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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID ALEXANDER DUKE, Defendant and Appellant.	B230290 (Los Angeles County Super. Ct. No. KA090669)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed in part; reversed in part.

Cindy Brines, 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, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant David Alexander Duke appeals from the judgment of conviction following a jury trial in which he was convicted of the unlawful driving of a vehicle in violation of Vehicle Code section 10851, subdivision (a), a felony. The jury found true the allegation that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1)(A). The trial court sentenced appellant to the midterm of two years for the unlawful driving of a vehicle, plus three years for the gang enhancement, for a total of five years. The court suspended execution of sentence, and placed appellant on formal probation, on the condition that he serve 365 days in county jail. Appellant was given 486 days of credit, consisting of 243 days of time served plus 243 days of good time/work time credit.

Appellant contends there was insufficient evidence to support both his conviction of the unlawful driving of a vehicle and the gang enhancement. We are satisfied the evidence supports the underlying conviction, but we agree there is insufficient evidence to support the gang enhancement.

FACTS

On May 15, 2010 at 9:00 p.m., Jessie Salas was standing outside his residence in East Valinda, California with his friend Jesus Sanchez when appellant's codefendant, Michael Humberto Munguia, got out of the passenger side of a 1984 Toyota van parked across the street. The van had been reported stolen about a month earlier.[1] Munguia approached Salas and Sanchez, holding a semi-automatic handgun in one hand and a magazine clip in the other. Munguia asked if they were from "Townsmen," then stated, "This is Li'l Hill Gang's barrio and if I find out you fools are from Townsmen, I'll light your ass up with an AK-47." Munguia displayed tattoos on his head and stomach indicating his Li'l Hill gang affiliation. When an unidentified person walked by,

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[1] The van's owner still had the only keys to the van.

Munguia hit him on the side of the head with the gun's magazine clip. Munguia then walked back to the van and got inside. Salas and Sanchez saw other men and a woman inside the van. Salas called 9-1-1.

About five or ten minutes later, Los Angeles County Deputy Sheriff Russell Helbing, who was in a helicopter, located a van matching Salas's description about two to four miles from the crime scene. According to Deputy Helbing, "It appeared to be just stopping and then was stationary. The vehicle lights were off, and then we saw the brake lights light up. That's what drew our attention to it. It appeared the vehicle was just stopping when we saw it." The van came to a stop across the street from the house of Mario Calderon, Munguia's cousin and a fellow member of the Li'l Hill gang. Deputy Helbing saw appellant exit the van from the driver's door and Munguia from the front passenger's door. He did not see anyone else in the van. Appellant walked across the street toward the house, and several people came out of the garage and joined him. They headed south on the street. Munguia walked to the middle of the street where he was met by a man and the same woman who was seen earlier in the van, and they headed north on the street.

About three minutes later, appellant and Munguia were arrested and searched. A key ring with three keys was found on appellant. No firearm was recovered. When questioned by Los Angeles County Deputy Sheriff Robert Chism about his whereabouts that evening, appellant initially responded that he had been inside a nearby mall, then stated he had only been outside the mall. When Deputy Chism asked appellant where precisely he was at the mall so that video footage could be obtained, appellant "blurted out" that he was not the only person in the van and refused to say anything further.

Deputy Chism testified as a gang expert familiar with both the Li'l Hill and Townsmen gangs. The location where Munguia threatened Salas and Sanchez is in an area that overlaps the territories of both gangs. He opined that based on their self-admissions, tattoos and associations, appellant and Munguia were active members of the Li'l Hill gang. Deputy Chism further opined that based on his own investigation and

interview with appellant and the evidence presented at trial, appellant's driving of the van was for the benefit of, at the direction of, or in association with the Li'l Hill gang. Deputy Chism testified that it is typical for gang members to drive stolen vehicles between crimes because such vehicles are harder to trace. He also testified that appellant had been a member of the Li'l Hill gang less than a year and that appellant would have to work his way up in the gang to improve his "status," and that "something as simple as driving a vehicle . . . is showing that you're willing to put in work for the gang."

DISCUSSION

Appellant contends the evidence was insufficient for the jury to find beyond a reasonable doubt that he unlawfully drove the van and that he did so for the benefit of, at the direction of, or in association with the Li'l Hill criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members.

Standard of Review.

When determining whether the evidence is sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the entire record in the light most favorable to the judgment to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid*.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness can be sufficient to uphold a conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) So long as the circumstances reasonably justify the trier of fact's finding, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v.*

Albillar (2010) 51 Cal.4th 47, 60; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A. Unlawful Driving of a Vehicle

Vehicle Code section 10851, subdivision (a), provides, in pertinent part, as follows: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . ."

