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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS SANTIAGO VELASCO, Defendant and Appellant.	F048350 (Super. Ct. No. 28804) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Juan Velasco and an accomplice, Fabian Sanchez, attacked and stabbed Richard Ashlock. A jury found appellant guilty of assault with a deadly weapon or by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)[1] The jury also found two special enhancement allegations to be true. One was that appellant personally inflicted great bodily injury upon Ashlock. (§ 12022.7, subd. (a).) The other was that appellant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members. (§ 186.22, subd. (b).) The court sentenced appellant to four years for the assault (§ 245, subd. (a)(1)), plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)), plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)), for a total prison term of 17 years.

APPELLANT'S CONTENTIONS

Appellant contends that both of the enhancements must be stricken because the court erred in instructing the jury with CALJIC No. 17.20 (the so-called "group beating" instruction). He further contends that his gang enhancement is not supported by substantial evidence. As we shall explain, we find both of these contentions to be without merit. We will affirm the judgment.

FACTS

The sufficiency of the evidence to support appellant's assault conviction is not challenged. On November 25, 2003, shortly before 7:00 p.m., Richard Ashlock was walking on California Street in Winton, California with three friends, Pablo Leon, Charley Guerra and Donald Brady. At the time, Ashlock was wearing a red hat and red jacket. He and his friends were confronted from behind by two men, appellant and Fabian Sanchez. Appellant seemed angry and he knocked Ashlock's red hat off of his

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

head. He asked Ashlock why he was wearing red on "his" (appellant's) street. Appellant then ordered Ashlock to take off his jacket. Ashlock did so to avoid a conflict even though it was a very cold night. After Ashlock had taken his jacket off, appellant and the other man walked away.

Ashlock and his friends proceeded to walk down the street and they cut through an orchard en route to another friend's house. Ashlock put his jacket back on. After cutting through the orchard, Ashlock and his friends arrived at a dirt lot. Ashlock noticed a red Chrysler LeBaron parked in the area. Appellant and another male were inside the red Chrysler. Appellant and the other male got out of the vehicle. Appellant ran toward Ashlock and Ashlock took off his jacket because he knew there would be a confrontation. Appellant swung at Ashlock, but he missed. Ashlock then hit appellant and appellant fell to the ground. The other male who was with appellant threw a beer at Ashlock and then attacked him. Ashlock defended himself by punching the other male and knocking him to the ground. Subsequently, appellant ran up behind Ashlock and stabbed him on the left side. Ashlock did not realize he had been stabbed at that time, although when he was struck by appellant he felt a "weird tingling inside." The blow was very painful.

After appellant had stabbed Ashlock on his left side, the other male stabbed Ashlock on his right side. Ashlock noticed one of his assailants carrying a five-or six-inch "boot knife." After the stabbing, appellant and the other male ran away, got in a car, and drove off.

Ashlock walked down the street and at some point noticed that his shirt was bloody. He felt very sick and cold. He then collapsed on the front lawn of a residence. Subsequently, emergency medical personnel arrived and Ashlock was airlifted to a hospital

Before Ashlock was taken to the hospital, Merced County sheriff's Deputy Richard Howard arrived at Ashlock's location. Ashlock was lying on his back and there was a large stab wound on the left upper portion of Ashlock's abdomen near his ribs.

Ashlock sustained two stab wounds, one on his right side and one on his left side, from the attack. The stab wound on Ashlock's left side, which was inflicted by appellant, was larger. Ashlock suffered a cut left intercostal artery, a left rib fracture, and a left lateral liver laceration as a result of the stabbing. Surgery was required in order to treat the injuries. After the artery and liver laceration were treated, Ashlock's stab wounds were closed with sutures and/or staples.

Upon his release from the hospital, Ashlock was contacted by Detective Wren on December 2, 2003. Ashlock identified appellant from a photographic lineup. He was 100 percent certain that it was appellant who had stabbed him.

