Filed 8/17/17 In re A.B., M.A., J.H. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re A.B., M.A., J.H., Persons Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.B., Defendant and Appellant.	2d Juv. No. B276855 (Super. Ct. No. NJ28698) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent. v. M.A., Defendant and Appellant.	2d Juv. No. B277400 (Super. Ct. No. NJ28699) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. J.H., Defendant and Appellant.	2d Juv. No. B277484 (Super Ct. No. NJ28700) (Los Angeles County)

Minors A.B., M.A., and J.H. appeal from the judgments entered after the juvenile court sustained juvenile wardship petitions (Welf. & Inst. Code, § 602) for two counts of second degree robbery (counts 1 and 3; Pen. Code, § 212.5, subd. (c))[1] and two counts of assault by means of force likely to cause great bodily injury (counts 2 and 4; § 245, subd. (a)(4)) with criminal street gang enhancements (§ 186.22, subd. (b)(1)(B)). The trial court declared the robberies felonies, reduced the assaults to misdemeanors and found they were subject to a section 654 stay, and placed appellants in a community camp program for five to seven months. The trial court removed appellants from the physical custody of their parents and set the maximum term of physical confinement at 26 years eight months. (Welf. & Inst. Code, § 726, subd. (d)(1).) We modify the disposition orders to reflect that the aggregate maximum term of physical confinement is 20 years for each appellant and affirm the judgments as modified. (Welf. & Inst. Code, § 726, subd. (d)(3).)

Facts

On the evening of May 15, 2016, Alexander S. and Christopher L. got off their bicycles to talk to appellant A.B. (aka Koa) in the City of Lomita. Moments later, a Chrysler drove up and three males jumped out of the vehicle: appellants J.H. and M.A., and a Matthew W. The three appellants and four male cohorts hiding nearby demanded that Alexander and Christopher surrender their bicycles. When Alexander resisted, the assailants pulled his jacket over his head. Alexander was hit multiple times and let go of his bicycle. Someone said, "'Give me

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

your phone'" and a second person took Alexander's cell phone. Alexander saw the group ride away on the stolen bicycles or leave in the Chrysler. He made a six-pack photo identification of three appellants.

Alexander's friend, Christopher, also had his jacket pulled over his head. A.B. said "'boom,'" punched Christopher, and said "'This has nothing to do with you.'" After Christopher let go of his bicycle, he received a "body shot" and was hit two more times. J.H. reached into Christopher's pockets, took his keys and money, and punched Christopher in the face. Two assailants rode off on the stolen bicycles and the others, including A.B., left in the Chrysler. Christopher was shown photo six-packs and identified four people involved in the robbery: appellants A.B. and J.H., and Joseph P. and Matthew W.

Alexander testified that A.B. betrayed him. A.B. was wearing a purple or vibrant blue tank top shirt which was the Harbor City Crips gang's chosen colors. Alexander heard someone say "Harbor," which Alexander took to mean the Harbor City gang. Alexander knew he was "getting jacked" and believed it was gang related.

Christopher and Alexander called the Sheriff's Department, told the responding officers what happened, and named A.B. as an attacker. A.B. was interviewed by the police and admitting punching Christopher in the face. A.B. said he was associated with the Harbor City Crips and that members and associates of the gang, including Matthew W., were involved in the incident. A.B. also said that Matthew W. took one of the bicycles.

On May 24, 2016, the Los Angeles County Sheriff found Alexander's stolen bicycle in front of M.A.'s house. A blue

and white gang bandana was in M.A.'s bedroom, along with a hat with the letter "H" and gang graffiti on a notepad.

Los Angeles Police Officer Victor Sosa, a gang expert, testified that the Harbor City Crips is a criminal street gang with more than 50 members. The gang colors are purple and blue and gang members wear hats bearing the "H" symbol. Officer Sosa testified that the gang's primary activities were murder, robbery and serious assaults, and that a gang nonmember would face gang reprisals if he or she wore gang colors. Officer Sosa knew appellants, had detained them in the past, and opined they were members or associates of the Harbor City Crips. Officer Sosa stated that gang members do not commit robberies and assaults with non-gang members. "It's just not tolerated, because when they're committing th[e] crime, they're enhancing the reputation, they're showing that pride that they have within a gang." Based on a hypothetical approximating the facts of the People's case, Officer Sosa opined that the assaults and robberies were committed in association with and for the benefit of the Harbor City Crips.

