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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RUDY ELIAS MARTINEZ, Defendant and Appellant.	F045722 (Super. Ct. No. 122493B) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. William Silviera, Jr., Judge.

Sylvia Whatley Beckham, 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 Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 1., 2.A., 2.B., and 3.

Rudy Elias Martinez appeals from a judgment entered on a jury verdict finding him guilty of assault with a deadly weapon or by force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)).[1] The jury found true a gang enhancement allegation (§ 186.22, subd. (b)(1) [offense committed for the benefit of, at the direction of, or in association with a criminal street gang]). In a bifurcated proceeding, the court found appellant had been convicted presently and previously of a serious felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and within the meaning of section 667, subdivision (a)(1).

The court sentenced appellant to a total prison term of 18 years: the upper term of four years for the assault, doubled pursuant to the three strikes law, five years for the gang enhancement, and an additional five years for the serious felony enhancement.

On appeal, appellant contends that his assault conviction is not supported by substantial evidence, because the victim's in-field identification was "not of solid value," and that the court made sentencing errors. We affirm the conviction, but remand for resentencing.

FACTS

On November 17, 2003, at about 10:30 p.m., Juan Gutierrez was standing on the front porch of his home on Second Avenue when four men wearing black pants and black jackets approached. One of the men challenged Gutierrez by asking if he was a "Sureno," a gang member. Gutierrez stated he was not. Two of the men attacked Gutierrez, and one of them struck him with a can of beer. Within a few seconds, the other two joined the attack with their fists and feet.

During the attack, one of the assailants hit Gutierrez with a broom handle, with sufficient force that the handle broke. Another struck Gutierrez in the ribs with a wooden two-by-four, 18 to 20 inches in length. While Gutierrez was on the ground, one of the

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

men threw a card table on top of him. Gutierrez was semiconscious after the first blow. He could see his attackers' faces, but did not recall which attacker hit him with which object.

When the attack was over, Gutierrez saw three men walk away. The assailants left behind a full and an empty can of Natural Light beer.

Shortly after the attack, Officer Bill Robertson saw four Hispanic men matching the suspects' descriptions walking on Second Avenue. Officer Robinson ordered the men to stop. Appellant complied, but the others ran. One of them, Mario Yado, was captured. When Yado was apprehended, he had a cut above his eye and was carrying a partial 12-pack of Natural Light beer.

Officer Reynaldo Vela handcuffed appellant. The officer did not notice any blood on appellant's hands, clothing, or skin. Appellant did not appear to be injured, and his clothing was not torn or ripped.

Officers Robertson and Vela took appellant and Yado to Gutierrez's home for an in-field identification. Officer Vela admonished Gutierrez that he should be "absolutely positive" before identifying any suspects. Without hesitation, Gutierrez identified both men as being involved in the attack.

At trial, Gutierrez remembered identifying his attackers at a distance of five meters and within a half hour of the attack. He stated that, when he made the identification, it was fresh in his memory. Gutierrez testified that the men were wearing black pants and black jackets during the attack and that, when he identified the subjects later, they were wearing the same clothing. Gutierrez was not able to identify appellant "one hundred percent" at trial, but testified that appellant did resemble one of his assailants.

Gang Evidence

Sheriff's Deputy Joe Aguilar testified as a gang expert for the prosecution. Aguilar opined that appellant, who had been identified as a gang member since April of 1998, was currently a member of the Norteno gang. Aguilar based his opinion on

appellant's prior contacts with law enforcement, his wearing of gang attire, a photograph of appellant "throwing" a sign, the presence of gang tattoos on his hands and face, and his admission that he was a gang member. Aguilar opined that Yado, who had been identified as a gang member since September of 2000, was also currently a member of the Nortenos. Aguilar based his opinion on Yado's prior contacts with law enforcement, his association with other gang members, his wearing of gang colors, and information from other law enforcement officials. According to Aguilar, the attack against Gutierrez occurred in an area claimed by Norteno gangs.

DISCUSSION

1. Sufficiency of the evidence*

Appellant contends there is insufficient evidence to sustain the conviction because the victim's in-field identification of him as one of the attackers was not confirmed at trial and was unreliable. We disagree.

When reviewing a criminal conviction for sufficiency of the evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Out-of-court identifications need not be corroborated at trial to constitute substantial evidence. (*People v. Cuevas* (1995) 12 Cal.4th 252, 263-275.) In *Cuevas*, our Supreme Court held that the substantial evidence test applies to a determination of

*See footnote, *ante*, page 1.

whether an out-of-court identification not confirmed by the witness at trial is sufficient to support a criminal conviction. (*Id.* at pp. 271-272.) In making that determination, the reviewing court assesses the circumstances of the identification to determine whether they are sufficiently probative to support the conviction. (*Id.* at pp. 269, 271, 274.)

Many circumstances may attend an out-of-court identification and affect its probative value. (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 267.) Those circumstances include: (1) the identifying witness's prior familiarity with the defendant; (2) the witness's opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness had a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime. (*Ibid.*) "Evidence of these circumstances can bolster the probative value of the out-of-court identification by corroborating both that the witness actually made the out-of-court identification (e.g., testimony by the police officer or other person to whom the statement was made) and that the identification was reliable (e.g., evidence that the witness was present at the scene of the crime and in a position to observe the perpetrator, evidence that the witness had a prior familiarity with the defendant, or evidence that the witness had no self-serving motive to implicate the defendant)." (*Ibid.*)

Here, the circumstances surrounding Gutierrez's identification of appellant bolster its probative value. First, Gutierrez testified he was able to see his attackers. He saw the men walk toward him and saw their faces before and during the attack. He was able to describe the clothing the men were wearing. Second, there was no evidence Gutierrez had a motive to falsely implicate appellant. Finally, Gutierrez gave details about the incident to the first officer at the scene who, in turn, broadcast that information, which led to appellant's detention by Officers Robertson and Vela shortly after the incident.

The *Cuevas* court also noted there are various safeguards available at trial to prevent an unjust conviction. When a trial witness is unable to confirm or deny the out-

of-court identification, for example, cross-examination can flush out that witness's bias, lack of attentiveness, poor eyesight, and bad memory. (*People v. Cuevas*, *supra*, 12 Cal.4th at pp. 273-274.) Here, defense counsel thoroughly cross-examined Gutierrez but failed to flush out any evidence suggesting that the in-field identification was unreliable.

Appellant also contends Gutierrez's identification was "not of solid value" because it lacked any corroboration other than improper "guilt by association" circumstances. We disagree.

Gutierrez identified appellant as one of his attackers within an hour of the attack. He identified him at close range, from a distance of 15 to 20 feet, and without hesitation. In addition, appellant was apprehended in the vicinity of the attack shortly after the attack occurred. Appellant was with three others (victim attacked by group of four), appellant and Yado were Norteno gang members (fight precipitated by question to victim "are you Sureno?"), and Yado was carrying the same type of beer cans found at the scene of the attack and had a fresh cut above his eye, suggesting he had recently been in a fight.

Under the substantial evidence test, "the probative value of the identification and whatever other evidence there is in the record are considered together to determine whether a reasonable trier of fact could find the elements of the crime proven beyond a reasonable doubt." (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 274.) The victim's in-field identification of appellant as one of his attackers, coupled with the circumstances of appellant's arrest, constitute substantial evidence to sustain appellant's assault conviction.

2. Sentencing error[*]

Appellant contends (1) that the trial court erred in failing to have the jury determine whether his current assault conviction was a serious felony for purposes of the section 186.22, subdivision (b)(1)(B) enhancement and the section 667, subdivision (a)(1) enhancement, both of which were alleged as to that offense; and (2) that, because

[*]See footnote, *ante*, page 1.

the jury did not make such determination, the trial court's findings on the two enhancements must be reversed.

We addressed analogous issues in *People v. Bautista* (2005) 125 Cal.App.4th 646 and held that the trial court properly imposed the section 667, subdivision (a)(1) enhancement because the jury's finding on the gang enhancement was tantamount to a finding that the current offense was a serious felony. However, we held that under the California Supreme Court recent opinion in *People v. Briceno* (2004) 34 Cal.4th 451, the trial court erred in imposing the five-year gang enhancement under section 186.22, subdivision (b)(1)(B). We will apply the same reasoning here.

Both enhancement statutes—section 667, subdivision (a)(1) and section 186.22, subdivision (b)(1)(B)—apply only where the current offense is a serious felony within the meaning of section 1192.7, subdivision (c). (§§ 667, subd. (a)(4), 186.22, subd. (b)(1)(B).) Section 1192.7, subdivision (c) lists the crimes that constitute serious felonies. The crime of assault with a deadly weapon *or* by means of force likely to produce great bodily injury is not listed, but may qualify as a serious felony if certain conduct relating to the offense is proved. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261; *People v. Luna* (2003) 113 Cal.App.4th 395, 398.)

A. The section 667, subdivision (a) enhancement[*]

Appellant's assault offense would constitute a serious felony as defined by section 1192.7, subdivision (c) if the jury had found that appellant, in committing the assault: (1) personally inflicted great bodily injury (§ 1192.7, subd. (c)(8)); (2) personally used a dangerous or deadly weapon (§ 1192.7, subd. (c)(23)); (3) committed a felony offense, "which would also constitute a felony violation of Section 186.22" (§ 1192.7, subd.

[*]See footnote, *ante*, page 1.

(c)(28)); or (4) committed an assault within the meaning of section 1192.7, subdivision (c)(31).[2]

The jury was not asked to make the determination whether appellant's current assault was a serious felony. Further, the prosecutor argued that appellant could be found guilty on various theories: He either assaulted Gutierrez with a deadly weapon or with force likely to cause great bodily injury, or he was an aider and abettor. Because the jury convicted appellant of assault with a deadly weapon *or* with force likely to cause great bodily injury, we cannot conclude as a matter of law that the jury determined appellant's conviction qualified under subdivision (c)(8), (23) or (31) of section 1192.7 as a serious felony.

The jury did find, however, that the assault was committed in association with a criminal street gang. (§§ 245, subd. (a)(1), 186.22, subd. (b)(1).) Recently, the Supreme Court held that "section 1192.7(c)(28) includes within its ambit any felony offense committed for the benefit of a criminal street gang under the section 186.22(b)(1) gang sentence enhancement." (*People v. Briceno, supra,* 34 Cal.4th at p. 459.) In *People v. Bautista*, *supra*, 125 Cal.App.4th at page 657, we applied this holding and concluded that a jury's finding on the section 186.22, subdivision (b)(1) enhancement was "tantamount to a finding that the [current] offense … was a serious felony pursuant to section 1192.7, subdivision (c)(28)."

In this case, the jury found that appellant committed the assault for the benefit of a gang within the meaning of the gang enhancement. Thus, for the same reasons set forth in *Bautista*, we hold that no prejudicial error occurred when the trial court found as a matter of law that the current assault was a serious felony which supported the imposition

[2]Section 1192.7, subdivision (c)(31) lists as a serious felony any "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245."

of the five-year enhancement pursuant to section 667, subdivision (a). (*People v. Bautista*, *supra*, 125 Cal.App.4th at p. 657.)

Appellant urges us to reconsider *Bautista* on the ground that it misreads *Briceno*. His position is similar to the position we rejected in *Bautista*. (*People v. Bautista*, *supra*, 125 Cal.App.4th at pp. 656-657.) Because he presents nothing new, we decline to do so.

B. The section 186.22, subdivision (b)(1)(B) enhancement[*]

Section 186.22, subdivision (b)(1) carries three possible additional terms depending on the nature of the current felony:

> "(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined by subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

Here, the trial court imposed the paragraph (B) five-year enhancement on appellant's assault conviction.

The *Briceno* court explained:

> "… [S]ection 186.22(b)(1)(A), (B), and (C) speak to an event that occurs in the current proceeding. Section 1192.7, subdivision (c), on the other hand, comes into play only if the defendant reoffends, at which time any *prior* felony that is gang related is deemed a serious felony. Thus, any felony that is gang related is not treated as a serious felony in the current proceeding, giving effect to section 186.22(b)(1)(A). [Citation.] [¶] Not only does this interpretation give meaning to section 186.22(b)(1)(A), (B), and (C), it also avoids impermissible bootstrapping that would occur if any felony that is gang related is also deemed serious in the current proceeding. Specifically, while it is proper to define any felony committed for the benefit of a criminal street gang as a serious felony under section 1192.7(c)(28), it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B) …." (*People v. Briceno*, *supra*, 34 Cal.4th at pp. 464-465.)

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[*]See footnote, *ante*, page 1.

In *Bautista* we determined that a consecutive five-year enhancement term on the same assault offense pursuant to section 186.22, subdivision (b)(1)(B) was "precisely the bootstrapping of which the Supreme Court spoke in *Briceno*." (*People v. Bautista*, *supra*, 125 Cal.App.4th at p. 657.) We therefore reversed the section 186.22, subdivision (b)(1)(B) enhancement and remanded to the trial court for resentencing pursuant to section 186.22, subdivision (b)(1)(A). (*Bautista*, at p. 657.)

For the same reasons, we reverse appellant's five-year gang enhancement and will remand to the trial court for resentencing pursuant to section 186.22, subdivision (b)(1)(A).

C. Section 654

In the unpublished portion of this opinion, we have held pursuant to *People v. Briceno*, *supra*, 34 Cal.4th 451 and *People v. Bautista*, *supra*, 125 Cal.App.4th 646, that the trial court did not err prejudicially when it found appellant's current assault offense to be a "serious" felony within the meaning of section 1192.7, subdivision (c), because the jury found true the gang enhancement allegation against him. That finding was tantamount to a finding that the current offense was a serious felony. (See § 1192.7, subd. (c)(28).) We also have held that remand is required, pursuant to *Briceno*, *supra*, at pages 464-465, because it was improper to "bootstrap" the finding on the section 186.22, subdivision (b) gang enhancement into punishment under subdivision (b)(1)(B) of that section. The question presented now is whether any punishment under the gang enhancement is to be permitted.

Appellant contends that, if the serious felony enhancement was proper, as we have held it was under *Bautista*, then section 654 required the trial court to stay *any* additional punishment for the true finding on the gang enhancement, because that finding was based on the same act or conduct used to support the serious felony enhancement. We disagree.

Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." This proscription applies to a course of conduct violating more than one statute, where the offenses were incident to one objective. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

Appellate courts disagree about the application of section 654 to enhancements. (*People v. Coronado* (1995) 12 Cal.4th 145, 157; see also *People v. Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7.) They agree, however, that there are two different categories of sentence enhancement: status enhancements, which go to the nature of the offender, such as recidivist enhancements; and conduct enhancements, which go to the nature of the offense, such as firearm or bodily injury enhancements. (*People v. Coronado*, *supra*, at p. 156; *People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519.) In *Coronado*, the Supreme Court held that section 654 does not apply to prior conviction enhancements because they "'relate to the *status* of the recidivist offender engaging in criminal conduct, not to the conduct itself.'" (*Coronado*, *supra*, at p. 157, quoting *Rodriguez*, *supra*, at p. 519.) Because a "repeat offender (recidivist) enhancement" does not implicate multiple punishment of an act or omission, section 654 is inapplicable. (*Coronado*, at p. 158; see also *People v. Price* (1992) 4 Cal.App.4th 1272, 1277 [§ 667, subd. (a) creates a status, not a conduct enhancement, and § 654 does not apply]; cf. *People v. Kane* (1985) 165 Cal.App.3d 480, 487-488 [no impermissible dual use of facts where use of firearm served to make the charged felony a serious felony under §§ 1192.7, subd. (c)(8), and 667, subd. (a) (status enhancement), and also supported conduct enhancement under § 12022.5].)

Appellant cites several cases addressing section 654's application to enhancements going to the nature of the offense (*People v. Flores* (1981) 115 Cal.App.3d 67, 79-80 [use of a firearm enhancement]; *People v. Reeves* (2001) 91 Cal.App.4th 14, 55-57 [great bodily injury enhancement]; *People v. Jones* (2000) 82 Cal.App.4th 485, 492-493 [use of a deadly or dangerous weapon enhancement]). These cases do not apply to his circumstances. Appellant is not being punished twice for the same criminal conduct.

Instead, his sentence was enhanced because (1) he is a recidivist serious offender, and (2) his conduct during the commission of the current offense fell within the scope of section 186.22, subdivision (b)(1).

Any overlap or, to use *Briceno*'s term, bootstrapping in appellant's sentence arises not from the fact that the conduct supporting his gang enhancement also supports one element of his serious felony enhancement; instead, it arises from the trial court's use of subdivision (b)(1)(B) of section 186.22, where the only way in which it could conclude as a matter of law that the charged felony was a serious felony was through the jury's finding that the gang enhancement was true. Under *Briceno*, this was impermissible. As we recognized in *Bautista*, a defendant cannot properly be punished for engaging in conduct that supports a gang enhancement and then, solely because that conduct makes the felony "serious," also punish him or her under subdivision (b)(1)(B) of the gang enhancement. Subdivision (b)(1)(B) of section 186.22, thus, can apply only where the felony is serious for some reason other than the conduct that brings subdivision (b)(1) into play. Otherwise, as the Court of Appeal had noted in its underlying opinion in the *Briceno* case, section 186.22, subdivision (b)(1)(A) would be superfluous. (See *People v. Briceno*, *supra*, 34 Cal.4th at p. 464.) This has nothing to do, however, with the question whether appellant can be punished under both section 186.22, subdivision (b)(1)(A), and section 667, subdivision (a). Under *Coronado and Bautista*, he can.

3. Imposition of the upper term[*]

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466, appellant contends that the trial court violated his Sixth Amendment right to trial by jury by imposing the upper term based on factors not admitted by him or found to be true by the jury beyond a reasonable doubt. The California Supreme Court recently undertook an extensive analysis of these cases

[*]See footnote, *ante*, page 1.

and concluded that the imposition of the upper term sentence, as provided under California law, is constitutional. (*People v. Black* (2005) 35 Cal.4th 1238.) Accordingly, appellant's contention fails.

DISPOSITION

The matter is remanded for resentencing pursuant to section 186.22, subdivision (b)(1)(A). In all other respects, the judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.