"The elements necessary to establish a violation of section 10851 of the Vehicle Code are the defendant's driving or taking of a vehicle belonging to another person, without the owner's consent, and with specific intent to permanently or temporarily deprive the owner of title or possession." (*People v. Windham* (1987) 194 Cal.App.3d 1580, 1590.) "'Specific intent to deprive the owner of possession of his car may be inferred from all the facts and circumstances of the particular case. Once the unlawful taking of the vehicle has been established, possession of the recently taken vehicle by the defendant with slight corroboration through statements or conduct tending to show guilt is sufficient to sustain a conviction of Vehicle Code section 10851. [Citation.]'" (*People v. Green* (1995) 34 Cal.App.4th 165, 181.) "Knowledge that the vehicle was stolen, while not an element of the offense, may constitute evidence of the defendant's intent to deprive the owner of title and possession." (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.) Possession of recently stolen property itself raises a strong inference that the possessor knew the property was stolen. (*Ibid*.) "[S]uch possession and an explanation from defendant that did not invite reasonable acceptance, coupled with

inconsistencies that tended to cast doubt upon the truth of his statements, are sufficient evidence to sustain a conviction. [Citations.]" (*People v. Brown* (1969) 1 Cal.App.3d 161, 166; *In re Jonathan M*. (1981) 117 Cal.App.3d 530, 537.) Thus, a defendant's possession of the stolen vehicle, inherently implausible testimony, and an unsatisfactory explanation may provide more than sufficient evidence. (*People v. Soranno* (1971) 22 Cal.App.3d 312, 315.)

There was ample evidence to support appellant's conviction of the unlawful driving of a vehicle. It is undisputed that the van was stolen. The evidence also suggests appellant knew the van was stolen. When appellant was arrested, he did not have possession of the van's keys. When caught lying about his whereabouts earlier on the evening of his arrest, appellant blurted out to Deputy Chism that he was not the only person in the van. Moreover, the jury could reasonably infer that when appellant became aware he was being observed by a police helicopter, he stopped the van, with no lights on at night, and immediately walked away from it. Although appellant never ran away from any officers, his conduct of quickly leaving the van could reasonably be viewed as flight, evidencing a consciousness of guilt. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1095.) Additionally, appellant's passenger, codefendant Munguia, walked away from the van in the opposite direction as appellant, indicating that both occupants of the van were attempting to dissociate themselves from both the van and each other. While knowledge that the van was stolen is not an element of the offense, it "may constitute evidence of the defendant's intent to deprive the owner of title and possession." (*People v. O'Dell, supra,* 153 Cal.App.4th at p. 1574.) The evidence also suggests appellant was the driver of the van. When Deputy Helbing observed the van from the helicopter, appellant was the only person to get out of the van from the driver's door. As noted, once the unlawful taking of the vehicle has been established, possession of the recently stolen vehicle by the defendant with slight corroboration through statements or conduct tending to show guilt is sufficient to sustain a conviction of violating Vehicle Code section 10851. (*People v. Green, supra*, 34 Cal.App.4th at pp. 180–181.)

B. Gang Enhancement

Penal Code section 186.22, subdivision (b)(1) provides that "any 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, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows . . . ." The jury was so instructed (CALCRIM No. 1401).

Appellant argues the evidence was insufficient to establish beyond a reasonable doubt the elements of the gang enhancement. The first prong of Penal Code section 186.22, subdivision (b)(1) requires that appellant be "convicted of a felony committed for the benefit of, at the direction of, *or in association* with any criminal street gang." (Italics added.) Appellant was convicted of the felony of the unlawful driving of a vehicle. We have little trouble finding that he committed this felony "in association" with a criminal street gang. Appellant was driving the stolen van with Munguia as his passenger. The evidence established that both appellant and Munguia were active members of the Li'l Hill criminal street gang. Moreover, when the van was spotted by Deputy Helbing from the air, it had just come to a stop in front of the house of a fellow Li'l Hill gang member. "[T]he jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198; see also *People v. Albillar, supra*, 51 Cal.4th at p. 62; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, fn. 7; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332.)

What is troubling here is the second prong of Penal Code section 186.22, subdivision (b)(1), which requires that a defendant commit the gang-related felony "'with the specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*People v. Albillar, supra*, 51 Cal.4th at p. 64.) The only criminal conduct with which Munguia was charged was two felony counts of criminal threats in violation

of Penal Code section 422 and two felony counts of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2), both against Salas and Sanchez. Appellant correctly points out there was no evidence placing him in the van when Munguia threatened Salas and Sanchez and assaulted a passerby. Although Salas and Sanchez observed several people in the van and identified Munguia and the woman later seen walking with him as being in the van, no one identified appellant as being in the van at the time the threats and assault were made. While appellant concedes Munguia's threats were gang related, there was no evidence that appellant saw, heard or otherwise knew about the threats or assault committed by Munguia. Appellant was not charged as an aider and abettor in Munguia's conduct, and he did not call out gang names or display gang signs. As appellant notes, the van was located between two to four miles from the scene of Munguia's offenses and there was no evidence as to what transpired from one location to the other. When Deputy Helbing located the van, the only occupants he saw in the van were appellant and Munguia. There was no evidence as to when the other occupants left the van, nor any evidence as to when appellant began driving the van.

Deputy Chism testified that as a new member of the Li'l Hill gang, appellant would want to improve his status within the gang by doing work for the gang, such as driving other gang members. But nothing in Deputy Chism's testimony established when appellant began driving the stolen van, i.e., whether appellant's felony offense occurred at the same time as Munguia's criminal conduct. As our Supreme Court recently stated, "[t]he enhancement set forth in section 186.22(b)(1) does not pose a risk of conviction for mere nominal or passive involvement with a gang. . . . it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar, supra*, 51 Cal.4th at pp. 67–68.) With no evidence that appellant was driving the stolen van when Munguia committed his offenses, the jury could not reasonably infer that appellant had the specific intent to promote, further, or assist criminal conduct by Munguia. Any such inference was mere speculation, and

"[s]peculation is not substantial evidence." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 661.)

DISPOSITION

We reverse the jury finding of the gang enhancement and order the trial court to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST