Filed 12/29/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HENRY CEASAR RIVERA, Defendant and Appellant.	G031469 (Consolidated with G031642) (Super. Ct. No. 01CF2906) O P I N I O N

Appeals from judgments of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed as modified and remanded with instructions.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Quisteen S. Shum, Raquel M. Gonzalez, and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Henry Ceasar Rivera was charged with unlawful taking of a vehicle (count 1), street terrorism (count 2), attempted kidnapping (count 3), and two

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

felony counts of exhibiting a loaded firearm (counts 4 and 5). After the trial court granted defendant's motion to sever counts 1 and 2 from counts 3, 4, and 5, a jury convicted him of the latter three counts and found true the allegation that he personally used a firearm during the attempted kidnapping. The court sentenced defendant to two years and six months on count 3, plus 10 years for the related firearm enhancement, for a total of 12 years and 6 months. The court also imposed two-year sentences each for counts 4 and 5, to be served concurrent with the sentence for count 3.

Following a court trial, defendant was convicted of counts 1 and 2. The court also found true the allegation that count 1 was committed to benefit a criminal street gang (Pen. Code, § 186.22, subd. (b); all further references are to this code unless otherwise noted). The court imposed a three-year sentence for count 1 and a two-year sentence for count 2, but ordered that these sentences be served concurrent to the sentence previously imposed in counts 3, 4, and 5.

Defendant appeals from both judgments. We consolidated the appeals for purposes of the opinion only. In case number G031642, defendant contends insufficient evidence existed to support his conviction in count 2 for street terrorism (§ 186.22, subd. (a)). He further argues the abstract of judgment incorrectly reflects that his sentence in count 1 is to be served consecutive to his sentence in count 3, for a cumulative sentence of 15 years and 6 months. The Attorney General contends there is substantial evidence to support defendant's conviction for street terrorism, but agrees that the abstract of judgment should be modified to show a concurrent sentence for count 1 unless we reverse the convictions being appealed in case number G031469. In such event, the Attorney General asserts that we should remand the matter to the trial court for resentencing.

In case number G031469, defendant contends he was improperly convicted in counts 4 and 5 of felony offenses for exhibiting a loaded firearm under section 417, subdivision (b). He argues that the statutory provision he was found guilty of violating requires that the crime be committed on the grounds of a day care center. Because there

was no evidence to support this element of the offense and the jury was not instructed on it, defendant argues his convictions in counts 4 and 5 must be reversed. The Attorney General concedes defendant's interpretation of section 417, subdivision (b) is correct, but contends his convictions should be reduced to misdemeanors under a different subdivision of section 417.

We agree with defendant's contention his felony convictions under section 417, subdivision (b) for exhibiting a loaded firearm are invalid. But we conclude there is sufficient evidence to support misdemeanor convictions under a different subdivision of the same statute. We therefore reduce his convictions in counts 4 and 5 to misdemeanor offenses for exhibiting a loaded firearm under section 417, subdivision (a)(2)(B) and remand the matter for resentencing on these counts. In the unpublished parts of the opinion, we conclude there was sufficient evidence to support defendant's conviction for street terrorism. But because the trial court ordered that his sentence in count 1 run concurrent with his sentence in count 3, the judgment must be modified accordingly upon remand.

I

FACTS

A. Counts 1 and 2 (G031642)

Pursuant to the parties' agreement, the evidence relied upon by the trial court in reaching its verdict was based on the preliminary hearing transcript and various police reports. The facts underlying defendant's convictions for unlawful taking of a vehicle (count 1) and street terrorism (count 2) are fairly succinct. A vehicle had been left running with the keys in the ignition in the victim's driveway. The victim came out of his home to discover the vehicle missing and a bicycle left behind in the driveway.

