

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE BABY BURNELL,

Defendant and Appellant.

G032634

(Super. Ct. No. 02WF1367)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed.

A.M. Weisman, 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, Gil P. Gonzalez, David Delgado-Rucci, and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Joe Baby Burnell guilty of attempted premeditated murder (Pen. Code, §§ 664, 187, subd. (a))(count 1),¹ second degree robbery (§§ 211, 212.5, subd. (c), & 213, subd. (a)(2)) (count 2), unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a)) (count 3), receiving stolen property (§ 496, subd. (a)) (count 4), mayhem (§ 203) (lesser included offense of count 6), and street terrorism (§ 186.22, subd. (a)) (count 9, renumbered count 7). The jury also found true allegations that defendant personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) (attached to counts 1, 2, and 6), and counts 1, 2, 3, 4, and 6 were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). The defendant admitted allegations he had served a prior prison term (§ 667.5, subd. (b)), had a serious felony conviction (§ 667, subd. (a)(1)), and two strikes (§ 667, subds. (d) & e(2)).

Defendant was sentenced to an indeterminate prison term of life on count 1, with a minimum parole eligibility date of 45 years, to which was added a consecutive 25-years-to-life firearm enhancement, an enhanced consecutive 29-years-to-life prison term for count 3, and a consecutive 25-years-to-life prison term for street terrorism. To that was added five more years for the serious felony enhancement pursuant to section 667, subdivision (a)(1). Execution of all other sentences was stayed pursuant to section 654.

On appeal, defendant asserts: (1) he cannot be convicted of both taking and receiving the same vehicle; (2) counts 1, 2, 3, 4, and 6 are necessarily included offenses of the street terrorism conviction on count 7; (3) counsel was ineffective for a variety of reasons; (4) the court committed several sentencing errors; (5) the street terrorism count and gang enhancements were not supported by substantial evidence; and (6) the 25-years-

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

to-life firearm enhancement constitutes cruel and unusual punishment. We reject all of defendant's contentions and affirm the judgment.

FACTS

James Earhart was the owner and sole employee of a Garden Grove business known as Holly's Coin and Collectibles (Holly's Coin). On June 13, 2002, defendant entered the store and sold some coins to Earhart. As he was leaving, defendant told Earhart he had some more coins and asked if he could bring them back the next day. While defendant was in Holly's Coin, another black man was seen walking the perimeter of the shopping center while still another waited for defendant in a silver Toyota.

At about 4:30 p.m. the next day, defendant returned in a stolen maroon GMC minivan in the company of Marquis Iben Alashanti and DeAngelo Clay. Defendant entered Holly's Coin. Alashanti entered a nearby store that had a view of Holly's Coin, but left after observing the store's employee watching television at the rear of the store. After Earhart finished with another customer, defendant approached the counter and laid out three rows of coins. As Earhart began looking at the coins, defendant came around the counter and grabbed Earhart from behind, put a gun to the back of his head, and said "I'm going to kill you, you mother fucker." Earhart struggled, but defendant put the gun to Earhart's right temple near the right eye and pulled the trigger. The bullet exited Earhart's left temple near the left eye. Earhart fell to the floor, still alert, but in pain and shock. He pretended he was dead, and felt someone go through his pockets. Earhart heard the sound of the buzzer on the store's security door, heard someone else come into the store, heard whispering, and then heard things being moved around in the direction of a corner safe. When Earhart heard the security door buzzer again, and it became silent in the store, he was able to crawl to the door,

unlatch it, and crawl outside where he yelled for help. Earhart lost both eyes, and his senses of smell and taste.

Defendant and his accomplices took merchandise worth, by Earhart's estimate, \$16,000 to \$20,000, some currency, and some personal mortgage refinancing papers. The stolen maroon GMC minivan was recovered shortly after 8:00 o'clock that evening in a parking lot half a mile from Holly's Coin. The steering wheel was stained with blood and Earhart's refinancing papers were found within the vehicle. Investigators also recovered a black plastic bag containing three duffle bags, black gloves, and a cardboard box. One of the duffle bags contained a small pry bar.

