

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY CABRERA,

Defendant and Appellant.

G042390

(Super. Ct. No. 07CF4087)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Heather Crawford and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Henry Cabrera of carjacking (Pen. Code, § 215, subd. (a); all statutory references are to this code unless otherwise stated; count 1); attempted second degree robbery (§§ 211, 212.5, subd. (c), 664; count 2); possession of a firearm by a felon (§ 12021, subd. (a)(1); count 3); street terrorism (§ 186.22, subd. (a); count 4); evading police while driving recklessly (Veh. Code, § 2800.2; count 5); receiving a stolen vehicle (§ 496d, subd. (a); count 6); carrying a loaded firearm by a gang member (§ 12031, subd. (a)(1), (2)(c); count 7); and unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a); count 8.) The jury found true a gang enhancement (§ 186.22, subd. (b)) for counts 1 through 3 and 5 through 7 and that defendant personally used a firearm (§ 12022.53, subd. (b)) while committing counts 1 and 2. In a bench trial the court found that defendant had one prior strike (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior prison term (§ 667.5, subd. (b)). The court sentenced defendant to 30 years to life.

Defendant argues there was insufficient evidence to support the street terrorism conviction or the gang enhancement and the court erroneously excluded an exculpatory statement which should have been admitted under Evidence Code section 356 and failed to instruct the jury on a crime on which the prosecution relied to prove the gang's primary activity. We affirm.

FACTS

On an evening in December 2007 as Julio Torrez was parking his car, two men, wearing dark blue or black sweatshirts with hoods, ran toward his car. One of them, holding a gun, demanded Torrez give him all his money and his car keys. The second man entered the passenger side and the man with the gun got into the driver's side of the car and drove away.

After receiving a report of a carjacking police found the car. Inside were two Hispanic men wearing dark sweatshirts with hoods, as described in the report. When the police first began following the car they saw the passenger throw a gun out the window, after which followed a high-speed chase. When the car stopped, the passenger, Pablo Jimenez, jumped out and ran. Defendant, in the driver's seat, surrendered. Several items, including the stereo and tools, were found missing from the car.

Torrez could not positively identify the gun as the one used but said it looked similar. At an in-field showup, Torrez was not absolutely sure defendant was the one who had taken the car. He was afraid of retaliation by the two men. About six weeks later Torrez picked defendant out of a six-pack photo lineup but at trial testified he did not recall whether he had identified him. A search of defendant's residence revealed a dark blue sweatshirt and other dark blue clothes, and a holster.

Corporal Ronald Castillo testified as the gang expert. He had 15 years in the gang unit and had served for 12 as the supervisor. His duties included assisting other gang detectives, determining whether gang charges are to be filed, and interacting with gang members. He had investigated more than 1,000 gang cases. He had also interviewed more than 5,000 gang members about their territories, allies, rivals, loyalty, respect, guns, and graffiti.

He was familiar with the Highland Street gang, having been assigned to its claimed turf since he began working with the Santa Ana police department in 1984, and had spoken to some of its members, although not for a couple of years and not with the 15 members active on the day of the carjacking. He testified as to its claimed territory, and, based on conversations with gang members, its allied and rival gangs. Its primary activities are possession of narcotics for sale (Health & Saf. Code, §§ 11378, 11351) and auto theft (Veh. Code, § 10851). He cited four narcotics arrests and five auto theft arrests of members of Highland Street, all between 2003 and 2007. This testimony was based on

his review of police reports and arrest reports he had studied to determine whether to file gang charges.

The two predicate crimes were attempted first degree burglary and street terrorism in 2006 and carjacking, receiving stolen property, possessing a firearm near a school, and street terrorism in 2007. As to the earlier crime, Castillo testified he knew and had contacts with the defendant and had reviewed arrest reports and related documents. As to the second crime, he conducted a background check, including review of police reports and gang notices.

