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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE ALEJANDRO GUEVARA,

Defendant and Appellant.

B280411

(Los Angeles County
Super. Ct. No. PA082250-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant, Rene Alejandro Guevara, of first degree murder (count 1), assault with a semiautomatic firearm (count 3) and possession of a firearm by a convicted felon (count 4). (Pen. Code,¹ §§ 187, subd. (a), 245, subd. (b), 29800, subd. (a)(1).) The trial court dismissed count 2. The jury found true as to counts 1 and 3 alleged gang and firearm enhancements. (§§ 186.22, subd. (b)(1)(c), 12022.5, subds. (a) & (d), 12022.53, subds. (d) & (e)(1).) The trial court sentenced defendant to 113 years to life in state prison.

On appeal, defendant challenges the sufficiency of the evidence as to the gang enhancements. We find substantial evidence supported those enhancements.

Defendant also urges us to apply amendments to sections 12022.5 and 12022.53, effective on January 1, 2018, that give the trial court discretion to strike or dismiss the firearm enhancements. We agree that those amendments apply. We further conclude, however, that “no purpose” would be served by remanding for resentencing. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

¹ Further statutory references are to the Penal Code.

DISCUSSION

A. *The Gang Enhancements*

1. Section 186.22, subdivision (b)(1)

The gang enhancement is defined in section 186.22, subdivision (b)(1): “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony [receive enhanced punishment].”

The first element—“committed for the benefit of, at the direction of, or in association with” a criminal street gang—requires that the crime be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) A crime is committed *in association with* a criminal street gang when gang members rely on their common gang membership and gang apparatus in committing the offense. (*Ibid.*) A crime is committed *in association with* a gang when gang members act together, actively assist each other, and rely on each other. (*Id.* at pp. 60-62.)

A crime is committed *for the benefit of* a criminal street gang when it elevates the individual status of gang members and the reputation of the gang as a whole. (*People v. Albillar, supra*, 51 Cal.4th at pp. 63-64.) “Expert opinion that particular criminal conduct benefited 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[, subdivision] (b)(1). [Citations.]” (*People v. Albillar, supra*, 51 Cal.4th at p. 63.)

The second element—“with the *specific intent* to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1) (*italics added*))—is met “when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang.” (*Id.* at p. 68.) The specific intent element “applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” (*People v. Albillar, supra*, 51 Cal.4th at p. 66.) Moreover, “[i]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Id.* at p. 68.)

2. Defendant’s arguments on appeal

Defendant argues there was no evidence “a street gang ordered the shooting in this case” or any evidence “regarding the identity of [defendant’s] accomplice”: Further he contends, no evidence suggested “that [the accomplice] was likely a member of a criminal street gang”: In addition, defendant asserts no evidence supported the prosecution’s hypothetical assertion that there was an exchange of words between the shooters and the victims that offended the shooters. He also argues there was no evidence anyone called out gang names, displayed gang signs, wore gang apparel, boasted about the crimes in their aftermath, or made a graffiti record of the offenses. Defendant also notes, “[T]he shooting occurred outside [gang] territory, and there was

no evidence that either [defendant] or his accomplice recognized any of the men whom they attacked as rival gang members.”

3. Standard of review

We review the gang enhancement for substantial evidence. (*People v. Albillar, supra*, 51 Cal.4th at pp. 59-60.) “In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ [Citation.]” (*Ibid.*)

4. Gang expert testimony

A prosecution gang expert can properly express an opinion, based on hypothetical questions tracking the evidence, whether a crime was committed for a gang purpose. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) “Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1),

gang enhancement. [Citation.]” (*Ibid.*) The “expert testimony is permitted even if it embraces the ultimate issue to be decided. (Evid. Code, § 805.) The jury still plays a critical role in two respects. First, it must decide whether to credit the expert’s opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions.” (*People v. Vang, supra*, 52 Cal.4th at pp. 1049-1050.) The present jury was so instructed.

5. Substantial evidence supported the gang enhancement

As discussed above, we view the evidence in the light most favorable to the jury’s findings. (*People v. Albillar, supra*, 51 Cal.4th at pp. 59-60.) We conclude there was substantial evidence defendant committed the crimes in association with and for the benefit of his gang with the specific intent to promote, further, or assist in criminal conduct by gang members.