Clay's palm print was found on the front passenger door of the minivan. Alashanti's fingerprints were found on the black plastic bag recovered from the vehicle. Defendant's fingerprints were found on the same black plastic bag, the cardboard box, and Earhart's papers. Inside Holly's Coin's premises, defendant's fingerprints were found on the display case.

Deputy Sheriff William Pickett of the Los Angeles County Sheriff's Department testified as an expert on the 11 Deuce Hoover Crips gang (11 Deuce Hoover).² He opined 11 Deuce Hoover was a criminal street gang of about 160 members whose primary activities were narcotic sales, shootings, assaults with deadly weapons, murders, car thefts, residential burglaries and weapons violations, and that defendant was an active member of the 11 Deuce Hoover gang on June 14, 2002. Pickett based his opinion on defendant's tattoos, various field information cards generated in the course of several contacts with law enforcement in 1999, and his opinion defendant's tattoos were "earned," not "given." It was also Pickett's opinion that the Earhart robbery was committed for the benefit of, and in association with, both the Rolling 30's Harlem Crips (Rolling 30's) and the 11 Deuce Hoover gangs.

² 11 Deuce Hoover is shorthand for 112th Street Hoover Crips.

Officer Jamie Smerdel of the Los Angeles Police Department gave expert testimony about the Rolling 30's gang. Smerdel opined the Rolling 30's gang was an active criminal street gang whose primary activities were robberies, drive-by shootings, murders and attempted murders, carjacking, narcotics sales, and weapons violations. Smerdel also opined Alashanti was a member and an active participant in the Rolling 30's gang as of the date of the Earhart robbery, June 14, 2002. Smerdel based her opinion on Alashanti's admission of his membership in 1999 when a weapon was found in a car in which he was a passenger,³ the numerous tattoos on Alashanti's body associating himself with the Rolling 30's, and contacts with police during investigations of criminal activities in 1990 and 1994.

Answering a hypothetical question based on facts in evidence, Smerdel opined the Earhart robbery was committed for the benefit of, and in association with both the Rolling 30's and the 11 Deuce Hoover gangs, and that an alliance between the Rolling 30's and the 11 Deuce Hoovers had been affirmatively documented in August 2002, two months after the Earhart robbery. Specifically, Smerdel had learned the Rolling 30's, the 11 Deuce Hoovers, and Nothing But Trouble, a gang having its origins on Haldale Street, had formed an alliance called the Triple H (Thirties, Hoover, and Haldale).

DISCUSSION

The Dual Conviction under Vehicle Code Section 10851 and Section 496

Defendant contends he may not be convicted of *both* taking a vehicle (Veh. Code, § 10851, subd. (a)) and receiving the same vehicle as stolen property (§ 496, subd. (a)). Vehicle Code section 10851, subdivision (a) prohibits *both* the unlawful *taking* of a

³ Alashanti also admitted membership in the Rolling 30's while being interrogated after his arrest in connection with the Earhart robbery.

vehicle and the unlawful *driving* of a vehicle.⁴ While it is true one may not be convicted of unlawfully taking a vehicle with intent to permanently deprive the owner of possession and receiving that same vehicle as stolen property, the “unlawful *driving* of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete” (*People v. Garza* (2005) 35 Cal.4th 866, 871 (*Garza*)). “Therefore, a conviction . . . for post-theft driving is not a theft conviction and does not preclude a conviction under section 496(a) for receiving the same vehicle as stolen property.” (*Ibid.*)

Here, count 3 of the information charged defendant with both taking and driving the vehicle and the jury verdict does not reflect which prong of the statute was violated. The prosecutor argued to the jury, however, that “[w]e know that [defendant] drove the vehicle. There is also an inference from the evidence that he took the vehicle. The evidence definitely shows he drove it.”