As of the date of the crimes, Highland Street was a criminal street gang based on the number of members, primary activities, symbol, and predicate crimes. Castillo testified Highland Street is a traditional Hispanic gang, which has a claimed territory, usually in a residential neighborhood, marked by graffiti and in which members have free rein because no one will try to stop them. Respect, which is critical to status, is obtained by committing crimes; violent crimes are those most helpful to the gang and earn more respect. A goal is to engender fear in the community to prevent opposition or cooperation with police or prosecutions. Victims often are hesitant to testify for fear of retaliation. Possessing a firearm increases a gang member's respect and is useful in committing crimes, including carjackings and when selling drugs. A sign of respect is to inform other gang members in a car if it contains a gun. The occupants will be aware it is available for use or to dispose of if the car will be stopped by police.

Castillo did not know defendant personally but had checked his background. He reviewed police reports and four STEP (Street Terrorism Enforcement and Prevention) notices dating between 2003 and 2007. They included information defendant had associated with two other gang members, grew up in the territory Highland Street claimed, and had been "claiming" that gang since he was in the sixth grade. Defendant had written "Highland" on a school door and a chair in his bedroom. Castillo also reviewed Lizardi's postarrest interview with defendant, where he admitted being

“documented” as a gang member for four years. On the basis of all those facts, it was Castillo’s opinion defendant was a gang member.

The prosecutor then presented a hypothetical question based on the facts of the case. Before Castillo answered the question the court instructed the jury with CALJIC No. 2.82, which stated that all facts assumed in the hypothetical were not necessarily true, although they could be and the jury was to decide when evaluating the expert’s testimony. Castillo then testified he was of the opinion the hypothetical facts showed the crimes were committed for benefit of Highland Street.

Carjacking benefitted the gang because, as members had told Castillo, the carjacked or stolen cars are used to commit other crimes. Additionally, gang members can more easily avoid police because if they used their own cars police can track them more easily. Carjacking also enhances the status of the gang and the member. If a gun is used it engenders fear and residents are less likely to call the police. Gangs use fear to operate by controlling the community located within their claimed turf.

DISCUSSION

1. Sufficiency of the Evidence

a. Introduction

Defendant challenges both the substantive crime of street terrorism and the gang enhancement, contending there was insufficient evidence of the gang’s primary activities as defined under section 186.22, subdivisions (e) and (f), and that therefore the prosecution had not proven Highland Street was a street gang. He also argues there was no substantial evidence the crimes were committed in association with, at the direction of, or to benefit the gang, a necessary element of the enhancement or, because he did not commit the acts with another gang member, there was no evidence he had the specific

intent to promote the gang or himself within the gang, which he claims is required to prove both street terrorism.

b. Proof Highland Street is a Street Gang

A criminal street gang is “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of [several enumerated felonies, including sale of narcotics and theft of a vehicle] having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subs. (f) & (e)(4) & (10).) The primary activities element may be proven by expert testimony that the criminal street gang “was primarily engaged in . . . statutorily enumerated felonies. [Citation.]” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Defendant maintains the prosecution did not prove Highland Street’s primary activity because the only evidence was Castillo’s testimony, which was based solely on inadmissible hearsay. He challenges Castillo’s reliance on police reports and STEP notices as insufficient bases to support his opinion as to Highland Street’s primary activities, and includes a claim Castillo never testified as to the basis for his opinion that some of the auto thefts and all of the drug crimes were committed by members of Highland Street. The record reveals otherwise.

Castillo had worked in some capacity as a gang officer for 15 years and 12 years as the supervisor, and previously had been assigned to patrol the territory Highland Street claimed. He had spoken to and was familiar with the Highland Street gang and its members, including those who had committed crimes. He testified about typical Hispanic gangs and Highland Street specifically, including turf, clothing, symbols, respect, alliances, and rivals. He not only reviewed police reports, he read all the department in-custody reports to determine whether gang charges should be filed. These

reports are the type of documents on which experts may reasonably rely (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, 619-620; *People v. Gamez* (1991) 235 Cal.App.3d 957, 967, disapproved on another ground in *People v. Gardeley, supra*, 14 Cal.4th at p. 624, fn. 10) and gave Castillo an opportunity to look for instances of Highland Street's gang activity.

