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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO LEE WILLIAMS et al.,

Defendants and Appellants.

F048580

(Super. Ct. Nos. MCR020946A &
MCR020946B)

OPINION

APPEALS from judgments of the Superior Court of Madera County. John W. DeGroot, Judge.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant Mario Lee Williams.

Linda Buchser, under appointment by the Court of Appeal, for Defendant and Appellant Kiteran Lavell Lee.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, J. Robert Jibson and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Mario Lee Williams and Kiteran Lavell Lee of numerous felonies and enhancements arising out of an armed robbery of a bar in Chowchilla. The trial court sentenced them to lengthy prison sentences. They challenge the sufficiency of the evidence to support the criminal street gang enhancement imposed pursuant to Penal Code section 186.22, subdivision (b).¹ They also challenge the imposition of the upper term of imprisonment as violating *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

We conclude there is no constitutional error under *Blakely* or *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*). We further conclude the evidence was sufficient to support the section 186.22, subdivision (b) enhancement.

We will credit appellant Lee with one additional day of presentence credit and in all other respects affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On September 16, 2003, at approximately 10:00 p.m., Stanley Cantrell, Anna Del Bianco, Paulette Leonard, and Irma Ferrarese were in the bar of Farnesi's Restaurant in Chowchilla. Three Black males wearing bandanas over their lower faces and carrying firearms strode into the bar through a side door. Ferrarese recognized Lee as one of the men.

The three men demanded the victims turn over all their money and valuables and then ordered the four people to lie down on the floor. As soon as the robbers left by the side door, Leonard ran out the front door and saw a blue or gray compact car with four people in it pulling away. Leonard jumped in her car and attempted to follow the compact on southbound Highway 99. She eventually lost sight of the compact car.

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

While Leonard was pursuing the robbers, someone in the restaurant reported the robbery to law enforcement.

Around 11:00 p.m. that same evening, Williams and Lee, along with a coparticipant, Brandon Crane, attempted to rob a liquor store in Fresno. The burglar alarm went off almost immediately, and the three men fled the scene.

Around 12:30 a.m. the morning of September 17, three armed men wearing bandanas robbed a pizza parlor in Fresno. After the robbers left, the police were notified.

A citizen monitoring the police scanner saw a vehicle matching the reported description and notified the police. A high speed chase ensued on northbound Highway 99, ending near Chowchilla where the suspects' car finally was stopped. During the chase, the suspects had thrown various items out the car window. Williams, Lee, and Crane were taken into custody at the scene.

Over the next day or two, various items were recovered in the car and along the chase route on Highway 99, including a blue knit cap, a blue bandanna, a blue Harley Davidson cap, a blue hooded sweatshirt, a Tec-9 assault rifle with ammunition, an empty nine-millimeter ammunition box, and personal property of the victims.

Williams and Lee were charged in Madera County with four counts of robbery, burglary, and membership in a street gang as a substantive offense. In addition, it was alleged that the robberies and burglary were committed for the benefit of and at the direction of a criminal street gang. As to all counts, it was alleged that Williams and Lee personally used a firearm. It also was alleged that Lee suffered a prior serious felony conviction and served a prior prison term. Williams was alleged to have served two prior prison terms.

At trial, Sergeant Thomas Trinidad of the Merced Police Department testified as an expert on gangs. Trinidad described the initiation process for gang members, the significance of tattoos, hand signs, graffiti, and style of dress. In the gang culture, committing property crimes is seen as supporting the gang financially, while committing

violent crimes is seen as supporting the gang by generating fear of the gang among other gangs and the general public. Violence also serves to deter victims from testifying. Property crimes are committed to support the gang lifestyle because most gang members are unemployed.

Trinidad is familiar with a criminal street gang known as the Merced Gangster Crips. The gang consists of 86 members or affiliates, uses the color blue as an identifying color, including the wearing of blue bandanas, and has robbery as one of its primary activities.