Ashlock had seen appellant before because Ashlock had gone to high school with appellant. In fact, Ashlock and appellant were in the same grade and even had some of the same classes. Additionally, Charles Guerra testified at trial that he knew both appellant and Fabian Sanchez because he had gone to the same school as them and had grown up with them. Guerra had also seen appellant around town a lot prior to the date in question. Both Leon and Guerra positively identified appellant as having been involved in the stabbing of Ashlock.

We will address the sufficiency of the evidence to support the gang enhancement in our analysis of that issue in part "II" of this opinion.

DISCUSSION

I. THE THREE-YEAR SECTION 12022.7(a) ENHANCEMENT WAS PROPERLY IMPOSED.

Subdivision (a) of section 12022.7 states:

> "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

The court instructed the jury with CALJIC No. 17.20 as follows:

"It is alleged in Counts 1 and 2 that in the commission of a felony or attempted felony, the defendant personally inflicted great bodily injury on Richard Ashlock.

"If you find a defendant guilty of Attempted Murder alleged in Count 1 or Assault by Means of Force Likely to Produce Great Bodily Injury or with a Deadly Weapon, charged in Count 2, you must determine whether the defendant personally inflicted great bodily injury on Richard Ashlock in its commission.

"'Great bodily injury,' as used in this instruction, means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury.

"When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he may be found to have personally inflicted great bodily injury upon the victim if 1) the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim; or 2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

"Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

Appellant contends that this instruction was erroneous in that it conflicts with the wording of section 12022.7, subdivision (a) itself. He contends that the instruction allowed the jury to find personal infliction of great bodily injury even if appellant himself may not have personally inflicted great bodily injury. The California Supreme Court recently addressed and rejected this argument in *People v. Modiri* (2006) 39 Cal.4th 481. The *Modiri* court stated:

"The Court of Appeal held that CALJIC No. 17.20 prejudicially failed to require the *personal* infliction of great bodily harm under section

1192.7(c)(8). When defendant sought review on other grounds, we solicited briefing on whether the Court of Appeal was wrong. The issue presented is whether the group beating theories in CALJIC No. 17.20 satisfy the personal-infliction requirement of section 1192.7(c)(8), as construed in [*People v. Cole* (1982)] 31 Cal.3d 568, and applied in [*People v. Corona* (1989)] 213 Cal.App.3d 589, and [*People v. Dominick* (1986)] 182 Cal.App.3d 1174.

"No instructional error occurred at trial. For 20 years, courts have upheld personal-infliction findings where the defendant physically joins a group attack, and directly applies force to the victim sufficient to inflict, or contribute to the infliction of, great bodily harm. Consistent with the statutory language and the manner in which it has been judicially construed, the defendant need not be the sole *or definite* cause of a specific injury. For reasons we explain, these group beating principles have been accepted by the Legislature. CALJIC No. 17.20 duly describes them. A contrary approach would mean that those who perpetrate mob violence and inflict gratuitous injury would often evade enhanced punishment. Thus, we will reinstate the section 1192.7(c)(8) finding vacated on appeal." (*Id*. at p. 486, second italics added.)[2]

The court thus did not err in instructing the jury with CALJIC No. 17.20, and the jury's finding that appellant personally inflicted great bodily injury upon Ashlock must be upheld.

II. THE 10-YEAR SECTION 186.22(b)(1)(C) ENHANCEMENT WAS PROPERLY IMPOSED.

Section 186.22 states in pertinent part:

"(b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction

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[2] Section 1192.7, subdivision (c) provides in pertinent part: "As used in this section, 'serious felony' means any of the following: [¶] … (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm …." Thus both section 1192.7, subdivision (c)(8) and section 12022.7, subdivision (a) contain the phrase "personally inflicts great bodily injury on any person." As the *Modiri* opinion points out, the Legislature intended this language to have the same meaning in each of these statutes. (*People v. Modiri*, *supra*, 39 Cal.4th at p. 498, and fns. 8 and 9 at p. 492.)

> 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: [¶] …
>
> "(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

Subdivision (c) of section 667.5 states in pertinent part: "For the purpose of this section, 'violent felony' shall mean any of the following: [¶] … [¶] (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 …."