After taking the car, defendant parked it a short distance away near his home. When a neighbor asked him about it, he told her the car belonged to his cousin. Defendant then spoke with the neighbor's roommate about a job reference and asked the roommate to show him where the job site was located. After the two drove to the job site, the roommate asked defendant about the car. Defendant said the car belonged to a cousin who "lent it to him to go look for a job." The victim saw defendant next to the vehicle shortly thereafter and informed the police of the vehicle's location. Defendant was arrested nearby.

In prior contacts with the police, defendant admitted to being a member of the Alley Boys gang. Eleven months before the present offense, defendant was arrested for being in possession of a stolen vehicle. At that time, he told the arresting officer that he had gotten the car from his fellow gangs members a few days earlier and that he knew the car had been stolen from a location in Anaheim.

A gang expert testified at the preliminary hearing that auto theft was one of the primary activities of the Alley Boys gang. The expert further testified that the vehicle in the present case had been stolen in an area claimed by both the Alley Boys and a rival gang called Delhi. The expert explained that gang members commit crimes to gain respect individually, to enhance the gang's reputation, and to instill fear in and intimidate residents of the area as well as rival gang members. While conceding that gang members also commit crimes without any intent to benefit their gang, the expert opined defendant committed the present offense to promote, further, or assist his gang's criminal activities.

B. Counts 3, 4, and 5 (G031469)

Defendant's convictions for attempted kidnapping and exhibiting a loaded firearm stem from two altercations which occurred about six hours apart one morning outside of the house where he and his girlfriend, Joanna Lopez, were living. The house belonged to Lopez's aunt. Around 2:00 or 3:00 a.m., defendant pushed Lopez into some

rosebushes during an argument. When Lopez's cousin, Eddy Diaz, came to her aid, defendant pointed a gun at him and then hit him in the face with it, leaving Diaz with a black eye. The fight ended, and everyone went back inside the house to sleep.

Roughly six hours later, Lopez awoke to find defendant pointing a gun at her head; he forced her to go outside. Diaz heard them arguing and came to Lopez's aid again. Defendant pointed the gun at Diaz; after Diaz tackled him to the ground, they struggled over the gun. Another cousin came out to help Diaz and together they were able to get the gun away from defendant. Diaz took the gun into the house and removed a magazine containing two bullets, items the police later recovered after being called to the scene.

Despite having made statements to the police to the contrary, Lopez testified she did not see defendant with a gun during the first incident, and she claimed she never saw him point the gun at Diaz during the second incident. She also denied telling the police that defendant put a gun to her head that morning. She admitted, however, she still loves defendant and considers him to be her boyfriend.

II

DISCUSSION

A. Counts 1 and 2 (G031642)

1. *Sufficiency of the Evidence*

Defendant contends there was insufficient evidence to support his conviction for street terrorism (§ 186.22, subd. (a)). We disagree.

"In assessing a sufficiency-of-evidence argument on appeal, we review the entire record in the light most favorable to the prevailing party to determine whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People*

v. Wader (1993) 5 Cal.4th 610, 640.) We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.)

Under section 186.22, subdivision (a), "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment . . . ." The provision "punishes active gang participation where the defendant promotes or assists felonious conduct by the gang. It is a substantive offense whose gravamen is the participation in the gang itself." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. & italics omitted.) Thus, it "applies to the perpetrator of felonious gang-related criminal conduct . . . ." (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.)

Here, the gang expert's testimony was used to link defendant's past gang activity to the present offense in an attempt to show defendant stole the vehicle with the intent to promote or further felonious conduct by his gang. It is well settled that expert testimony about gang culture and habits is the type of evidence on which the trier of fact may rely to reach a verdict on a gang-related offense or to make a finding on a gang allegation. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) We do not reweigh such evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "'If circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citations.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

Viewing the evidence here in the light most favorable to the prosecution, we conclude, as did the trial court, that there was sufficient evidence to show defendant stole the vehicle with the requisite intent to further the criminal activities of his street gang. We recently considered the same issue in the context of a drug offense in *People v.*

Ferraez (2003) 112 Cal.App.4th 925. There, the defendant claimed he planned to use the drugs found in his possession for his own personal benefit; scant evidence existed beyond his gang membership to show the crime was gang related. We noted that by itself, the gang expert's testimony would not have been sufficient to support the defendant's conviction for street terrorism. We nevertheless concluded sufficient evidence existed because, in addition to the gang expert's testimony, there was evidence that the crime occurred in an area where drug sales were controlled by a particular gang, and the defendant had admitted he sought permission from that gang to sell drugs in the area. (*Id*. at p. 931.) Hence, the facts associated with the charged crime affirmatively connected the crime to gang activity.

Similarly here, the gang expert testified that auto theft was one of the primary activities of the Alley Boys gang and that the vehicle had been stolen in an area claimed by the Alley Boys and a rival gang. The expert explained that gang members commit crimes to gain respect individually, as well as to enhance the gang's reputation. The expert's opinion, by itself, would not have been sufficient to support defendant's conviction for street terrorism. But here it was coupled with evidence of defendant's prior conviction for possessing a stolen vehicle and statement that it had been passed on to him by other gang members.

We realize the issue is a close one. The victim was not a rival gang member, and defendant's explanations to the neighbor and roommate, neither of whom were reported to have any gang affiliation, that he borrowed the car from a cousin, did not fit with the gang expert's theory. Nevertheless, it was entirely reasonable for the trier of fact to rely on the expert's testimony and evidence of the prior offense to find defendant stole the vehicle with the intent to further the gang's criminal conduct.

2. *Error in Abstract of Judgment*

Defendant contends the abstract of judgment erroneously reflects that his three-year sentence in count 1 is to be served consecutive to his sentence in count 3. The Attorney General agrees, and so do we.

Before the court sentenced defendant on counts 1 and 2, it had imposed sentence on counts 3, 4, and 5 for an aggregate term of 12 years and 6 months. Prior to the court trial on counts 1 and 2, the parties clarified with the court that, if it found defendant was guilty of those counts, any resulting sentence would be imposed concurrent with the earlier sentence. After the court found defendant guilty as charged, it imposed a three-year sentence on count 1 stating, "[t]hat sentence is concurrent with any other sentence." The court then imposed a two-year sentence on count 2 "concurrent with any other sentence." In similar fashion, the court imposed a three-year sentence on the gang allegation "that is concurrent as well with any other sentence." The minute order from the sentencing hearing likewise reflects the "[s]entence imposed to be concurrent with any other sentence now being served."

Instead of reflecting a total sentence of 12 years and 6 months, the abstract of judgment, which sets forth defendant's sentences on all five counts, incorrectly shows an aggregate sentence of 15 years and 6 months. We may correct such clerical errors at any time by ordering the correction of the abstract of judgment to accurately reflect the sentence orally pronounced. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We therefore order that, upon remand, the abstract of judgment be amended to reflect a concurrent sentence on count 1.

B. Counts 3, 4, and 5 (G031469)

Defendant contends his convictions for exhibiting a loaded firearm in violation of section 417, subdivision (b) must be reversed for lack of evidence and because the trial court failed to instruct the jury on an element of the offense, namely that

it take place at a day care center or similar facility. The Attorney General concedes the trial court erred, but argues we may reduce the felony convictions to misdemeanors under section 417, subdivision (a).

In connection with the altercations involving Lopez and Diaz, defendant was charged with two felony counts of exhibiting a loaded firearm pursuant to section 417, subdivision (b), which makes it a crime for "[e]very person who, except in self-defense, in the presence of any other person, draws or exhibits any loaded firearm in a rude, angry, or threatening manner, or who, in any manner, unlawfully uses any loaded firearm in any fight or quarrel upon the grounds of any day care center, as defined in Section 1596.76 of the Health and Safety Code, or any facility where programs, including day care programs or recreational programs, are being conducted for persons under 18 years of age, including programs conducted by a nonprofit organization, during the hours in which the center or facility is open for use . . . ." Anyone who violates this provision "shall be punished by imprisonment in the state prison for 16 months, or two or three years, or by imprisonment in a county jail for not less than three months, not more than one year." (§ 417, subd. (b).)

In discussing the jury instructions, defense counsel argued that, to be a felony, the charged offense had to be committed on the grounds of a day care center or other recreational facility as stated in the statute. Since there was never any dispute that the altercations occurred outside of a private residence, and not upon the grounds of a day care center, defendant took the position he could not be charged with violating section 417, subdivision (b). The prosecutor, however, countered that the language of section 417, subdivision (b) "describe[d] two separate and distinct crimes," one which required that the offense be committed on the grounds of a day care center and one which did not. In the prosecutor's view, the first crime proscribed in subdivision (b) occurs when a person draws or exhibits a loaded firearm in a rude, angry, or threatening manner in the

presence of another; only the second crime, which prohibits using a loaded firearm in any fight or quarrel, has to be committed on the grounds of a day care center.

The court accepted the prosecutor's interpretation of the statute despite "see[ing] some problems with that statutory construction . . . ." The jury ultimately was instructed: "Every person who except in self-defense in the presence of another person draws or exhibits any loaded firearm in a rude, angry, or threatening manner is guilty of a violation of Penal Code section 417, subdivision (b). [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person in the presence of another person drew or exhibited a loaded firearm; [¶] 2. That person did so in a rude, angry, or threatening manner; and [¶] 3. The person was not acting in lawful self-defense." This was error.

The plain language of the provision is susceptible of two interpretations, the one urged by defendant and the one accepted by the trial court. By its terms, the provision prohibits two types of conduct – drawing or exhibiting a loaded firearm in a rude, angry or threatening manner and unlawfully using a loaded firearm in any fight or quarrel. The issue is whether both types of conduct must occur on the grounds of a day care center before a defendant can be convicted of a felony under this subdivision.

To resolve this ambiguity, we look to the other relevant provisions of the same statute and to the provision's legislative history. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192-193; *People v. Jefferson* (1999) 21 Cal.4th 86, 94.) In doing so, we conclude that both support defendant's view.

The conduct proscribed in subdivision (b) of section 417, is nearly identical to that proscribed in subdivision (a)(2), which states that it is a crime for "[e]very person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel . . . ." (§ 417, subd. (a)(2).)

The crime is a misdemeanor unless it was committed in a public place. (§ 417, subd. (a)(2)(A), (B).)

One significant difference between the provisions is the reference to the locations of the crime. Those locations are generally referred to in subdivision (a)(2) of section 417 as public and nonpublic places, whereas subdivision (b) specifically refers to "the grounds of any day care center . . . or any facility where programs . . . are being conducted for persons under 18 years of age . . . during the hours in which the center or facility is open . . . ." (§ 417, subd. (b).) To avoid redundancy and inconsistency (see *Legacy Group v. City of Wasco* (2003) 106 Cal.App.4th 1305,1315), we interpret subdivision (b), the more specific provision, as being limited to instances where the proscribed offense is committed on the grounds of a day care center or other youth facility. This interpretation is more logical than the one urged by the prosecutor and accepted by the trial court. Otherwise, exhibiting a loaded firearm in a rude, angry, or threatening manner would be arbitrarily punishable as a misdemeanor under one subdivision and as a "wobbler" under the other.

Our duty is to reconcile conflicting provisions in a manner that carries out the Legislature's intent. (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.) Turning to the legislative history behind subdivision (b) of section 417, we are confident our interpretation of its limited application is correct.

