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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DASHON TYWON JACKSON, Defendant and Appellant.	B252822 (Los Angeles County Super. Ct. No. BA401368)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail R. Feuer, Judge. Judgment is affirmed in part and reversed in part.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Nelson and Jessica C. Owen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant of one count of dissuading a witness from reporting a crime in violation of Penal Code section 136.1, subdivision (b)(1).[1] As to this count, the jury found as true the allegation that appellant committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(4). The jury also convicted appellant on count 2, criminal threats under section 422. As to both counts 1 and 2, the jury found true the allegation that appellant committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1)(B). Appellant waived trial on his prior convictions and admitted the allegations.

On count 1, the trial court sentenced appellant to twelve years to life, comprised of seven years to life plus five years pursuant to section 667, subdivision (a)(1). As to count 2, the court imposed a concurrent sentence but stayed it because the same conduct formed the basis for both convictions.

Appellant appeals his sentence on the grounds that: (1) there was insufficient evidence to support the jury's true findings on the gang enhancements, and (2) the court incorrectly sentenced him on count 1 because a conviction under section 136.1, subdivision (b)(1) does not qualify for the sentencing enhancement imposed in this case under section 186.22, subdivision (b)(4)(C).

We reject the first argument, but accept the second. Substantial evidence supports the jury's findings on the gang enhancements. However, as to the second claim of error, we find that it was not harmless error when the trial court imposed a sentence of seven years to life pursuant to section 186.22, subdivision (b)(4)(C) based on appellant's conviction under section 136.1, subdivision (b)(1). Imposition of

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[1] All future statutory references are to the Penal Code unless otherwise indicated.

a sentence of seven years to life under section 186.22, subdivision (b)(4)(C) is permissible only if appellant was convicted of witness dissuasion with threats to victims and witnesses, as defined in section 136.1, subdivision (c). As appellant was charged and tried under section 136.1, subdivision (b), the jury was not asked and did not find appellant used an implied or express threat of force in committing the crime. Given the unique facts presented in this case, it is impossible to conclude that the jury found, beyond a reasonable doubt, that the defendant's dissuasion of Edith was accompanied by force or by an express or implied threat of force.

Accordingly, we must vacate the sentence imposed on count 1 and remand the matter to the trial court for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of August 11, 2012, appellant went to the taco stand owned by his father-in-law, Ricardo Garduno. The taco stand is located in the territory controlled by the Six Deuce East Coast Crips gang (Six Deuce). Appellant is a Six Deuce gang member.

Appellant called out, " 'bitch, come out here.' " His wife, Leticia Garduno, came outside and they began to argue. As appellant became angrier, he jumped up on the front counter of the taco stand and began stomping his feet. Ricardo came to the front of the stand and told appellant to get off the counter. Once appellant was off the counter, Ricardo told him to stop screaming at Leticia and to leave. Appellant and Ricardo then began to fight. Ricardo's other daughter, Edith, came outside and, concerned for her family's safety, pulled her cell phone out of her pocket and called 9-1-1. She got a busy signal.

Appellant saw Edith dial her phone.[2] Edith saw appellant flash gang hand signals to a group of men standing nearby. Appellant walked toward the men and then returned with them to the taco stand. Both appellant and several of the men in the group

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[2] At the preliminary hearing, Edith testified that when appellant saw her on the phone, he told her not to call the police, but nothing more. Appellant then left and returned with some other men.

were screaming "Six Deuce" as they approached. Edith testified on cross-examination that she was afraid when the men walked up with appellant, although they did not say anything to her. Appellant then identified Edith (by the blue shirt she was wearing) to the other men and stated that she " 'called the police on [him].' " Appellant then told the men, " 'if the police take me away, you know the shit is going to go down. You know we are burning the shit down. You know what has to happen.' " He further told his associates to leave his wife alone, but said if they found Ricardo and Edith alone, " '[y]ou know what to do.' " Both Ricardo and Edith understood that appellant was instructing his associates to burn down the taco stand and this frightened them.

Police arrived and took appellant into custody. When interviewed by police, Edith was upset and wanted to tell the police what had happened. Ricardo provided a handwritten statement in which he stated that he felt appellant was a threat to his family and that appellant had specifically threatened Edith because she called the police. He also wrote, " 'Every time we argue, [appellant] threatens he's going to send his friends.' "

Appellant was charged in count 1 with a felony violation of section 136.1, subdivision (b)(1), the crime of dissuading a witness from reporting a crime. Appellant was also charged in count 2 with felony criminal threats, a violation of section 422. Both counts specified Edith Garduno as the victim and the date of the crimes as August 11, 2012. As to count 1, the information also alleged a violation of section 186.22, subdivision (b)(4). It alleged that appellant had committed the crime of dissuading a witness for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. As to both counts, the information also alleged under section 186.22, subdivision (b)(1)(B) that appellant had committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. The information also alleged that appellant had a prior conviction for which he had served

a prison sentence that qualified under the three strikes law, and had two other convictions for which he had served prior prison terms.