Appellant raises two arguments as to why he contends the section 186.22, subdivision (b)(1)(C) enhancement must be stricken.

His first argument is that because the jury was instructed with an erroneous CALJIC No. 17.20 instruction on personal infliction of great bodily injury in connection with the section 12022.7, subdivision (a) enhancement, we must conclude that his infliction of great bodily injury was not properly "charged and proved as provided for in Section 12022.7." (§ 667.5, subd. (c)(8).) Thus, he contends, the People did not properly prove that he committed a "violent felony" within the meaning of sections 667.5, subdivision (c) and 186.22, subdivision (b)(1)(C). As we explained in part "I" of this opinion, however, there was no error in the CALJIC No. 17.20 instruction. (*People v. Modiri, supra*, 39 Cal.4th 481.)

Appellant's second argument is that the gang enhancement is not supported by substantial evidence because the People failed to prove that appellant's gang, South Side Locs or "SSL," was a "criminal street gang" within the meaning of section 186.22, subdivision (b)(1). Subdivision (f) of section 186.22 states:

> "(f) As used in this chapter, "criminal street gang" means 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 one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), 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."

Appellant contends that there was insufficient evidence that SSL had "as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e)." We disagree. In *People v. Sengpadychith* (2001) 26 Cal.4th 316, the court stated:

> "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996)] 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. (*Gardeley*, *supra*, at p. 620.)" (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

In this case prosecution witness Officer Preston Hambrecht testified as an expert on gangs. Included in his testimony was the following:

"Q. Tell us what the primary activities of South Side Locs are.

"A. Robberies, grand thefts, vandalisms, murders, drive-by shootings.

"Q. Are you aware of previous cases where the South Side Locs have been found to be a criminal street gang?

"A. Yes, I have."

The criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e) include robbery (§ 186.22, subd. (e)(2)), grand theft (§ 186.22, subd. (e)(9)), felony

vandalism (§ 186.22, subd. (e)(20)), unlawful homicide or manslaughter (§ 186.2, subd. (e)(3)), and discharging or permitting the discharge of a firearm from a motor vehicle (§ 186.22, subd. (e)(6)). Thus, Officer Hambrecht's testimony was more than sufficient to satisfy the "primary activities" component of subdivision (f) of the statute. (*People v. Sengpadychith, supra*, 26 Cal.4th 316.)

Appellant correctly points out that the court's instruction to the jury on the definition of "criminal street gang" omitted from that definition some of the crimes which Hambrecht testified were primary activities of SSL. The court's instruction stated:

> "'Criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, Penal Code Section 245(a)(1), Assault With a Deadly Weapon or With Force Likely to Produce Great Bodily Injury, Penal Code Section 459, Burglary, Penal Code Section 187, Murder, Penal Code Section 487(c), Grand Theft from the Person, or Vehicle Code Section 10851, Unlawful Driving or Taking of a Vehicle (2) having a common name or common identifying sign or symbol and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

Hambrecht's testimony nevertheless did include as primary activities of SSL at least two of the criminal acts mentioned in the instruction (murder and grand theft). As the statute and the instruction point out, only "one or more" of the qualifying criminal acts must be a primary activity of the gang in order to satisfy the "primary activities" requirement of the section 186.22, subdivision (f) definition of "criminal street gang." Hambrecht's testimony was thus still more than sufficient to satisfy the requirement of the statute.

We also note that Officer Hambrecht's testimony on the issue of the primary activities of SSL was undisputed, and that appellant's trial counsel in fact offered, in the presence of the jury, to stipulate that "SSL is a criminal street gang within the meaning of 186.22." The People declined to stipulate and instead presented their evidence. Not surprisingly, appellant raised no argument in the trial court that the People had failed to

prove SSL was a criminal street gang. Rather, appellant's unsuccessful defense was that appellant was not the perpetrator of the assault on Ashlock.

DISPOSITION

The judgment is affirmed.

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Levy, Acting P.J.

WE CONCUR:

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Hill, J.

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Kane, J.