In a letter to the governor requesting support for Senate Bill No. 377, which enacted the challenged provision, the author of the bill wrote that the proposed addition of subdivision (b) to section 417 would "increase the penalty for brandishing a firearm on the grounds of a day-care center from a misdemeanor to a wobbler." (Sen. Thompson, author of Sen. Bill No. 377 (1991-1992 Reg. Sess.), letter to Governor, Sept. 18, 1991.)

The summary digest provides a more detailed explanation of Senate Bill No. 377. "Under existing law, every person who, except in self-defense, in the presence of any other person draws or exhibits any firearm, whether loaded or unloaded, in a rude,

angry, or threatening manner or who in any manner unlawfully uses the firearm in any fight or quarrel is guilty of a misdemeanor punishable by imprisonment in the county jail for a term of not less than 3 months. [¶] This bill would additionally provide that every person who carries out the above conduct with any loaded firearm upon the grounds of a day care center, as defined, or any other facility or center where specified programs are conducted for persons under 18 years of age during hours in which the center or facility is open for use shall be punished by imprisonment in the state prison for one, 2, or 3 years, or by imprisonment in the county jail for a term of not less than 3 months nor more than one year." (Legis. Counsel's Dig., Sen. Bill No. 377, 4 Stats. 1991 (1991-1992 Reg. Sess.) Summary Dig., p. 566.)

Analysis of later legislation amending the penalties for violating the provision indicates the Legislature was aware of the ambiguity in the language of section 417, subdivision (b). "Current law includes a higher penalty for brandishing or using a loaded firearm in a day care center . . . than for similar crimes in other places. The language of this provision, Penal Code section 417, subdivision (b), is not particularly clear. It can be read as applying an alternate felony-misdemeanor penalty to any brandishing of a loaded firearm, or the quarrelsome use of a loaded gun at a day care or youth recreation center. [¶] The legislative history of the bill that created the higher penalties for day care brandishing . . . indicates that the intent of the Legislature was to require that the brandishing have occurred in a day care center before the more serious crime could be proved." (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2523 (1999-2000 Reg. Sess.) as amended Apr. 12, 2000, pp. 5-6, at <http://leginfo.ca.gov/pub/99-00/bill/asm/ab_2501-2550/ab_2523_cfa_20000606_163005_sen_comm.html> [as of Nov. 18, 2003].)

Based on our view that subdivision (b) of section 417 is intended to apply only to proscribed conduct occurring on the grounds of a day care center or other youth facility, and since it is undisputed that the challenged offenses were not committed in

such a location, defendant's convictions under this provision cannot stand. The Attorney General contends that rather than vacate the felony convictions altogether, we may reduce them to misdemeanors because there is adequate evidence to support convictions under section 417, subdivision (a)(2)(B). We agree.

Appellate courts are authorized to "reduce the degree of the offense." (§ 1260.) "'Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. [Citations.]'" (*People v. Edwards* (1985) 39 Cal.3d 107, 118; see also *People v. Howard* (2002) 100 Cal.App.4th 94, 99 ["an appellate court may reduce a conviction to a lesser included offense if the evidence supports the lesser included offense but not the charged offense"].)

Defendant was charged with and convicted of exhibiting a loaded firearm in a rude, angry, or threatening manner. The overwhelming evidence shows he committed this crime twice in one day. Consequently, we reduce his convictions to the lesser included misdemeanor offenses of exhibiting a loaded firearm under section 417, subdivision (a)(2)(B) and remand the matter to the trial court for resentencing on these counts.

III

DISPOSITION

Appellant's convictions in counts 4 and 5 are modified to find him guilty of the misdemeanor offense of exhibiting a loaded firearm in violation of section 417, subdivision (a)(2)(B). As so modified, the judgments are affirmed, and the matter is remanded to the superior court for resentencing on counts 4 and 5. Upon remand and

resentencing, the superior court is further directed to correct the judgment to show appellant's sentence in count 1 as concurrent with his sentence on the remaining counts.

CERTIFIED FOR PARTIAL PUBLICATION

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.