Based upon Lee's past admissions, his contacts with Merced police, and state parole records, Trinidad was of the opinion that Lee was a member of the Merced Gangster Crips. Trinidad also testified that Williams was a member of the same gang, based upon gang photos, the "MGC" tattoo on Williams's arm, a chest tattoo reading "MG Crip gangster," and the moniker "Mr. Dice," which also was tattooed on Williams.

A hypothetical fact pattern, based upon the Farnesi's robbery, was posed to Trinidad. He opined that each of the three perpetrators would receive a benefit from the crime, as well as the gang as a whole, and each perpetrator and the gang would receive a monetary benefit and an increase in status. It was to the gang's benefit to have multiple gang members involved in the commission of a crime because it increased the chance of a successful outcome. Since gang members tend to be unemployed, their main means of economic support is by committing crimes for profit.

Trinidad also testified that if gang members went together to a location for the purpose of committing a crime, it would tend to show the crime was committed for the benefit of, or at the direction of, the gang. It also was significant, in Trinidad's opinion, that Lee, Williams, and Crane wore blue clothing and blue bandanas during the robbery.

Additionally, Trinidad presented various court records establishing that the required predicate offenses had been committed by the Merced Gangster Crips.

The jury found Williams and Lee guilty as charged of all substantive offenses and found the enhancements true. In a bifurcated trial on the prior conviction allegations, Lee admitted to one prior prison term and Williams admitted to two prior prison terms.

DISCUSSION

Williams and Lee raise two principal issues: insufficiency of the evidence to support the gang enhancement and a constitutional challenge to the imposition of the upper term of imprisonment.

Lee also contends he is entitled to one additional day of presentence credit, which the People concede.

I. Sufficiency of the Evidence

Both Williams and Lee contend the evidence was insufficient to support the street gang enhancements. Specifically, they maintain that (1) no facts support the finding that the offenses were committed for the benefit of a street gang; (2) no facts support the finding that they had the specific intent to promote criminal conduct; and (3) expert testimony alone is insufficient to sustain a finding that the offenses were gang related. None of these contentions is convincing.

Standard of review

In determining the sufficiency of the evidence, we review the entire record to determine whether there was evidence that was reasonable, credible, and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Catlin* (2001) 26 Cal.4th 81, 139; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) The standard is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.) The trier of fact may reasonably rely on the testimony of a single witness, unless the testimony is

physically impossible or patently false. (Evid. Code, § 411; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.)

We resolve all conflicts in the evidence and questions of credibility in favor of the verdict and indulge every reasonable inference the trier of fact could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless “upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]” (*People v. Bolin, supra*, 18 Cal.4th at p. 331.) This same inquiry applies to an evaluation of the sufficiency of the evidence to support an enhancement. (*People v. Alvarez* (1996) 14 Cal.4th 155, 225.)

Role of expert testimony

The prosecution may rely on expert testimony to establish the required elements of the gang enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) Expert testimony concerning the culture, habits, and psychology of a gang is permissible because these subjects are “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” [Citation.]” (Evid. Code, § 801, subd. (a)); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) An individual’s membership in a criminal street gang also is a matter beyond the common knowledge of jurors and thus a proper subject of expert testimony. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 965, disapproved on other grounds in *Gardeley*, at p. 624, fn. 10.) As stated in *People v. Valdez* (1997) 58 Cal.App.4th 494, “determining whether someone is involved [in a gang] and the level of involvement is not a simple matter and requires the accumulation of a wide variety of evidence over time and its evaluation by those familiar with gang arcana in light of pertinent criteria.” (*Id.* at p. 507.)

Expert testimony is admissible to address the definition of a criminal street gang, the requisite primary activities and predicate offenses, and the gang’s past criminal conduct and ongoing criminal nature. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463-1465.) Expert testimony also is admissible regarding the size, composition, or

existence of a gang, an individual's membership in or association with a gang, gang-related tattoos, and gang-related clothing and indicia. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657.)

Numerous cases have held that an expert may rely on hearsay in forming his or her opinion. (See *People v. Catlin*, *supra*, 26 Cal.4th at p. 137; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1463.) Expert testimony may be premised on material that is not admitted into evidence -- or on material that is not ordinarily admissible, such as hearsay -- as long as that material is reliable and of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) An expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of his or her opinion. (*Ibid.*) “[A] gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies. [Citations.]” (*Duran*, at p. 1463.)

