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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES GARCIA,

Defendant and Appellant.

E039839

(Super.Ct.No. FSB052583)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael M. Dest,
Judge. Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant
Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton,
Supervising Deputy Attorney General, and Marissa Bejarano, Deputy Attorney General,
for Plaintiff and Respondent.

A jury found defendant and appellant James Garcia guilty of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1),¹ count 1) and of possessing stolen property (§ 496, subd. (a), count 4).² The jury also found true the allegation that the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).) Defendant admitted that he had a prior serious felony conviction, within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), as well as section 667, subdivision (a)(1). The trial court sentenced defendant to a total term in state prison of 14 years, including the upper term of three years on count 1, doubled to six years as a result of the prior strike conviction, plus three years for the gang enhancement, and a consecutive five years for the prior serious felony conviction. As to count 4, the court sentenced defendant to four years, plus three years for the gang enhancement; however, it stayed the sentence on count 4, pursuant to section 654.

On appeal, defendant contends that his trial attorney provided ineffective assistance of counsel (IAC) by failing to object to an expert witness's opinion that defendant possessed a stolen firearm with the specific intent to benefit a street gang. He thus claims that his conviction (although he does not specify which conviction) should be reversed. Defendant also filed a supplemental brief, contending that the court erred in imposing the upper term, pursuant to *Blakely v. Washington* (2004) 542 U.S. 296 [124

¹ All further statutory references will be to the Penal Code unless otherwise noted.

² Counts 2 and 3 were dismissed, pursuant to the prosecution's motion.

S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*). We disagree and affirm.

FACTUAL BACKGROUND

On August 26, 2005, Officer Michael Mascetti parked his police car in a parking lot before attending a function. Someone informed him that one of the windows on the car was broken. When he returned to the car, Officer Mascetti discovered that his gun was missing.

On October 14, 2005, a parole agent (the agent) was conducting a parole visit in Colton when he noticed defendant. He contacted defendant because he had information that defendant was possibly in that area. When the agent started talking to defendant, he noticed that defendant had the number “13” on his earlobes. The agent knew that “13” was an insignia of the North Side Colton (NSC) gang, so he asked defendant if he was in a gang. Defendant said he was from Colton, which indicated to the agent that defendant was in the NSC gang. He checked defendant for weapons and found a loaded gun in his front pocket. Once the agent took the gun, defendant fled. Defendant was soon apprehended by a police officer. While the officer was booking defendant, he asked him if he was a member of the NSC gang, and defendant said yes. The gun recovered from defendant was Officer Mascetti’s stolen gun.

Officer Shawn McFarland testified as a gang expert at trial. In 2004, he began working in the Colton Police Department gang unit. His primary function was to contact gang members on a daily basis and interview them in order to gather information about gangs based in Colton. He testified that the main criminal activities of the NSC gang

included homicide, assault with a deadly weapon, robbery, carjacking, and selling controlled substances. Officer McFarland stated that guns were a necessity to gang members since they used guns to commit their crimes. The crimes committed helped gangs portray themselves as violent, which in turn earned them respect in the community. In addition, McFarland said guns benefit gangs by helping them defend against other gangs and protect their territories.

Officer McFarland explained that since a lot of gang members had felony convictions, they were not able to purchase guns; thus, most guns possessed by gang members were stolen. The guns were then passed from gang member to gang member so that they could commit crimes on behalf of the gang. Moreover, stolen guns particularly benefited a gang since they could not be traced back to the gang when used to commit crimes. Officer McFarland further stated that possession of a weapon would heighten a gang member's status within a gang. He testified that a gun stolen from a police officer would especially heighten one's status in a gang since gang members do not care for police officers or want to cooperate with them.

Officer McFarland then stated that, based on his review of the facts in the instant case and the testimonies at trial, he believed defendant committed the crime to benefit the NSC gang and enhance his status within that gang. He further testified that, in general, possession of a stolen gun by a gang member would benefit the gang and its reputation in the community for violence.

ANALYSIS

I. Defendant Has Failed to Demonstrate That He Received IAC

Defendant contends his attorney provided IAC by not objecting to Officer McFarland's testimony that defendant possessed a firearm with the specific intent to benefit the NSC gang. Defendant argues that Officer McFarland's opinion testimony regarding his specific intent was inadmissible. He accordingly claims that he is entitled to reversal of his conviction. At the outset, we note that the testimony at issue was only relevant to the jury's true findings on the enhancement allegations under section 186.22, subdivision (b)(1)(A), not to the jury's determination that defendant was guilty of the underlying charges. Thus, defendant has not presented a valid basis upon which to reverse his conviction. In any case, defendant's IAC claim fails.

To demonstrate IAC, a defendant must establish that: 1) his counsel's performance was deficient under an objective standard of professional competency; and 2) there is a reasonable probability that, but for counsel's errors, a more favorable determination would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) If the defendant makes an insufficient showing on either one of these components, the claim fails. (*Ibid.*) "Moreover, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." [Citation.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

A. Testimony at Issue

“[Prosecutor:] Now, you have listened to all of the testimony in this case and, based upon your review of the facts of this case, do you have an opinion as to whether or not this crime was committed with the specific intent to promote, benefit, or enhance North Side Colton?”

“A. Yes.

“Q. And what is that opinion?”

“A. That this crime was committed to benefit the North Side Colton gang and the gang status of [defendant] within that gang.

“Q. And how does that happen?”

“A. Due to the fact that [defendant] was found in possession of a loaded firearm. The firearm was stolen. It was stolen from a law enforcement officer. And upon being retrieved or located by another law enforcement officer, James Garcia fled on foot and was apprehended. [¶] What that does is show that he was uncooperative with law enforcement, which was one of the major rules amongst members, that they be uncooperative with law enforcement.