Importantly, there was substantial evidence that connected the murder of victim Jorge Lopez to gang activity. Defendant was an active member of the “Anybody Killas” (ABK), a subset of the Pacoima Van Nuys Boys gang (PVNB). The PVNB engaged in a pattern of criminal activity including murder, attempted murder, and firearm possession. The ABKs were reckless, ruthless, out of control gang members who actively sought to shoot others, whether or not the targets were rival gang members. Defendant’s tattoos indicated he was a known gang shooter who had earned the right to claim his status as such.

Before the attack, defendant and his co-assailant left defendant’s home together. Both were armed with

semiautomatic handguns. They drove to a place outside their gang's territory. While armed, they walked around an apartment complex in an area where there had been recent gang conflict.

Upon provocation that was based on their apparent gang membership, defendant and his unidentified accomplice committed the attack on Lopez. Defendant used a .45-caliber semiautomatic firearm. The second assailant used a 9-millimeter semiautomatic pistol. The victim, Lopez, was a member of Virginia Street, a rival gang to PVNB. They shot Lopez after Lopez's friend, Jaime Berdiel, disrespected them by calling them "niggas." That is, Berdiel told the detectives that, as defendant and the second individual passed by, Berdiel said, "[W]ho's them niggas." Berdiel thought the two men heard him. They started shooting right away. "Niggas" was a derogatory name that Hispanic gangs used for PVNB members, which is an Hispanic gang that associates with a particular African-American gang.

The prosecution's gang expert, Officer Jesus Rico, tied these facts to promoting PVNB's gang activity. As Rico told the jury, it was incumbent upon defendant and his fellow gang member having been disrespected to immediately retaliate; if they failed to do so, they would face discipline by their own gang. Rico further testified a hypothetical murder based on the facts of this case benefited the perpetrators' gang by enhancing its reputation for violence and engendering fear and intimidation. Rico testified that a gang member such as defendant earns status and respect within the gang by committing crimes in the company of other gang members. Two gang members acting together would serve as each other's witness to the crime; each could report the crime to their fellow gang members. And by committing a shooting, gang members cause others to fear the

gang and be intimidated by it, earning the actors respect and empowering the gang.

There was also evidence defendant committed the murder and assault “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) As noted above, “[i]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*People v. Albillar, supra*, 51 Cal.4th at p. 68.)

It is true that defendant’s companion was never identified. But there was substantial evidence from which the jury could reasonably infer that individual was defendant’s fellow gang member. Defendant was an active PVNB gang member and a known gang shooter. Defendant and his co-assailant left defendant’s home together, both armed with semiautomatic weapons. They drove to a place outside PVNB’s territory. While armed, they walked around an apartment complex in an area where there had been recent gang conflict.

It makes sense that the two gang members would be traveling together in these circumstances, though this inference alone might not be dispositive. Rico, the gang expert, testified that he would expect a gang member to commit crimes such as murder and assault with another gang member; and, if defendant was in the ABK subset of the gang, it was possible the unknown assailant was not just a fellow PVNB member but also an ABK. As Rico testified, having two gang members together serves the purpose of verifying each others’ word about events that occur.

Here, importantly, the crime occurred after defendant and his companion were disrespected in a manner that specifically related to their being gang members, as they both were called a derogatory name Hispanic gangs used for PVNB. Both reacted without hesitation to the disrespect by starting to fire their weapons immediately. Both fled following the shooting. Thus, there is substantial evidence that the pair reacted promptly in tandem in response to a provocation that was apparently a display of gang disrespect, and they reacted by committing a particularly serious crime.

Rico's testimony provided a basis for tying these facts to a conclusion that the co-assailant was a gang member. Rico explained the importance of respect to a gang: "Nobody wants to belong to a gang that's not respected, a gang that's not feared. In gang life it's all about fear and respect." He also testified that one gang calling another gang a derogatory name was a manner of showing disrespect. When gang members are disrespected, Rico testified, they "take action right away" in order to gain respect, both for themselves within their own gang and for their gang's reputation on the street. If the companion were *not* a gang member, it is hard to understand why he would have reacted to the use of a derogatory term for the gang by immediately shooting, as defendant did. At the very least, the fact that the companion *did* react to this provocation by shooting is substantial evidence that he was, like defendant, a PVNB member. (Compare *People v. Ramirez* (2016) 244 Cal.App.4th 800, 817, 819 [only facts linking shooter to gang were his tattoos, which the expert testified were gang tattoos, and a Facebook photograph of him wearing all blue, a gang color; only evidence linking co-

perpetrator to the gang was her romantic relationship to the shooter and his tattoo of her purported moniker on his ribcage].)