After the parties completed their briefing, the California Supreme Court decided *Garza*, which, on similar facts, resolved the issue raised by appellant. The high court held that where “the evidence is such that it is not reasonably probable that a properly instructed jury would have found that the defendant took the vehicle but did not engage in any post-theft driving, a reviewing court may construe the Vehicle Code section 10851(a) conviction as a conviction for post-theft driving and on this basis may uphold the conviction under Penal Code section 496(a) for receiving the same vehicle as stolen property.” (*Garza, supra*, 35 Cal.4th at p. 872.) So it is in the case at bar. Eyewitness testimony identified the *driver* of the vehicle as the first person to enter Holly’s Coin, and Earhart identified *defendant* as that first person. Eyewitness testimony also identified the driver who first entered the store as the driver who also drove the

⁴ Vehicle Code section 10851, subdivision (a) provides in pertinent part: “Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, . . . is guilty of a public offense”

vehicle away. In sum, the evidence was overwhelming that defendant *drove* the stolen vehicle. It is not reasonably probable that a jury would conclude that defendant took the vehicle but did not drive it. Thus, under *Garza*, defendant's convictions for a violation of Vehicle Code section 10851, subdivision (a) *and* section 496, subdivision (a) may both stand.

The People Did Not Improperly "Splinter" Its Prosecution

Defendant argues defendant's convictions of attempted murder and mayhem cannot both stand because both were based on a single act of shooting Earhart. According to defendant, the multiple convictions were based upon "an improper splintering of a single offense."

Defendant misapprehends the rule upon which he relies. Simply put, the rule defendant attempts to invoke prohibits multiple convictions of the *same crime* based upon a single act or course of conduct. But the rule against "splintering" does not prohibit convictions of *different crimes* based upon a single act or course of conduct. The principal case upon which defendant relies, *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, states the rule plainly. "[A] charge of *multiple counts of violating a statute* is appropriate only where the actus reus prohibited by the statute — the gravamen of the offense — has been committed more than once." (*Id.* at p. 349, italics added.) Thus, in *Wilkoff*, the court held that one instance of driving under the influence supported only one charge under Vehicle Code section 23153, even though the defendant caused injury to several persons. (*Wilkoff* at p. 353.) The rule against "splintering" was similarly applied to prevent multiple convictions under the *same statute* in the other cases cited by defendant. (See, e.g., *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1162-1164 [a single course of conduct of felony evading a police officer could support only one charge under Vehicle Code 2800.2, subd. (a), no matter how many police officers joined in the chase]; *People v. Brito* (1991) 232 Cal.App.3d 316, 326 ["A defendant commits only one

robbery no matter how many items he steals from a single victim pursuant to a single plan or intent”].)

Here, in contrast, defendant was convicted of *different* criminal offenses — attempted murder and mayhem — based upon a single act. Section 954 expressly *permits* convictions of different crimes based on the same act, although section 654 then prohibits multiple punishment. The California Supreme Court explained the relationship between sections 954 and 654 with clarity in *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*): “A person may be convicted of, even if not punished for, more than one crime arising out of the same act or course of conduct. ‘Section 954 sets forth the general rule that defendant may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct. It provides in relevant part: “An accusatory pleading may charge two or more different offenses connected together in their commission, or *different statements of the same offense* The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged” (Italics added.)’ [Citation.] Section 954, which permits multiple *conviction*, meshes neatly with section 654, which prohibits multiple *punishment* for the same ‘act or omission.’ When multiple conviction is permitted under section 954, but multiple punishment is prohibited under section 654, the court, as in this case, simply stays execution of the sentence for the excess convictions.” (*Id.* at p. 704.)

The *Ortega* court then pointed out the *exception* to the general rule. “[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses.’ [Citation.] “‘The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.’”” (*Ortega, supra*, 19 Cal.4th at p. 704.) Defendant’s convictions of attempted premeditated murder and mayhem do not come within the exception to the general rule. Neither offense is necessarily included

in the other. One may be guilty of attempted murder even though the victim suffers no injury since injury of the victim is not an element of the crime. (See §§ 664, 189.) On the other hand, conviction of mayhem requires that the victim be deprived of a member of his body, or that the body member be disabled, disfigured, or rendered useless, or that the tongue be cut or disabled, the eye be put out, or the nose, ear or lip be slit (§ 203), but the specific intent to kill is not an element of mayhem as it is in the crime of attempted murder.

