

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.111.5.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re J.E., a Person Coming
Under the Juvenile Court Law.

2d Juv. No. B280939
(Super. Ct. No. YJ38756)
(Los Angeles County)

THE PEOPLE,

Plaintiff and Respondent,

v.

J.E.,

Defendant and Appellant.

J.E. appeals from the judgment entered after the juvenile court sustained a juvenile wardship petition (Welf. & Inst. Code, § 602) for two counts of second degree robbery (counts 1 and 2; Pen. Code, § 211)¹, receiving property not exceeding \$950

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

in value (count 3; § 496, subd. (a)) and two counts of assault by means likely to produce great bodily injury (counts 4 and 5; § 245, subd. (a)(4)), with a gang enhancement finding on counts 1, 2, 4, and 5 (§ 186.22, subd. (b)(1)(B).) The trial court declared the robberies and assaults felonies, placed appellant in a community camp program for five to seven months, and set the maximum term of physical confinement at 24 years 10 months. (Welf. & Inst. Code, § 726, subd. (d)(1).)

We reverse the gang enhancements. (*People v. Prunty* (2015) 62 Cal.4th 59, 75-76 (*Prunty*).) Appellant, a member of the Venice 13 gang, assisted members of another gang, the Venice Shoreline Crips, in the commission of the charged offenses. The prosecution, however, presented no evidence that Venice Shoreline Crips gang members had committed at least two predicate offenses as required by section 186.22, subdivision (f). *Prunty* requires that the prosecution prove, beyond a reasonable doubt, “that those who commit[ed] the predicate acts . . . belong[ed] to the same gang that [appellant] act[ed] to benefit.” (*Id.* at p. 76.) We reverse and remand for resentencing with directions to strike the gang enhancement on counts 1, 2, 4, and 5. In all other respects, the judgment is affirmed.

Facts

On the evening of July 3, 2016, appellant and a tall Black male confronted Luigi V. and Alex P. in an alley in the City of Venice. The Black male asked “where we were from,” which Luigi took to mean what gang are you from and do you bang? Luigi answered, “No. We are just from the Valley.” The Black male said “Shoreline Crip” and patted down Luigi’s pockets.

Appellant and the Black male continued to talk “trash” and walked away.

Moments later, other people entered the alley. The group, including appellant and the Black male, “jumped” Luigi and Alex. The Black male held Luigi in a headlock while others punched him. Other people laughed, saying “Fuck ‘em up” and “Take the shit in his pockets.” Alex tried to defend himself but was hit from behind by appellant and tripped and fell. Appellant and another male kicked Alex multiple times.

Appellant and the group ran off just as the police arrived. Luigi heard the group scream “Shoreline” several times and realized that his backpack and wallet were missing. The wallet had less than \$20 of his money and \$100 of Alex’s money. During the fight, someone took Alex’s cell phone and broke it. Luigi suffered a broken nose, a black eye, and cuts inside his mouth. Alex had a black eye and bruises on his head and body.

Los Angeles Police Officer Andrew Paxton detained appellant, conducted a pat down, and found a blue denim wallet in his pants pocket. Appellant said, “I just found that. But don’t worry, I haven’t used it.” The wallet had a work identification and credit cards issued in the name of Steven Ornelas.

Los Angeles Police Officer Jose Pedroza, a gang expert, testified that the assault occurred in territory controlled by the Venice Shoreline Crips and the Venice 13 gangs. Each gang had about 200 members and was well established. Following a bloody gang war over narcotics sales, the gangs declared a truce with respect to narcotics sales in the Venice area. The primary activities of both gangs included narcotics sales, robberies, assaults with deadly weapons, burglaries, homicides, and theft.