Gang purpose and intent

Trinidad's opinion that Williams and Lee were gang members and committed the offenses for the benefit of the gang was based on law enforcement records, statements of Williams and Lee, statements of other members of the Merced Gangster Crips, the physical evidence of tattoos and clothing, and Trinidad's knowledge of gang culture, all matters on which expert testimony is appropriate. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 322.) Even if Trinidad relied in part on information or material that constitutes hearsay in forming his opinion, it is of the type that is reasonably relied upon by experts in the field and his reliance on the information is permissible. (*People v. Duran*, *supra*, 97 Cal.App.4th at pp. 1463-1465.)

Both Williams and Lee were members of the Merced Gangster Crips, drove together to Chowchilla, and committed the offenses together. There also was sufficient

evidence that both wore blue bandanas and clothing. Trinidad opined in response to a hypothetical question that the use of blue bandanas and blue clothing during the commission of the offenses was a significant factor in identifying the crime as gang related and the perpetrators as having the intent to promote the gang. Trinidad also testified that robbery was one of the primary activities of the Merced Gangster Crips, and that the commission of robberies enhanced the status of the gang and gang members and provided a source of income for gang activities. Additionally, he noted that all of the perpetrators of the Farnesi robbery were members of the Merced Gangster Crips.

A gang expert may testify as to the motivation for a crime and whether the crime is committed for the benefit of a gang. (*People v. Zermeno* (1999) 21 Cal.4th 927, 930.) In response to a hypothetical question based upon the scenario surrounding the Farnesi robbery, Trinidad testified that, in his opinion, the offense was committed for the benefit of the gang, with the intent to promote the gang. The testimony of a single witness is sufficient for conviction. (*People v. Panah* (2005) 35 Cal.4th 395, 489.)

Williams and Lee rely on the cases of *People v. Killebrew, supra*, 103 Cal.App.4th 644 and *In re Frank S.* (2006) 141 Cal.App.4th 1192. They are distinguishable. In both *Killebrew* and *Frank S.* the experts testified regarding a specific, subjective intent harbored by a specific individual at a specific point in time, rather than in response to a hypothetical question that the perpetrators had the intent to promote the gang. Both cases acknowledge that it is appropriate for experts to testify on the issue of any gang motivation for a crime. (*Frank S.*, at p. 1197; *Killebrew*, at pp. 656-657.)

Williams and Lee also challenge the sufficiency of the evidence providing the factual support for Trinidad's opinions. They claim that there was conflicting evidence concerning the colors of the bandanas worn by and the general attire of the robbers. The presence of conflicting evidence is of no consequence to our review. The testimony of one witness can provide substantial evidence and is sufficient for conviction. Regardless of whether the evidence presented at trial is direct or circumstantial, conflicting or

undisputed, the relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

Here, the evidence was sufficient for a reasonable jury to have found that Williams and Lee committed the offenses for the benefit of a street gang with the intent to promote the gang.

II. Upper Term Sentence

Lee and Williams contend the imposition of the upper term of imprisonment is unconstitutional because the factors relied upon by the trial court to impose the aggravated term were not found true by a jury.

Appropriate trial court considerations

In *Blakely*, the United States Supreme Court held that other 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 or admitted by the defendant. (*Blakely, supra*, 542 U.S. at pp. 301, 303.) Recently, in *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856], the United States Supreme Court clarified that “In accord with *Blakely*, ... the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum. [Citation.]” (*Id.* at p. ____ [127 S.Ct. at p. 868].) An upper term constitutionally may be imposed if it is based upon facts admitted by the defendant, facts reflected in the jury’s verdict, or a prior conviction. (*Blakely*, at p. 301.)

Recidivism is a traditional basis for increasing a defendant’s sentence. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244 (*Almendarez-Torres*).) Recidivism factors do not relate to the current offense, but to criminal history. (*Ibid.*) Recidivism factors that may be found by a judge include prior convictions, prior prison terms, the number of convictions, and parole or probation status, as these pertain to a defendant’s criminal history, not the current offense. (See *ibid.*)

Lee's sentence

In imposing the aggravated term for the principal offense on Lee, the trial court noted: (1) the victims were elderly; (2) Lee had a history of engaging in violent conduct as demonstrated by his prior criminal history of robberies and assault on a peace officer; and (3) his performance while on parole was unsatisfactory in that he was on parole at the time the current offenses were committed. The trial court also imposed an aggravated term on the enhancement, stating that it was doing so because Lee was on parole at the time the offenses were committed.

Lee asserts there was no evidence presented establishing the age of the victims, and the People do not dispute this contention. This factor, therefore, cannot be a basis for imposing the upper term pursuant to *Blakely* and *Cunningham*. Excluding this factor, there are two recidivism factors that validly can be used as a basis for imposition of the upper term.

Under *Cunningham* and *Blakely*, Lee's prior criminal history and his status as a parolee are both *Almendarez-Torres* factors that the trial court validly can consider in constitutionally imposing the upper term. Issues of fact concerning a defendant's prior criminal history and criminal status do not warrant a jury trial. (*Rangel-Reyes v. United States* (2006) 547 U.S. ____ [126 S.Ct. 2873, 2874] (Stevens, J., statement re denial of certiorari).) Lee has not raised any challenge to the proof of the prior convictions and parole status. (*Almendarez-Torres, supra*, 523 U.S. at pp. 247-248.)

The trial court also relied on Lee's poor performance on parole as a basis for the upper term. The trial court noted, as it was entitled to do, that Lee committed the current offenses while on parole. Thus, Lee's poor performance on parole essentially was determined by the jury when it returned guilty verdicts on the instant offenses.

Regardless of whether any improper factors were cited as a basis for imposition of the upper term, the trial court constitutionally could rely on Lee's history of prior convictions and his parole status as grounds for imposing the upper term. One

aggravating factor is sufficient for imposition of an upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.)

Because the trial court cited only one improper factor, Lee's very poor prior record convinces us beyond a reasonable doubt that Lee suffered no prejudice under *Cunningham*. The trial court would have sentenced him to the upper term even without considering the improper factor. (*People v. Price* (1991) 1 Cal.4th 324, 492.)

Williams's sentence

In imposing aggravated terms, the trial court noted that Williams had a history of violent conduct, as demonstrated by his prior convictions; his prior convictions were numerous; the victims were elderly; and Williams's prior performance on probation or parole was unsatisfactory. Williams also admitted serving two prior prison terms.

In Williams's case, his poor performance on parole was not tied to his commission of the current offenses. Therefore, even if we excluded this factor and the age of the victims from consideration, the trial court constitutionally could rely upon Williams's criminal history to impose the upper term. Williams had suffered numerous prior convictions and had served prior prison terms before committing the current offenses. Again, one aggravating factor justifies an upper term. (*People v. Cruz, supra*, 38 Cal.App.4th at pp. 433-434.)

Additionally, when counsel inquired about imposing a sentence of less than the upper term, the trial court noted that the evidence in the case was "very strong." The trial court also indicated its disagreement with a plea agreement obtained for a third participant in the offenses in another court, stating the agreement "did shock the conscience" that the offender was treated so "leniently" in light of the evidence. Again, in light of these comments we conclude beyond a reasonable doubt that the trial court would not have imposed a lesser sentence if it were found that some factors could not constitutionally be relied upon. (*People v. Price, supra*, 1 Cal.4th at p. 492.)

III. Additional Credit

Lee's claim of an additional day of presentence credit is not disputed. We will, therefore, order that a corrected abstract of judgment be prepared reflecting 305 days of credit.

DISPOSITION

The judgments are affirmed. The trial court shall prepare a corrected abstract of judgment reflecting 305 days of presentence credit for Lee, and transmit it to the appropriate agencies.

CORNELL, Acting P.J.

WE CONCUR:

DAWSON, J.

HILL, J.