Here, defendant was appropriately convicted of both attempted premeditated murder and mayhem, even though both crimes were based on the same act of shooting Earhart through the head. Thereafter, the court correctly imposed sentence of 25 years to life on the mayhem conviction and then stayed execution of sentence pursuant to section 654. There was no error.

Attempted Murder, Robbery, Vehicle Theft, Receiving Stolen Property, and Mayhem Are Not Necessarily Included Offenses of Street Terrorism

Defendant next contends that counts 1 (attempted murder), 2 (robbery), 3 (vehicle theft), 4 (receiving stolen property), and 6 (mayhem) are necessarily included in the street terrorism offense and conviction of these counts must therefore be stricken. Defendant's argument is without merit.

“Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.” (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Manifestly, the statutory elements of street terrorism do not include all elements of attempted murder, robbery, vehicle theft, receiving stolen property and mayhem. Section 186.22, subdivision (a) provides: “Any 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” Thus, utilizing the statutory elements, we see that one can be convicted of street terrorism without ever committing an attempted murder, a robbery, a vehicle theft, receiving stolen property, or mayhem. Promoting or furthering any felonious criminal conduct will do. Since the elements of the purportedly included offenses are not common to street terrorism, they are not necessarily included offenses under the statutory test.

Recognizing the inherent problem in using the statutory test to determine what constitutes a necessarily included offense of street terrorism, defendant bases his argument on the so-called “pleadings test.” Defendant begins by correctly quoting the allegations of the operative information: “On or about June 14, 2002, JOE BABY BURNELL, in violation of Section 186.22(a) of the Penal Code (STREET TERRORISM), a FELONY, did willfully, unlawfully and actively participate in a criminal street gang, to wit: 112TH STREET HOOVER CRIPS, with knowledge that its members engage in and have engaged in a pattern of criminal gang activity and did willfully promote, further and assist in Felony criminal conduct by gang members.” The recitation of the street terrorism charge as alleged in the information defeats defendant’s argument under the pleadings test. The allegation does *not* allege any particular felony that was promoted, furthered, or assisted, and specifically does not mention attempted murder, robbery, vehicle theft, receiving stolen property, or mayhem.

Defendant glosses over this problem and bases his argument on events occurring at trial, viz., the court’s instructions to the jury, and the prosecutor’s arguments, both of which referenced these five offenses as satisfying the necessary felonious conduct under the street terrorism charge. But the pleadings test does not permit the use of events at trial to add to the language of the information. (*Ortega, supra*, 19 Cal.4th at p. 698.) “There are several practical reasons for not considering the evidence adduced at trial in

determining whether one offense is necessarily included within another. Limiting consideration to the elements of the offenses and the language of the accusatory pleading informs a defendant, prior to trial, of what included offenses he or she must be prepared to defend against. If the foregoing determination were to be based upon the evidence adduced at trial, a defendant would not know for certain, until each party had rested its respective case, the full range of offenses of which the defendant might be convicted. Basing the determination of whether an offense is necessarily included within another offense solely upon the elements of the offenses and the language of the accusatory pleading promotes consistency in application of the rule precluding multiple convictions of necessarily included offenses, and eases the burden on both the trial courts and the reviewing courts in applying that rule.” (*Ibid.*) Limiting our review to the face of the information, as directed by *Ortega*, compels us to conclude the offenses of attempted murder, robbery, vehicle theft, receiving stolen property, and mayhem are not necessarily included in the offense of street terrorism under either the statutory test or the pleadings test.

Defendant also argues the jury should have been instructed with CALJIC No. 17.03 to advise the jury that conviction of street terrorism was an alternative to conviction of attempted murder, robbery, vehicle theft, receiving stolen property, and mayhem. But having reached our conclusion that none of these offenses are necessarily included in the others, defendant’s contention regarding the jury instruction must necessarily fail. These counts were not alternative. Defendant could lawfully be convicted of all six.

Defense Counsel’s Failure to Request Bifurcation of the Gang Count and Enhancements Caused No Prejudice to Defendant

Defendant claims his trial counsel provided ineffective assistance by not asking the court to sever the trial of the street terrorism count and to bifurcate the gang

enhancements.⁵ “To establish ineffective assistance, defendant bears the burden of showing, first, that counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel’s error, it is reasonably probable that the verdict would have been more favorable to him.” (*People v. Hawkins* (1995) 10 Cal.4th 920, 940; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

Defendant fails to sustain his burden under both prongs. Tellingly, defendant fails to cite any case in which the court found prejudicial error for joining the trial of a street terrorism charge with the trial of other offenses committed at the same time, and we have not found any. It appears highly unlikely a motion to sever would have been granted had it been made.

First, section 954 permitted the joinder. All of the crimes charged against defendant arose out of a single course of conduct. “An accusatory pleading may charge two or more different offenses connected together in their commission” (§ 954.) “The burden is on the party seeking severance to *clearly establish* that there is a substantial danger of prejudice requiring that the charges be separately tried.” (*People v. Bean* (1988) 46 Cal.3d 919, 938, italics added.)

Second, the factors the court would have considered had the motion to sever been made were these: “(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does

⁵ Actually, defendant confuses “severance” of a substantive count with “bifurcation” of an enhancement by arguing defendant’s counsel should have moved to “bifurcate” both the street terrorism count and the gang enhancements attached to other counts.

joinder of the charges convert the matter into a capital case.” (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.) The fourth factor is not relevant to the instant case. And while the gang evidence may not have been admissible against defendant if the street terrorism count had been severed and the gang enhancements bifurcated, it was nevertheless relevant to the charges against Alashanti in which the prosecution proceeded on aiding and abetting and conspiracy theories. Thus to entirely eliminate the gang evidence would have required a severance not only of the street terrorism count and the bifurcation of the gang enhancements. A severance of the entire case against Alashanti would also have been required. “The benefits to the state of joinder [are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process. These considerations outweigh the minimal likelihood of prejudice through joinder of the charges in this case.” (*People v. Bean, supra*, 46 Cal.3d at p. 939.) Given these considerations, we believe it unlikely the court would have granted a motion to sever the gang evidence had it been made.

Moreover, with respect to the third factor — the coupling of a weak case with a strong case — the strong case here was the robbery and attempted murder of Earhart. The impact of the relatively benign gang evidence paled in comparison to the direct evidence of the depraved, senseless, and brutal acts committed by defendant. If anything, the brutal nature of the attempted murder, robbery, and mayhem would more likely prejudice defendant in their consideration of the street terrorism charge. But a separate prosecution of street terrorism would have required proof defendant “willfully, promote[d], further[ed]s, or assist[ed] . . . felonious criminal conduct” (§ 186.22, subd. (a).) And to establish this element of street terrorism, the People relied upon the

crimes charged in the other counts of the information. Thus, defendant would not have benefited by having the street terrorism charge tried separately.

If a severance of the street terrorism charge was highly unlikely, the bifurcation of the gang enhancements was even more unlikely. Virtually all of the gang evidence which would be admissible on the gang enhancements would also be admissible on the street terrorism charge. Thus the jury would hear the evidence during trial of the substantive gang offense. Further, “[a]ny evidence admitted solely to prove the gang enhancement was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendants’ actual guilt.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.) Accordingly, a consideration of the above factors weigh against the probability the court would have granted a severance and bifurcation motion in this case. We cannot say counsel’s failure to make these motions fell “below an objective standard of reasonableness under prevailing professional norms.” (*People v. Hawkins, supra*, 10 Cal.4th at p. 940.)

Finally, even were we to assume counsel was deficient, there was no prejudice. The evidence against defendant was overwhelming. Without again reciting the evidence in detail, suffice it to note that defendant’s fingerprints were found both on the display case inside Holly’s Coin and on Earhart’s personal papers found inside the stolen van. It is not reasonably probable the verdict would have been more favorable to defendant had a motion to sever and bifurcate been successful.