Officer Pedroza believed that appellant was a member of the Venice 13 gang and had arrested appellant in the past with Venice 13 gang drawings and photos. In response to a hypothetical question that included case-specific facts, Officer Pedroza opined that the charged offenses were committed for the benefit of and in association with a criminal street gang. On cross-examination, Officer Pedroza stated that appellant did not commit the crimes for the benefit of the Venice Shoreline Crips but opined that the offenses were committed for the benefit of both gangs because “there’s a truce, a working relationship between Venice Shoreline Crips and Venice 13, . . . so that narcotics business can continue to thrive at Venice Beach.” On further questioning, Officer Pedroza conceded that the charged offenses did not involve narcotics activity.

The trial court asked: “[C]an two people from . . . different gang[s], doing the same act, benefit both gangs?” Officer Pedroza responded: “It can benefit the gang. But if you are asking me if [appellant] is doing it to directly benefit the other gang, I am saying he is doing it more for the benefit of his own gang.”

Gang Enhancement

To establish the gang enhancement, the prosecution had to prove (1) appellant committed the robberies and assaults for the benefit of, at the direction of, or in association with a criminal street gang, and (2) that appellant did so with the specific intent to promote, further, or assist in any criminal conduct by the gang members. (§ 186.22, subd. (b)(1).) “A criminal street gang . . . is defined by the [California Street Terrorism Enforcement and Protection] Act as any ‘ongoing organization, association, or group of three or more persons’ that

shares a common name or common identifying symbol; that has as one of its ‘primary activities’ the commission of certain enumerated offenses; and ‘whose members individually or collectively’ have committed or attempted to commit predicate offenses. (§ 186.22, subd. (f)) To prove that a criminal street gang exists in accordance with these statutory provisions, the prosecution must demonstrate that the gang satisfies the separate elements of the STEP Act’s definition and that the defendant sought to benefit that particular gang when committing the underlying felony.” (*Prunty, supra*, 62 Cal.4th at p. 67.)

Relying on *Prunty, supra*, 62 Cal.4th 59, appellant argues that a gang truce not to interfere with another gang’s narcotics sales does not establish that the offenses (robbery and assault) were committed for the benefit of or in association with the Venice Shoreline Crips gang.² “[I]t is axiomatic that those who commit the predicate acts must belong to the same gang that the defendant acts to benefit.” (*Id.* at p. 76.) Officer Pedroza testified that Venice 13 gang members and Venice Shoreline Crips gang members may on occasion come to the aid of one another, but “[g]enerally Venice Shoreline Crip gang members do work for their own gang, and Venice 13 gang members do work for their respective gang.”

² The STEP Act requires that the prosecution prove that the gang “engaged in, a pattern of criminal gang activity.” (§ 186.22, subd. (f).) “A gang engages in a ‘pattern of criminal gang activity’ when its members participate in ‘two or more’ statutorily enumerated criminal offenses (the so-called ‘predicate offenses’) that are committed within a certain time frame and ‘on separate occasions, or by two or more persons.’ [Citation.]” (*People v. Zermeno* (1999) 21 Cal.4th 927, 930.)

There was no evidence that the offenses involved narcotics activities, that it was a truce-related crime, or that the two gangs were subsets of a larger group and shared a common identity “that warrants treating them as a single group.” (*Prunty, supra*, 62 Cal.4th at p. 79.) As explained in *Prunty*, “the gang the defendant sought to benefit . . . and the group [or gang] whose actions the prosecution alleges satisfy the ‘primary activities’ and predicate offense requirements of section 186.22(f), must be one and the same.” (Id. at pp. 75-76.)

The prosecution’s theory was that appellant, a Venice 13 gang member, committed the crimes in association with or to benefit the Venice Shoreline Crips. That, however, required the prosecution to prove that Venice Shoreline Crips gang members had committed or attempted to commit two or more predicate offenses. (§ 186.22, subd. (f); *Prunty, supra*, 62 Cal.4th at p. 67.) That evidence was not forthcoming. The predicate offense evidence pertained to narcotics offenses committed by Venice 13 gang members.³

The Attorney General argues that the predicate offense element is satisfied where “the prosecution’s case posit[s] the existence of a single ‘criminal street gang’ for purposes of section 186.22(f) turns on the existence and conduct of one or

³ Officer Pedroza testified that Christopher Garcia, a self-admitted Venice 13 gang member, was convicted of possession of methamphetamine for sale in 2016, and that Arthur Luna, another Venice 13 gang member was convicted of possession of methamphetamine for sale on another occasion. The two predicate acts qualified the Venice 13 as a criminal street gang but there was no predicate act evidence regarding the Venice Shoreline Crips.

more gang subsets [T]he prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence of collaboration or organization Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together.” (*Prunty, supra*, 62 Cal.4th at p. 71.)