As to the basis for his testimony the narcotic and auto theft crimes were committed by members of Highland Street, Castillo listed the five drug arrests in response to a question as to whether he could provide specific incidents that Highland Street members had participated in those crimes. After testifying to them, he confirmed they were all committed by members of Highland Street. The prosecutor then asked for specific cases of auto thefts. Although he did not explicitly inquire whether the crimes were committed by gang members, it is reasonable to infer from the context that that was the basis of the testimony. There is no requirement the prosecution introduce proof of convictions for those activities. (*In re Leland D.* (1990) 223 Cal.App.3d 251, 258.)

Likewise we reject defendant's claim the prosecution was required to show the particular narcotics the gang sold. The arrest reports, in conjunction with the other information to which Castillo testified, were sufficient foundation for his opinion. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 619-620; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484, fn. 3.) Looking at all the evidence most favorably to the prosecution a reasonable jury could find Highland Street was a street gang. (*People v. Martinez, supra*, 158 Cal.App.4th at pp. 1329-1330.)

That Castillo had never spoken to the current Highland Street members does not vitiate the foundation, and neither Castillo nor the prosecution had any duty to obtain and present criminal records of those members or testimony from other witnesses. *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, on which defendant relies, does not

change our result. As a federal appellate court case it is not binding. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

Taking a different tack defendant asserts the prosecution's reliance on hearsay violated the Confrontation Clause, relying on *Mejia*. This issue was not properly briefed, lacking its own separate heading as required by the California Rules of Court, rule 8.204(a)(1)(B). Even on the merits, however, the argument fails. The evidence of the gang's primary activities was not based on hearsay but on Castillo's opinion developed through his personal experience, training, and knowledge in addition to the documents, on which an expert may reasonably rely in forming an opinion. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [hearsay used solely as basis for expert's opinion not testimonial].)

In a related argument defendant asserts the hypothetical posed to Castillo was improper because the facts presented to him "precisely mirrored" the actual facts of the case. In support he relies on *People v. Vang* (2010) 185 Cal.App.4th 309, review granted September 15, 2010, S184212. But based on the grant of review, this case is no longer good authority. And, as discussed above, there was sufficient foundation for Castillo's opinion.

c. Street Terrorism

Defendant argues that because his cohort was not a gang member, to prove street terrorism the prosecution had to show he had the specific intent to further Highland Street's purposes or his own personal goals vis-à-vis the gang. Section 186.22, subdivision (a) declares that a person may be convicted of street terrorism if he "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" Defendant asserts that although this provision does not contain a specific intent requirement, due process demands that the crime he commits must have some connection to the gang.

The cases he cites in support do not persuade us of his position. In *People v. Gardeley, supra*, 14 Cal.4th 605 the court was explaining why the STEP Act was constitutional. But the language quoted, which speaks of a defendant's "specific intent," is from subdivision (b), the enhancement provision, not subdivision (a) with which we are concerned.

Defendant also relies on *People v. Castenada* (2000) 23 Cal.4th 743, which ruled the STEP Act satisfied due process because it did not make mere membership in a gang a crime but required a defendant actively participate in a gang with knowledge of its pattern of criminal conduct and willfully further, assist, or promote felonious criminal activity by gang members. (*People v. Castenada, supra*, 23 Cal.4th at p. 749.) *Castenada* stated that a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members" (*Ibid.*) This language is dictum, however, because in *Castenada* whether section 186.22, subdivision (a) was satisfied when defendant himself perpetrated a felony was not at issue.

Three cases run contrary to defendant's argument. In *People v. Ngoun* (2001) 88 Cal.App.4th 432, 435-437, the court ruled that the element at issue here can be proven by evidence the defendant directly perpetrated the felony; it was not necessary he be an aider or abettor.

In *People v. Salcido* (2007) 149 Cal.App.4th 356, the court upheld a jury instruction providing for conviction of street terrorism if the defendant himself committed the felony or aided and abetted in its commission. (*Id.* at pp. 365-366.) It reasoned that a perpetrator "'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity.'" (*Id.* at pp. 367-368.)

Finally, in *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1306-1308, relying on *Ngoun* and *Salcido*, the court upheld a conviction where the defendant himself committed the robberies.