Substantial Evidence: Robbery and Assault

Appellants argue that the true findings on the robbery and assault counts are not supported by the evidence. "On appeal we review the whole record in the light most favorable to determine whether it discloses 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. [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) We view the evidence in the light most favorable to the prosecution and presume the existence of every fact the trier of fact could have reasonably deduced from

the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) We do not reweigh the evidence or consider matters of credibility. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*Ibid.*) The same standard of review applies to juvenile adjudications. (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 165.)

Here the evidence shows that appellants were present and acted in concert to assault and rob the victims. A.B., a self-admitted associate of the Harbor City Crips, got the victims to stop as M.A. and J.H. drove up in the Chrysler. Appellants and their cohorts surrounded the victims and demanded the bicycles. Christopher testified that they "were coming after us, continuously, no matter how much we begged them to stop."

The assailants pulled jackets over the victims' heads and beat them. A.B. said "'boom'" and punched Christopher. Christopher received a "body shot" and more blows as J.H. searched his pockets and took his cell phone and money. Christopher was sure that A.B. and J.H. punched him and made a photo identification of A.B. and J.H. and two other assailants (Joseph P. and Matthew W.) associated with the gang.

Alexander corroborated much of Christopher's testimony and saw M.A. and J.H. get out of the Chrysler. Alexander said he was "jumped," that someone said "Harbor," and that appellants were all "part of the same thing." It was a surprise gang attack and carried out by the use of superior numbers. Although there is no specific evidence that M.A. struck the victims or reached into their pockets, substantial evidence supports the finding that he aided and abetted his cohorts. M.A.

got out of the Chrysler with J.H., helped quell the victims as the victims begged them to stop, and left with the others after the bicycles, money, and phone were taken. Alexander identified M.A. in court and said that M.A., J.H., and A.B. left together after the robbery.

M.A.'s presence at the robbery, his companionship with J.H. and A.B., and his flight was strong circumstantial evidence. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.) Although gang evidence standing alone does not prove that M.A. was an aider and abettor, Officer Sosa's expert testimony strengthened the inferences arising from the evidence specific to M.A. (*Id.* at p. 1055.) Nine days after the gang attack, Alexander's stolen bike was found at M.A.'s house, which supported the inference that M.A. not only participated in the robbery but kept some of the stolen property. Inside M.A.'s bedroom, officers found a blue and white gang bandana, a hat with an "H" logo, and a notepad containing Harbor City Crips gang graffiti. M.A. shared a gang association with J.H. and A.B. and it was relevant to show that he aided and abetted his cohorts. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 947.) Officer Sosa had never heard of a Harbor City Crips gang member committing a crime with non-gang members. Based on his work experience and contacts with the gang, Officer Sosa opined that the bandana, hat, and gang graffiti in M.A.'s bedroom "signifies he's a documented [gang] member." "[T]he color blue, the color purple, whether it's on a bandana or a T-shirt, hats, shoe laces, all that cannot be worn, it's not allowed if you're not a Harbor City Crip gang member."

In the words of the trial court, "this is a garden variety robbery case." We concur. Appellants acted in concert to

assault and rob the victims. A.B. staged the ambush and M.A. and J.H. drove up in the Chrysler to help subdue the victims and rob them. Appellants argue that the evidence points to their innocence but it is not our function to reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Gang Enhancement Findings

Appellants next contend that the evidence does not support the true findings on the gang enhancements. We apply the same substantial evidence standard of review. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) To establish the gang enhancement, the prosecution had to prove (1) appellants committed the robberies and assaults for the benefit of, at the direction of, or in association with a criminal street gang, and (2) appellants did so with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1).) The crimes have to be gang related (*People v. Albillar* (2010) 51 Cal.4th 47, 60) and must "'have some connection with the activities of a gang . . . .'" (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.) In determining whether appellants possessed the requisite intent under section 186.22, subdivision (b)(1), intent may be inferred from the facts and circumstances surrounding the offenses. (*People v. Rios* (2013) 222 Cal.App.4th 542, 567-568.)

A.B., an admitted associate of the Harbor City Crips, wore a blue or purple tank top, the gang's color of choice, and staged the ambush. Moments after the victims stopped to talk, M.A. and J.H. showed up with Joseph P., a Harbor City Crips gang member. A.B. said "'This has nothing to do with you,'" and punched Christopher. Christopher took the comment to mean

the robbery was gang related, as did the gang expert. Alexander heard someone say "Harbor" and knew he "was getting jacked" by a gang. (See, e.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1045, 1050-1051 [announcing name of gang during the attack interjected a gang element into the crime].)

Officer Sosa testified that appellants were members or associates of the Harbor City Crips, that the gang was known for committing robberies and violent assaults, and the crimes were committed outside Harbor City Crips gang territory to benefit the gang. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1048-1049 [gang expert testimony that criminal conduct benefited a gang can be sufficient to support gang enhancement].) Much of that was corroborated by A.B. who told the police that members and associates of the Harbor City Crips were involved in the incident. During the robberies, the Harbor gang name was announced and A.B. told Christopher "'This has nothing to do with you.'" Officer Sosa opined that the remark meant "I'm a Harbor City Crip, these are my friends, we're doing this to benefit the gang. That's why we're beating you up." A.B. later told a detective that the Harbor City Crips stole Alexander's bike and the bike was found at M.A.'s house.

J.H. contends that Officer Sosa's testimony about J.H.'s gang membership lacks foundation and fails to show that J.H. knew co-appellants were members of the Harbor City Crips. We reject the argument because gang membership is not an element of the gang enhancement. (*People v. Sanchez* (2016) 63 Cal.4th 665, 698 (*Sanchez*).) The enhancement applies to "any person" who is convicted of a felony committed for the benefit of a gang and who acts with the requisite intent. (§ 186.22, subd. (b)(1).) There is no requirement that the defendant know he is

assisting someone who belongs to a gang. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1362.) "[T]he only mens rea required to establish the gang enhancement is proof of an intent to promote, further or assist a crime or crimes committed by gang members." (*Ibid*.) The victims' testimony and A.B.'s confession show that J.H. and M.A. participated in the gang attack, were gang members, and acted with the requisite intent. During the robbery, someone said "Harbor" and the victims were beaten and told "This has nothing to do with you." After the bicycles, money and phone were taken, A.B., J.H. and B.A. all left together. The jury reasonably inferred that appellants had the specific intent to promote, further, or assist criminal conduct by Harbor City Crips gang members. (*People v. Albillar*, *supra,* 51 Cal.4th at pp. 67-68.)

Sanchez/Crawford Error - Gang Predicate Offenses

To establish the gang enhancement, the prosecution had to prove that the Harbor City Crips "'includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' [Citations.]" (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) Appellants argue that Officer Sosa's testimony about the gang predicate offenses, i.e, prior shootings by gang members Olli Brumfield and Pedro Mendez, was hearsay (*id.* at p. 686) and violated the confrontation clause (*Crawford v. Washington* (2004) 541 U.S. 36). Certified copies of Brumfield's and Mendez's conviction records were received into evidence. Officer Sosa testified that Brumfield and Mendez were "both documented Harbor City Crips" but that he had never met them.

Relying on *Sanchez,* appellants contend that the expert testimony is hearsay and inadmissible.[2] The argument fails because *Sanchez* does not preclude expert testimony about gang predicate offenses. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174-1175 (*Meraz*), review granted Mar. 22, 2017, S239442, on other grounds but Court of Appeal opinion ordered to remain precedential (Cal. Rules of Court, rule 8.1115(e)(3).) *Sanchez* holds that a gang expert is generally not permitted to testify about case-specific facts on which the expert has no personal knowledge. (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) But "[u]nder *Sanchez*, facts are only case specific when they relate '*to the particular events and participants* alleged to have been involved in the case being tried,' which in *Sanchez* were the defendant's personal contacts with police reflected in the hearsay police reports, STEP notice, and FI card. [Citation.]" (*Meraz*, *supra*, at pp. 1174-1175.) A gang expert may testify about general background matters such as the gang's operations, primary activities, pattern of criminal activities, and predicate offenses even if it is based on hearsay sources. (*Id.* at p. 1175.) *Crawford* does not apply because the background information was not testimonial and certified copies of Brumfield's and Mendez's conviction records were received into evidence. (*Ibid.*; see, e.g., *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [certified

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[2] Appellants failed to object but did not forfeit the error because *Sanchez* was decided less than a month before trial. Under the circumstances, objection to Officer Sosa's testimony "would . . . have been futile because the trial court was bound to follow pre-*Sanchez* decisions . . . ." (See *Meraz*, *supra*, 6 Cal.App.5th at p. 1170, fn. 7.)

conviction records of other gang members not testimonial under *Crawford*].) "[N]othing in the record suggests Officer [Sosa] obtained any of this information 'primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony.' [Citation.]" (*Meraz*, *supra*, at p. 1175, quoting *Sanchez*, *supra*, at p. 689.)