While in custody, appellant and Leticia worked to get the case dismissed before trial. On different days, Leticia visited the jail and spoke with appellant on the phone about the case. These calls were recorded and played for the jury. While these conversations did not form the basis for criminal charges, they explained why the trial testimony of Edith and her father varied so dramatically from their earlier statements. In one call, appellant told Leticia to tell Edith not to come to court and to say that she made everything up. In a second conversation, appellant warned Leticia that any efforts taken to assist the prosecution by her family would not "sit good with people" and that if anything were to happen to the appellant, his fellow Six Deuce gang members might "do some shit" on their own. During a later call, on the day of the preliminary hearing, appellant told Leticia that he was "gonna blow your sister and them out of the water" if they came to court.

Trial was by jury and they found appellant guilty as charged. Appellant waived a trial on the prior conviction allegations and admitted the allegations.

The court heard and denied a motion for a new trial. One of the arguments asserted in support of that motion was that Edith had not been dissuaded from calling the police because of a threat of violence. In response the trial court asserted that she was under the impression that Edith had testified at the preliminary hearing that she got off the phone because she felt threatened by appellant. At the preliminary hearing, however, Edith testified only that appellant told her not to call the police; nothing more.

As to the witness dissuasion count, the court sentenced appellant to 12 years to life in state prison. The court granted a *Romero* motion and struck the appellant's prior strike. The court imposed the statutory minimum sentence of seven years to life on count 1 and added five years pursuant to section 667, subdivision (A)(1). On the criminal threats count, the court imposed a concurrent sentence of two years (mid-term). The court, however, stayed that sentence under section 654, "because it's the same set of facts."

DISCUSSION

A. *Substantial Evidence Supports the Jury's True Finding on the Gang Enhancement*

Appellant challenges the sufficiency of the evidence to support the jury's true finding on the gang enhancements. Appellant asserts that the testimony of the prosecution's gang expert was not a sufficient basis upon which the jury could rationally conclude that when appellant got his Six Deuce associates to join him in a public place in the heart of Six Deuce territory and loudly announce that they should burn down the taco stand if the police took him away, he did so with the specific intent of promoting, assisting or furthering any criminal conduct by gang members. Nor appellant contends, was there even expert testimony on whether it was appellant's specific intent to dissuade Edith in order to promote, further or assist the Six Deuce gang. We disagree.

The test for determining a claim of insufficient evidence in a criminal case is whether, on the entire record, a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27; *People v. Jones* (1990) 51 Cal.3d 294, 314.) In making that determination, the appellate court must view the evidence in the light most favorable to the People presuming every fact that the trier of fact could have reasonably deduced from the evidence in favor of the judgment. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) Determining the credibility of witnesses is the exclusive province of the trier of fact. (*Id.,* at p. 314.) The conviction should be upheld unless " ' "upon no hypothesis whatever" ' " was there sufficient substantial evidence to support it. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

To subject a defendant to a gang enhancement, the prosecution must prove both that the underlying crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang" and that the defendant possessed the "specific intent to promote, further, or assist in any criminal conduct by gang members." (Section 186.22, subdivision (b)(1).) Specific intent is rarely susceptible to direct proof and usually must be inferred from the facts and circumstances surrounding the offense.

(*People v. Rios* (2013) 222 Cal.App.4th 542, 567-568.) For example, if substantial evidence establishes that a defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant acted with the specific intent to promote, further, or assist gang members in criminal conduct. (*Id.* at p. 570).

In addition, the use of expert testimony on the subject matter of the culture and criminal habits of street gangs is well-established. (*People v. Vang* (2011) 52 Cal.4th 1038, 1044.) It is proper for an expert to provide, in response to a hypothetical question based on the facts of the particular case, an opinion was to whether the defendant's criminal conduct could be described as " ' "gang-related activity." ' " (*Id.* at p. 1045, 1048). Expert opinion that particular criminal conduct benefited a gang is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. (*Ibid.; People v. Albillar* (2010) 51 Cal.4th 47, 63.)

In this case, Officer Hogg was qualified as a gang expert on the Six Deuce gang. His opinions were well-founded and grounded in facts perceived by or personally known or made known to him and within the scope of permissible expert opinion. Officer Hogg testified about appellant's membership in the Six Deuce, his tattoos and monikers, and testified about the crimes committed by appellant's Six Deuce cohorts, including witnesses intimidation. Officer Hogg's knowledge of the facts specific to this case, as well has his extensive experience, education and training regarding gang subculture and lifestyles, provided invaluable assistance as opinion testimony to the trier of fact.

Appellant's reliance on *In re Frank S.* (2006) 141 Cal.App.4th 1192 and *People v. Ramon* (2009) 175 Cal.App.4th 843 to challenge the sufficiency of the expert opinion evidence in this case is misplaced. In *Frank S.*, the expert's opinion that carrying a dirk or dagger for self-protection was done with the specific intent to benefit the gang was found to be entirely speculative because the circumstances in which that conduct occurred bore no connection with the activities of the gang and failed to benefit

them. (*In re Frank S., supra*, at pp. 1195-1196, 1199.) In *Ramon*, the gang expert had few facts from which he drew his inferences. (*Ramon, supra,* at p. 851.) Ramon was driving a stolen car in gang territory in the company of another gang member and carrying a weapon. The expert's opinion, which failed to include that possessing stolen vehicles were one of the principal activities of the gang, failed to support the conclusion that the defendant had the specific intent to promote the gang. (*Id.* at p. 853).

In this case, appellant publicly declared that he and his gang would burn down the taco stand if the police took him away. That declaration took place in the heart of Six Deuce territory and in the company of Six Deuce gang members, who appellant had assembled by throwing gang signs and who were also shouting "Six Deuce" for all to hear. There was no question that appellant was a member of the Six Deuce gang and that he dissuaded Edith with the assistance of fellow Six Deuce gang members. The expert also testified that intimidating residents living in Six Deuce territory facilitate and comprise the primary activities of the gang. Although the identities of appellant's fellow gang members were never ascertained, the gang expert testified that there would be "serious repercussions" if someone other than a Six Deuce member threw back gang hand signs or yelled out the gang's name in this area. Thus, the jury could reasonably infer that the men who joined appellant at the taco stand were members of the Six Deuce gang.

The open and brazen nature of these crimes advanced the gang's objectives of instilling fear in their territory and dissuading future witnesses from calling the police. The events transpired in a public area, in daylight, with no attempt by appellant and his cohorts to conceal their identities. In fact, they went to some lengths -- by way of calls and hand signals -- to establish that they were Six Deuce gang members. As testified to by the expert, witness dissuasion benefits gangs by creating a community in which the gang can conduct its criminal activities with impunity. From this circumstantial evidence, a jury could rationally infer that the appellant's conduct was committed with the specific intent to promote or assist in criminal conduct by members of that gang. (See, e.g., *People v. Albillar, supra,* 51 Cal.4th at p. 60-61.)

B. *The Trial Court's Sentencing Error*

Appellant argues that his case must be remanded for resentencing because his conviction on count 1, a violation of section 136.1, subdivision (b)(1), does not qualify for a life sentence under section 186.22, subdivision (b)(4). We agree.

In the information, appellant was charged with a violation of section 136.1, subdivision (b)(1). Subdivision (b)(1) of section 136.1 provides that anyone who attempts to prevent or dissuade another person from reporting a crime to law enforcement is guilty of an offense that may be punished as either a misdemeanor or felony. It also specifically names subdivision (c) as an exception to its provisions. Subdivision (b)(1) does not require the element of an express or implied threat of force or violence upon the witness. This was the offense alleged against appellant, the offense on which the jury was instructed and on which they found appellant guilty.

By comparison, subdivision (c) of section 136.1 provides, in relevant part, that every person who commits the acts described in subdivision (b) where the act is accompanied by force or by an express or implied threat of force is guilty of a felony with an increased term of imprisonment. (*People v. Lopez* (2012) 208 Cal.App.4th 1049, 1064.)

Without that additional element of an express or implied threat of force or violence, the crime of dissuading a witness is not a qualifying offense required to impose of a life sentence under the enhancement provisions of section 186.22, subdivision (b)(4)(C). (*People v. Lopez, supra,* 208 Cal.App.4th at p. 1065; *People v. Anaya* (2013) 221 Cal.App.4th 252, 269.) To qualify for the imposition of a life sentence, a defendant must have been convicted of a felony under section 136.1, subdivision (c)(1). (*Id.,* at p. 1065.) That did not happen in this case.

The next question is whether that error is harmless. As noted in *Lopez*:

> "The Sixth and Fourteenth Amendments to the United States Constitution preclude a trial court from imposing a sentence above the statutory maximum based on a fact, other than a prior conviction, not found to be true by a jury. (*citations omitted.*) Whether a defendant used an express or implied threat of

> force when attempting to dissuade a witness from testifying is a question of fact that subjects the defendant to a greater sentence. Accordingly, *Apprendi* and its progeny require the jury find this fact true beyond a reasonable doubt."

(*People v. Lopez, supra,* 208 Cal.App.4th at p. 1064.)

Given the facts of this case, we cannot conclude that the jury found that appellant used an express or implied threat of force when attempting to dissuade Edith. Appellant was not charged with that offense and the jury was not instructed as to that requirement. The verdict did not so find. Nor, given the trial judge's misperception as to the nature of Edith's testimony at the preliminary hearing, can we infer from the decision to stay the criminal threats count pursuant to section 654 that the jury would have found appellant guilty of dissuading a witness using an implied of express threat of force in committing the crime beyond a reasonable doubt.

Accordingly, we vacate the sentence on Count 1 and remand the matter to the trial court for resentencing.

DISPOSITION

The judgment is affirmed in part and reversed in part. Appellant's sentence on count 1 must be reversed and the case remanded for resentencing. In all other respects, the judgment is affirmed.

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JONES, J.*

WE CONCUR:

ALDRICH, Acting P. J.

LAVIN, J.

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