While acknowledging those cases, defendant contends they do not deal with the due process issue and neither they nor any other case has dealt with facts comparable to those here, i.e., a gang member committing a crime with a connection to the gang. Regardless, there is no constitutional issue. Castillo testified that, based on conversations he had with gang members, stolen cars are used to commit other crimes. This shields members from easy identification because they are not using their own cars and thereby promotes gang activity, thus connecting the crime with Highland Street. And such was the case in *People v. Salcido, supra*, 149 Cal.App.4th 356, 360-361, where the defendant's crimes were some of the gang's primary activities.

Nor is our conclusion changed by *People v. Rodriguez* (2010) 188 Cal.App.4th 722, decided after briefing was completed and which we asked the parties to be prepared to discuss at oral argument. In that case the court held the defendant could not be convicted of street terrorism where he was the sole perpetrator of attempted robbery. (*Id.* at p. 737.) It based this on its interpretation of the language in section 186.22, subdivision (a), relying on a statement in *People v. Castenada, supra*, 23 Cal.4th 743, which stated that the section "limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22[, subdivision](a) has also aided and abetted a *separate* felony offense committed by gang members" (*Id.* at p. 749, italics added.) *Rodriguez* concluded from this language that section 186.22, subdivision (a) "requires perforce that there be more than one participant" and "that the perpetrator promote for further a 'specific felony' (as *Castenada* says) of other members of the gang. It makes no sense to say that a person has promoted or furthered his own criminal conduct." (*People v. Rodriguez, supra*, 188 Cal.App.4th at p. 726.)

Rodriguez disagreed with *People v. Ngoun, supra*, 88 Cal.App.4th 432 and *People v. Salcido, supra*, 149 Cal.App.4th 356. As to *Salcido*, it stated that, by holding a street terrorism conviction was supported by sufficient evidence the defendant intended to promote, further, or assist the gang in committing felonious conduct, it had incorrectly imported the “intent” requirement from section 186.22, subdivision (b) into section 186.22, subdivision (a). (*People v. Rodriguez, supra*, 188 Cal.App.4th at pp. 727, 736.) It likewise criticized *Ngoun* on the ground it had misread the statutory language. (*Id.* at pp. 734-735.)

We are more persuaded by the dissent, which, engaging it its own construction of section 186.22, subdivision (a), read *Ngoun* and *Salcido* as having reached the right decision. (*People v. Rodriguez, supra*, 188 Cal.App.4th at p. 737 (dis. opn. of Sims, J.)) Relying on those cases it concluded that “[s]omeone can ‘promote’ or ‘further’ felonious criminal conduct by committing the offense himself, without the participation or aid of others.” (*Id.* at p. 740.) We agree. The evidence here supports a determination that defendant’s actions, committed without another Highland Street member present, promoted or furthered the gang’s felony conduct.

d. Gang Enhancement

A gang enhancement attaches when felonious conduct is “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” (§ 186.22, subd. (b).) “[T]o prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.)

Defendant challenges the gang enhancement, claiming Castillo's opinion was the only evidence and it was not competent because its sole support was defendant's gang membership and past criminal activity. Not so.

In addition to those two pieces of information, as detailed above Castillo testified to his years of experience as a gang investigator and supervisor, his familiarity with Hispanic gangs and Highland Street in particular, including crimes it has committed. In addition, after he was given a set of hypothetical facts based on those of defendant's crimes, Castillo testified that they would have been committed for the benefit or at the direction of or in association with Highland Street and explained why.

Defendant points out that he did not act with another gang member, he had no visible tattoos, and the victim was not a gang member. Nor did he yell a gang slogan, display a gang sign, or inscribe graffiti. Further, carjacking was not a primary activity of Highland Street. As to the latter, there is no requirement a crime sufficient to support a gang enhancement constitute the gang's primary activity; section 186.22, subdivision (b) only requires conviction of any felony. Further, the fact there is conflicting evidence, the resolution of which is the jury's responsibility, does not supersede the evidence supporting the convictions. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Cases defendant cites, such as *People v. Ramon* (2009) 175 Cal.App.4th 843 and *People v. Ochoa* (2009) 179 Cal.App.4th 650, while at first glance might seem to support his argument, fail on a closer reading. In *Ramon* the court ruled the expert's opinion the defendant's receipt of a stolen car was committed for the benefit of his gang, expressed in response to a hypothetical question, was not based on any facts. That the defendant's cohort was also a gang member and they were in gang territory, by themselves, were insufficient. (*People v. Ramon, supra*, 175 Cal.App.4th at p. 851.) In *Ochoa* there was no evidence of the gang expert's experience with and knowledge of the

gang nor was a hypothetical posed. We have more evidence than in either of those cases, as discussed, and it is sufficient.