From this evidence, the jury could reasonably infer defendant had “the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1); *People v. Albillar, supra*, 51 Cal.4th at p. 68.) On these facts that include an immediate response to disrespect based on their apparent gang membership, the evidence was sufficient even though there was no evidence that: a gang ordered the shooting; defendant recognized the victim as a rival gang member; or anyone called out gang names, displayed gang signs, wore gang apparel, boasted about the crimes in the aftermath, or made a graffiti record of the offenses.

B. *The Firearm Enhancements*

For the reasons discussed below, we conclude that as of January 1, 2018, the trial court has discretion in this case to strike or dismiss section 12022.5 and 12022.53 firearm enhancements. We further conclude, however, that under the circumstances of this case, a remand for resentencing is unnecessary.

As noted above, the trial court imposed firearm enhancements under sections 12022.5, subdivisions (a) and (d) (10 years), and 12022.53, subdivisions (d) and (e)(1) (25 years to life). The sentences imposed were mandatory. This is because, at the time defendant was sentenced, on January 25, 2017, sections 12022.5, subdivision (c) and 12022.53, subdivision (h) prohibited a trial court from striking the firearm enhancements. Those subdivisions stated: “Notwithstanding Section 1385 or any other

provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.” (Stats. 2011, ch. 39, § 60, eff. June 30, 2011, op. Jan. 1, 2012 [§ 12022.5]; Stats. 2010, ch. 711, § 5, eff. Jan. 1, 2011, op. Jan. 1, 2012 [§ 12022.53].) Pursuant to Senate Bill No. 620, effective January 1, 2018, however, sections 12022.5, subdivision (c) and 12022.53, subdivision (h) have been amended to allow a trial court to exercise its discretion under section 1385 to strike or dismiss section 12022.5 or section 12022.53 firearm enhancements at the time of sentencing or resentencing: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, §§ 1, 2.)

In supplemental briefing, defendant has asked this court to apply the recent amendments under Senate Bill No. 620 to his case. In response, the Attorney General concedes the amendments apply retroactively to this case. We agree. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; *In re Estrada* (1965) 63 Cal.2d 740, 742, 745, 748.) We turn to the question whether a remand for resentencing is required.

The Attorney General argues no remand for resentencing is required because the record demonstrates the trial court would not in any event have exercised its discretion to strike or dismiss the firearm enhancements. (*People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) In *Gutierrez*, Division Two of this appellate district held in a similar context that a remand for resentencing is not required when “the record shows that the sentencing court clearly indicated that it would not, in any event,

have exercised its discretion to strike the [prior conviction] allegations.” (*Ibid.*) In *Gutierrez*, the trial court had imposed the maximum sentence after stating it was “appropriate” to do so. The Court of Appeal concluded that under the circumstances, [N]o purpose would be served in remanding for resentencing.” (*Ibid.*)

We agree with the Attorney General. The trial court denied defendant’s motion to strike a prior serious felony conviction allegation. The court noted defendant’s prior serious felony, attempted carjacking, was recent (committed in 2010) and involved violence; additionally, “[defendant] has escalated now to a murder case.” The trial court then exercised its discretion to maximize defendant’s sentence at each opportunity. On count 1, the trial court imposed the *mandatory* terms for first degree murder and for the firearm enhancement under section 12022.53. And on counts 1 and 3, the trial court imposed the *mandatory* five-year enhancement for a prior serious felony under section 667, subdivision (a)(1). The trial court had no discretion to impose any difference sentence in those respects. But on three occasions with respect to count 3, assault with a semiautomatic weapon, the trial court exercised its discretion to impose *high* terms—for the substantive offense, for the section 12022.5, subdivision (a) firearm enhancement, and for the section 186.22, subdivision (b)(1)(A) gang enhancement. Further, the trial court imposed a consecutive rather than concurrent sentence on count 4, firearm possession by a felon. (As required by section 654, the count 4 sentence was stayed.) The only point at which the trial court exercised any discretion in defendant’s favor was when it stayed (§ 654) the gang enhancement punishment on count 3. The trial court imposed the *high term* (four years) under section

186.22, subdivision (b)(1)(A) but stayed that punishment. The trial court did so *at the prosecution's request*. In light of defendant's record and the facts of the present case, imposition of the maximized sentence was well within the trial court's discretion. Under these circumstances, "no purpose" would be served by remanding for resentencing. (*People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.)

DISPOSITION

The judgment is affirmed.
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RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.