that I[']m going to ask for them to remove his testimony and if that happen[]s then I'll be firme [*sic*] [be]cause he[']s the only one who I.D. [identified] me. The 2 other vict[i]ms never saw me so I think I should be ok." This evidence supports the jury's verdict in this case.

Herrera challenges the evidence of Arturo Frias's identification of him with evidence that the photographic lineup was performed in a prejudicial and suggestive manner. He also points out inconsistencies, not only in Arturo Frias's statements about what he actually saw during the incident but also in the descriptions of all suspects provided by the four prosecution witnesses.[2]

The circumstances of the identification of Herrera were addressed at trial, and the jury heard evidence from Arturo Frias about suggestive and prejudicial statements made by the officer conducting the photographic lineup. The jury did not conclude that the circumstances of the identification compromised that identification. "In the instant case, 'there is in the record the inescapable fact of in-court eyewitness identification. That alone is sufficient to sustain the conviction.' [Citation.] Next, when the circumstances

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[2] In a subheading for this argument, Herrera also contends that "the Cognitive Deficiencies of the One Victim Who Did Identify Appellant" warrant reversal, but Herrera's opening brief contains no argument concerning the impact of Arturo Frias's cognitive abilities on the identification. In the reply brief Herrera asserts in the introductory paragraph that cognitive deficiencies are a further basis for reversal but never again mentions these deficiencies in five pages of argument. We do not consider this contention based on its mere inclusion in a heading of the opening brief and cursory mention in the reply brief when Herrera has made no argument regarding this basis for reversal. (Cal. Rules of Court, rule 8.204(a)(1)(B) [briefs must "support each point by argument"].)

surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court. [Citation.] Third, the evidence of a single witness is sufficient for proof of any fact. [Citations.]" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) Beyond this identification evidence, Herrera's own words established that he was present and involved in the robberies and indicated consciousness of guilt. We cannot say that the evidence was insufficient to establish that Herrera participated in the robberies.

II. Sufficiency of the Evidence for the Gang Enhancement Allegation

Herrera contends that the evidence was insufficient to support the gang enhancement because the prosecution failed in two respects to prove a pattern of criminal activity as required by section 186.22, subdivisions (e) and (f): (1) only one of the two predicate acts presented to the jury was committed by a member of Alcoholics Causing Ruckus (ACR), the gang involved here; and (2) there was insufficient evidence that criminal acts were one of the primary activities of ACR. The evidence was sufficient to support the true finding on the gang enhancement allegation.

The prosecution attempted to establish the requisite pattern of criminal activity with respect to ACR with evidence of crimes committed by people named Andrew Rodriguez and Roger Mendoza. Herrera points to testimony of gang expert witness Detective Eduardo Aguirre on cross-examination in which Aguirre acknowledged that Rodriguez had maintained he was a member of an associated gang, Lott 13, and that another officer, purportedly the source of information that Rodriguez was an ACR member, had actually written down on an investigation card (a "gang hard card") that Rodriguez claimed to be a member of Lott 13. Aguirre, however, also testified that he understood Rodriguez to be an ACR member based on having spoken with Rodriguez and speaking to people who know him. Regardless of whether Rodriguez admitted to being a member of ACR, the jury could reasonably conclude that he was an ACR member. Moreover, because the offense being tried may also constitute one of the

predicate offenses for the gang enhancement statute (*People v. Gardeley* (1996) 14 Cal.4th 605, 625), even if the Rodriguez evidence were to be considered insufficient, Herrera still has not shown that there was insufficient evidence of two predicate acts to support the gang enhancement allegation.

Next, Herrera contends that there was insufficient evidence that criminal acts were one of the primary activities of ACR because Aguirre only listed a series of criminal acts the gang had been involved in as a response to the prosecutor's question asking him to state the primary activities of ACR. Herrera claims the evidence was deficient because Aguirre did not state that criminal activity was one of the gang's primary activities, but we find this argument unpersuasive. Aguirre was asked, "What are the primary activities of ACR?" and responded, "ACR, over the years, they've been involved in shootings, robberies, stolen vehicles, gun possessions, sales of narcotics, vandalism." We decline to attach talismanic significance to the words "primary activities": the jury was entitled to understand this response as an enumeration responsive to the specific question concerning the gang's primary activities.

Herrera asserts that Aguirre's testimony concerning primary activities was insufficient because he did not take "the next step and testify[] that these 'involvements' resulted in convictions (or, failing that, at least arrests) of the gang members in question, leav[ing] one merely with conjecture." We are aware of no authority supporting the principle that testimony concerning a gang's primary activities is too speculative or conjectural unless it is supported by evidence of specific arrests or convictions, and Herrera has not offered any authority to support this argument. The case he relies on, *People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*), does not support this view. The *Sengpadychith* court stated that "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*Id*. at p. 323.) The court discussed the meaning of the word "primary" and noted that the definition "would necessarily exclude the occasional commission of those crimes by the group's members." (*Ibid*.) While the Supreme Court in *Sengpadychith* emphasized that this element of the