2. *Exclusion of Evidence*

Part of the basis of Castillo's opinion defendant was a member of Highland Street and committed the crimes to benefit the gang was that defendant had told police during his postarrest interview with Lizardi that "he was documented as a Highland Street member in 2003. He said he was never jumped in because he grew up in the neighborhood. He said this is why he associates with Highland Street." Subsequently, pursuant to Evidence Code section 356, defense counsel sought to introduce another statement defendant made during that interview, "I didn't take the car. I found it with the keys in it and drove it away." When the prosecutor objected to the statement as hearsay, counsel offered to call Lizardi. The court sustained the objection on the ground the evidence was hearsay and ruled Evidence Code section 356 did not apply because the statement was unrelated to defendant's gang membership.

Evidence Code section 356 provides that if one party introduces part of a statement or writing, "the whole on the same subject may be inquired into by an adverse party; . . . and when a detached . . . conversation . . . is given in evidence, any other . . . conversation . . . which is necessary to make it understood may also be given in evidence." Defendant claims that his statements relating to gang membership were a "detached" portion of his interview with Lizardi, entitling him to introduce the statement as to how he gained possession of the car. But defendant has failed to take into account the remaining portion of the statute that allows introduction of additional parts of the conversation only if they are needed to explain the statement in evidence. Here, the statements defendant sought to introduce had nothing to do with his admission of gang membership. Thus the court did not abuse its discretion (*People v. Brady* (2010) 50 Cal.4th 547, 558) in excluding the statements.

3. *Jury Instructions*

The two primary activities attributed to Highland Street were possession of narcotics for sale and car theft. The court instructed the jury as to car theft but gave no instruction as to the narcotics crime. Defendant argues the court erred by failing to instruct sua sponte on the latter crime because, to determine Highland Street was a criminal street gang, the jury had to find had possession of narcotics for sale was one of the gang's primary activities.

Under section 186.22, subdivision (f) the prosecution need only prove one crime as a primary activity. Because the jury was instructed on car theft, even assuming the court should have also instructed as to drug crimes, failure to do so was harmless beyond a reasonable doubt. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 326.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

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HENRY CABRERA,

Defendant and Appellant.

G042390

(Super. Ct. No. 07CF4087)

ORDER MODIFYING OPINION
AND CERTIFYING OPINION FOR
PUBLICATION; NO CHANGE IN
JUDGMENT

It is ordered that the opinion filed herein on November 30, 2010, be modified as follows:

On page 10, first sentence of the second full paragraph, the word “a” is changed to “no” so the sentence reads:

While acknowledging those cases, defendant contends they do not deal with the due process issue and neither they nor any other case has dealt with facts comparable to those here, i.e., a gang member committing a crime with no connection to the gang.

On page 10, fifth sentence of the third full paragraph, the word “for” is changed to “or” so the sentence reads:

Rodriguez concluded from this language that section 186.22, subdivision (a) “requires perforce that there be more than one participant” and “that the perpetrator promote or further a ‘specific felony’ (as *Castenada* says) of other members of the gang.

On page 11, first sentence of the second full paragraph, the word “it” is changed to “in” so the sentence reads:

We are more persuaded by the dissent, which, engaging in its own construction of section 186.22, subdivision (a), read *Ngoun* and *Salcido* as having reached the right decision.

On page 14, last sentence of the first full paragraph, the word “had” is deleted so the sentence reads:

Defendant argues the court erred by failing to instruct sua sponte on the latter crime because, to determine Highland Street was a criminal street gang, the jury had to find possession of narcotics for sale was one of the gang’s primary activities.

There is no change in the judgment.

Plaintiff and Respondent requested that our opinion filed November 30, 2010, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The request is GRANTED. The opinion is ordered published in the Official Reports.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.