“Q. And as to your opinion of him possessing the weapon to benefit either himself or the gang, does your prior contacts with [defendant] and a weapon impact that opinion at all?”

“[Defense Counsel]: Objection, your Honor. I cite Mitchell v. Prunty, the Ninth Circuit, 1977. The police department cannot testify to specific elements of specific intent or knowledge.

“[Prosecutor]: Actually, your Honor, there’s more recent case law that says they can.

“The Court: This is a --

“[Defense Counsel]: People v. Killebrew, 2002, I also cite.”

After that, the court sustained the objection, subject to review. Defense counsel then moved to strike the answer. The court struck the answer and told the jury to disregard it.

B. Defendant Cannot Show That He Was Prejudiced by the Testimony at Issue

Defendant now argues that defense counsel erred in failing to object to the prosecutor’s first question regarding Officer McFarland’s opinion on whether defendant committed the crime with the specific intent to benefit the NSC gang. He further contends that, once defense counsel got the favorable ruling on the objection that she did raise, she should have requested the court to also strike Officer McFarland’s answer to the specific intent question. By failing to do so, defendant claims that his counsel provided him with ineffective assistance and his conviction should be reversed. We conclude that defendant has failed to show that a more favorable result would have resulted, absent defense counsel’s alleged errors.

The evidence established that defendant was a felon in possession of a gun that was stolen from a law enforcement officer. Defendant admitted that he was a member of the NSC gang, and the evidence showed that the NSC gang’s main criminal activities included offenses in which guns are used, such as homicide, assault with a deadly weapon, robbery, and carjacking. Officer McFarland, a gang expert, testified that gang

members who possess guns stolen from law enforcement officers would have heightened status within the gang. Furthermore, the evidence showed that guns were necessary for gangs to commit crimes, defend themselves against other gangs, protect their territories, and establish their reputation in their communities. Officer McFarland explained that most guns used by gangs were stolen, and that stolen guns were beneficial to gangs since they could not be traced back to them. Once obtained, gang members would pass the guns around to commit crimes on behalf of the gang. In view of this evidence, the jury easily could have concluded that defendant stole Officer Mascetti's gun for the benefit of his gang, even without Officer McFarland's opinion testimony.

Defendant argues that there was no direct evidence, other than Officer McFarland's opinion, that he possessed the gun with the intent to benefit his gang. Without that evidence, defendant claims that the jury would have reached a different conclusion. However, "[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.]" [Citation.] A jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors. [Citation.] . . . When the evidence is sufficient to justify a reasonable inference that the requisite intent existed, the jury's finding of that intent will not be disturbed on appeal. [Citation.]" (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 834.) The evidence here was sufficient to justify the jury's true finding that defendant had the requisite intent to support the enhancement.

We conclude that it is not reasonably probable that, but for counsel's alleged errors, a more favorable determination would have resulted. Thus, defendant's IAC claim fails.

II. The Court Properly Sentenced Defendant to the Upper Term

Defendant contends that his Sixth Amendment right to a jury trial, as defined in *Blakely, supra*, 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), was violated when the trial court imposed the upper term sentence in count 1. We disagree and conclude that the present sentence may be affirmed based on defendant's recidivism.

A. *The Upper Term Was Supported by Factors That Did Not Need to Be Found by a Jury*

In *Blakely*, the U.S. Supreme Court affirmed that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Blakely, supra*, 542 U.S. at p. 301, quoting *Apprendi, supra*, 530 U.S. at p. 490.) In *Cunningham, supra*, 127 S.Ct. at page 860, the United States Supreme Court held that the imposition of an upper term sentence under California's determinate sentencing law, based solely on a judge's factual findings, violates a defendant's Sixth and Fourteenth Amendment right to a jury trial.

At the outset, the People assert that defendant forfeited his *Blakely* claim by failing to raise it at the sentencing hearing. We disagree. At the time of defendant's sentencing, the decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) was the controlling

precedent. *Black* held that *Blakely* did not apply to California's determinate sentencing law. (*Black, supra*, at p. 1244.) In light of that holding, it would have been futile for defendant to raise a *Blakely* objection at sentencing. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) Thus, defendant did not waive his claim of *Blakely* error by failing to object in the trial court. Nonetheless, his contention fails.

A single factor in aggravation suffices to support the imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Here, the court based the upper term on the aggravating factors that the firearm was stolen from a police officer, defendant had served a prior commitment in the California Youth Authority (CYA), he was on felony probation at the time he committed the offense, and he was personally armed with a loaded weapon. Both *Blakely* and *Apprendi* recognize that "the fact of a prior conviction" can be found by a judge, even though any other fact that increases the maximum statutory penalty for a crime must be found by a jury. (*Blakely, supra*, 542 U.S. at p. 301; *Apprendi, supra*, 530 U.S. at p. 490.) The *Apprendi* exception for prior convictions has been broadly interpreted by California courts. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221-223.) Because the facts of defendant's probation status at the time of the current offense and his prior CYA commitment arise out of the fact of a prior conviction, and are so closely related to the prior convictions themselves, they come within the prior conviction exception. Also, as with a prior conviction, these facts can be established by a review of court records. (*Id.* at p. 223.) Thus, the upper term was

supported by factors that did not need to be found by a jury. (*Blakely, supra*, at p. 301; *Apprendi, supra*, at p. 490.)

B. *Any Error Was Harmless*

The record shows that the court relied upon factors, which perhaps should have been submitted to a jury—that the firearm was stolen from a police officer and that defendant was personally armed with a loaded weapon. However, in view of the court’s proper reliance on the recidivist factors, any error in relying on the other factors was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Price* (1991) 1 Cal.4th 324, 492, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1164.)

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.