gang enhancement required more than occasional criminal conduct, the court did not require arrests or convictions. Instead, the Supreme Court held that primary activities could be proven by evidence that the gang's members consistently and repeatedly committed enumerated criminal offenses, or by expert testimony. (*Id*. at p. 324.) Here, there were both types of evidence: First, Aguirre testified that he was familiar with the gang and that he had investigated shootings and robberies that ACR members had committed, and he identified a number of specific criminal offenses in response to a question about the gang's primary activities. This testimony was supported by the evidence of the charged offense, a coordinated street robbery involving multiple ACR members. (See *id*. at p. 323 [both present and past conduct can be considered in evaluating a criminal street gang's primary activities].) Second, Aguirre testified about one ACR member's conviction for gun possession and another member's conviction for robbery. There was sufficient evidence to support the gang enhancement allegation.

Finally, Herrera contends that Aguirre's testimony was unreliable and untrustworthy because of his bias and his unprofessional behavior toward the court and counsel. Specifically, Herrera contends that Aguirre "made clear that he would testify and say anything to convict appellant," by asserting that any crime committed by a gang member was committed for the benefit of the gang and by "admitt[ing] that one of his goals in being a gang expert is to see suspects of gangs convicted and sentenced." Herrera also contends that instances of disrespect by Aguirre during the trial toward defense counsel demonstrate his bias and untrustworthiness.

We have reviewed the record with particular attention to those portions identified by Herrera as demonstrating Aguirre's bias, and we find that the record does not support Herrera's claim. Aguirre did not testify, as Herrera contends, that "it is not possible" for a gang member to commit a crime for his own personal benefit. His view was more nuanced: even as he pointed out that robberies committed by gang members always benefit their gangs, Aguirre acknowledged that gang members may commit offenses that are not for the benefit of the gang:

"Q. Is it possible for a gang member to commit a robbery and commit that robbery for his own personal benefit and not necessarily for the benefit of his gang?

"A. Not when he identifies himself with a gang and is active.

"Q. So it's always for the benefit of the gang for a gang member?

"A. Like I testified, if he's active, he has a gang, it's for his gang; benefits his gang.

"Q. How about if the gang member is, for example, selling drugs? Is that a crime for the benefit of his gang, or is it for his own personal benefit?

"A. It all depends on what other factors you have with him selling drugs.

"Q. Okay. So it could depend. Depends on the crime and it could depend on the circumstances?

"A. Exactly, yes.

"Q. Okay. So gang members can commit crimes for their own personal benefit in some circumstances?

"A. Again, I would need to know all the factors to make my opinion on whether it's gang related or not."

We also fail to find evidence of bias in a police officer expert witness acknowledging that one of his goals is to see suspects of gang crimes convicted and sentenced. It is difficult to imagine any police officer—particularly one who is serving as both investigating officer and gang expert—not aiming to ensure that offenders are properly convicted and sentenced. To consider that acknowledgment to be evidence of impermissible bias would preclude all police officer testimony.

The record does demonstrate that Aguirre evinced disrespect for counsel for Herrera's co-defendants both during court sessions and out of court: Aguirre mocked one attorney through gestures and laughter and insulted another with profanity. When this unfortunate and unprofessional conduct was brought to the trial court's attention during trial, the court addressed it by admonishing Aguirre that if the behavior did not stop instantly he would be excluded from the courtroom unless he was testifying, and he would also be subject to contempt proceedings for his disruptive and inappropriate

behavior. The trial court directed counsel to bring any further inappropriate conduct to the court's attention immediately so that the court could take action "right then." The problem of Aguirre's behavior was promptly resolved by the court, and no participant expressed any concern that his misbehavior called into question his testimony. Accordingly, even if Herrera's claim of bias was properly preserved for appeal, the record does not support his contention that Aguirre was so biased and untrustworthy that his testimony could not be considered.

III. CALCRIM No. 1403

The jury was instructed with a version of CALCRIM No. 1403 that directed jurors that they could consider evidence of gang activity for the limited purpose of deciding intent, purpose, and knowledge relative to the gang enhancement allegation; motive; or "The identity of the person who committed the crimes." The jury was authorized to use the evidence to evaluate witness credibility and when it considered the facts and information relied upon by an expert witness in reaching an opinion. The jury was instructed not to consider the gang evidence as evidence of a bad character or disposition, or for any other purpose.

Herrera contends that the inclusion of the phrase, "[t]he identity of the person who committed the crimes" was tantamount to directing a verdict "on the sole basis that appellant's membership in a gang established his identity in the offenses." There is no reasonable likelihood that the jury improperly applied the instruction as Herrera suggests. (*People v. Smithey* (1999) 20 Cal.4th 936, 963 ["If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction"].) This limiting instruction informed the jury that it could consider the gang evidence when it determined the question of identity; it did not compel a conclusion of identity if the jury found Herrera to be a gang member. Particularly when read in conjunction with CALCRIM No. 315, which instructed the jury on all the

considerations involved in evaluating witness identifications, we find no reasonable likelihood that the jury relied upon this instruction to use the gang evidence improperly.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.