There is no evidence that the Venice Shoreline Crips is a subset of the Venice 13 gang or that the two gangs are part of the same organization controlled by a hierarchical organization. (*Prunty, supra*, 62 Cal.4th at p. 77.) Evidence that the two gangs had a truce with respect to drug sales does make them a subset of one another when the charged offense has nothing to do with narcotics. “*Prunty* . . . rejects this sort of bait-and-switch tactic . . . , holding that the criminal street gang that is shown to exist under section 186.22, subdivision (f) must be the same criminal street gang with which the defendant acted in association or sought to benefit in the commission of his crimes. [Citation.]” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 950.)

In *People v. Franklin, supra*, 248 Cal.App.4th 938, defendant committed the offenses in association with three friends who were members of a different gang. The Court of Appeal held that *Prunty* was not satisfied because the criminal street gang that was shown to have committed the predicate offenses under section 186.22, subdivision (f) had to be the same criminal street gang with which the defendant acted in association with or sought to benefit in the commission of the charged offenses. (*Id.* at p. 950.)

The same analysis applies here. Appellant was a member of the Venice 13 gang and knew Venice Shoreline Crips

gang members, but there was no evidence that the Venice Shoreline Crips had committed two or more predicate offenses within the meaning of section 186.22, subdivision (f). The prosecution argued that “the robberies and the assaults, were committed for the benefit of, in association with, Shoreline, with a specific intent to promote[,] further and assist . . . Shoreline. [¶] [¶] . . . [I]t was the expert’s opinion that [appellant] committed the crime in association with Shoreline, as [appellant] was with a taller African-American male who yelled out ‘Shoreline’ and originally asked the victims where they were from. . . . And we heard from the expert how this assault and the robbery furthers the efforts of Shoreline in this territory.” We reject the argument that subset theories save the gang enhancement finding. *Prunty* requires that we reverse on the gang enhancement and remand for resentencing.

Confrontation Clause - Receiving Stolen Property

Appellant claims that the trial court erred in admitting a hearsay statement that the wallet found in appellant’s pocket was stolen. When Officer Paxton patted down appellant and retrieved the wallet, appellant volunteered: “I just found that. But don’t worry, I haven’t used it.” The wallet contained work identification and credit cards issued to Steven Ornelas who was asked to come to the police station and speak to Officer Lee. Officer Lee stated that Ornelas “told me basically that he was an Uber driver and he picked up several juveniles, several people during a fair, and he recalls putting the wallet . . . by the glove compartment area. At one point one of the passengers stated he needs to charge his phone, and there was I guess an outlet in one of the console parts, and that’s when he believes that the wallet was taken during that time.” The trial

court, in overruling a hearsay objection, ruled the testimony was not “offered for the truth of the matter asserted. He [Officer Lee] turned the wallet over. Somebody has got to explain why he turned it over to that person.”

Appellant claims that the testimony violated the Sixth Amendment Confrontation Clause but appellant forfeited the error by not objecting on that ground. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Raley* (1992) 2 Cal.4th 870, 892 [hearsay objection did not preserve a claim under the confrontation clause].)

Disposition

The gang enhancement findings are reversed. We remand for resentencing only. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David S. Wesley, Judge

Superior Court County of Los Angeles

Goldstein Legal Office and Elana Goldstein, 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, Susan Sullivan Pithey, Supervising Deputy Attorney General, William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.