Assuming, arguendo, that the predicate offense testimony was erroneously admitted, the error was harmless because appellants' robbery convictions qualify as predicate offenses. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401-1402 [charged offenses may be considered in determining pattern of criminal gang activity element].) The robberies established the requisite "'pattern of criminal gang activity'" consisting of two robberies "'committed on separate occasions, or by two or more persons.' [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 625, overruled on other grounds in *Sanchez*, *supra*, 63 Cal.4th at pp. 669, 686, fn. 13.) Here, there were two victims and two contemporaneous robberies. The prosecution did not have to prove that any one of the predicate offenses predated the crimes charged. (Cf. *People v. Loeun* (1997) 17 Cal.4th 1, 9-11 [requisite "pattern of criminal gang activity" established by defendant's commission of assault with deadly weapon (a baseball bat), contemporaneously with fellow gang member's assault with a deadly weapon (a tire iron) on same victim], with *People v. Zermeno* (1999) 21 Cal.4th 927, 932 [defendant hit victim with beer bottle while fellow gang member held off victim's friends; only one predicate offense committed].)

The alleged error in admitting expert opinion testimony on the predicate offenses was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18,

24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) "[A] violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced. [Citation.]" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 147.) Appellants make no showing they were prejudiced or denied effective assistance of trial counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692; *People v. Mickel* (2016) 2 Cal.5th 181, 198.)

Maximum Term of Physical Confinement

Appellants argue, and the Attorney General concedes, that the trial court erred in calculating the maximum term of physical confinement. (Welf. & Inst. Code, § 726, subd. (d)(1).) The trial court found that the maximum confinement time was five years on count 1 (second degree robbery), plus 10 years on the gang enhancement, plus a consecutive subordinate term of one year on count 3 (one-third the midterm of three years) and 10 years on the gang enhancement, plus eight months on a previous sustained petition for attempted residential burglary[3] for an aggregate maximum term of imprisonment of 26 years eight months.

An order removing a ward from the custody of a parent must state a maximum term of physical confinement not

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[3] On April 18, 2016, a month before the robberies, appellants admitted separate petitions for attempted first degree residential burglary. Appellants were placed on deferred entry of judgment. (Welf. & Inst. Code, § 790, subd. (b).) After the trial court sustained the new petitions for assault and robbery, the court lifted the deferred entry of judgment (Welf. & Inst. Code, § 793, subd. (a)), aggregated the maximum confinement time on the petitions, and found that the maximum time of confinement for attempted first degree residential burglary was eight months (one-third the midterm).

to exceed the maximum term of imprisonment that could be imposed on an adult convicted of the same offense. (Welf. & Inst. Code, § 726, subd. (d)(1); see *In re Eddie M.* (2003) 31 Cal.4th 480, 488 [discussing former Welf. & Inst. Code, § 726, subd. (c)].) Where, as here, the trial court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, including previously sustained petitions adjudging the minor a ward, it must apply the "one-third of the middle term" limitation for subordinate counts and terms under section 1170.1. (Welf. & Inst. Code, § 726, subd. (d)(3).) Section 1170.1, subdivision (a) provides: "The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment. . . , and shall include one-third of the term imposed for any specific enhancements . . . ." That would require a consecutive subordinate term of one-third the midterm on count 3 (one year) and one-third the 10-year gang enhancement (three years four months) for an aggregate maximum term of physical confinement of 20 years.[4]

[4] A.B. argues that the trial court ordered a maximum term of confinement of six years and eight months. The trial court set forth in detail its calculations and said "[t]he court[] calculates the maximum time of confinement as 26 years and eight months." At the conclusion of the disposition hearing, the court summarized the disposition order but inadvertently said the "[m]aximum time of confinement time is six years, eight months," a number that does not compute. The record clearly indicates that the trial court calculated the maximum confinement time to be 26 years eight months.

Disposition

The judgments (i.e., August 2016 disposition orders) are modified to show that the maximum term of physical confinement is 20 years for each appellant. The juvenile court clerk is directed to amend the disposition orders to so reflect and issue appropriate minute orders. As modified, the judgments are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

John C. Lawson II, Judge

Superior Court County of Los Angeles

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