Counsel Was Not Deficient For Failing to Object to “Gang Profile” Evidence

Defendant next argues his counsel was deficient, and he thereby did not have effective assistance of counsel, because no objection was made to the testimony of gang experts Smerdel and Pickett. Defendant asserts that “gang profile” evidence is

inadmissible, and argues that the expert opinions of Smerdel and Pickett were nothing more than inadmissible profile evidence. We disagree.

“A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime.” (*People v. Robie* (2001) 92 Cal.App.4th 1075, 1084.) And it is true that “[p]rofile evidence is generally inadmissible to prove guilt.” (*Ibid.*) But that is not how the expert opinions were presented or argued in this case. The People did not argue, nor did the expert witnesses suggest, that defendant was proved guilty of attempted premeditated murder, robbery, unlawful taking of a vehicle, receiving stolen property, and mayhem by reason of his membership in a gang. Those crimes were proved by eyewitness testimony and physical evidence. The gang evidence was used to prove the substantive offense of street terrorism, and the gang enhancements attached to the remaining counts. And it is well-established the subject matter of the culture and habits of criminal street gangs is permissible expert testimony in a prosecution under the STEP Act (§ 186.20 et seq.) because this type of information is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) With the law squarely against defendant on the issue of the admissibility of the expert testimony regarding gangs, an objection would have been futile. The failure to make a futile objection does not constitute ineffective assistance of counsel. (*People v. Diaz* (1992) 3 Cal.4th 495, 562.)

As in defendant’s previous argument, even were we to assume counsel was deficient, there was no prejudice because of the overwhelming evidence of defendant’s guilt. It is not reasonably probable the verdict would have been more favorable to defendant had the gang evidence been somehow excluded.

Defendant's Counsel Was Not Deficient for Failing to Request a Pinpoint Instruction

Defendant next argues he was denied effective assistance of counsel because he did not request the jury be instructed that gang membership cannot substitute for proof beyond a reasonable doubt of the elements of the charged offenses. The argument is wholly without merit.

The jury was instructed with CALJIC No. 2.50 which advised the jurors that evidence of uncharged crimes may only be used as foundation for the expert gang testimony and with respect to the street terrorism count, and that the evidence “may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.” The instruction ends with the admonition, “You are not permitted to consider such evidence for any other purpose.”

But, defendant nevertheless argues, the jury should have been told that *gang membership* is not a *substitute* for proof beyond a reasonable doubt of the elements of the charged offense. Defendant asserts that “[m]embership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting” (*Mitchell v. Prunty* (9th Cir. 1987) 107 F.3d 1337, 1342) and “evidence of gang membership cannot itself prove that an individual has entered a criminal agreement to attack members of rival gangs.” (*United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1246) But *Prunty* and *Garcia* were cases in which the *only* evidence of aiding and abetting was gang membership (*Prunty*) and the *only* evidence of a conspiracy was gang membership (*Garcia*). Here, the prosecution’s theory and proof was that defendant was the direct perpetrator, and the People did not attempt to show defendant was derivatively liable as an aider and abettor or as a coconspirator. Moreover, the People never contended that gang membership, by itself, constituted proof of any specific element of the crimes charged except, of course, the street terrorism count and the gang enhancements. The jury was given precise instructions on the specific elements of each charged crime. In light of that, and in light of the evidence of

defendant's direct involvement with the charged crimes, why would any juror, for example, entertain the notion that gang membership, by itself, would *substitute* for proof that defendant committed "[a] direct but ineffectual act . . . towards killing another human being," or that defendant had "a specific intent to kill unlawfully another human being." (CALJIC No. 8.66.) We conclude it more likely the jurors would have reacted, had they been given the proposed instruction, by thinking, "Whoever said that gang membership could substitute as proof of all elements of the charged crimes?"

Defendant's proposed instruction is properly relegated to counsel's closing argument to the jury, and not a very effective one at that, but it would not have been an appropriate instruction to be given by the court on the state of the evidence in this case. Counsel was not deficient in failing to request it. And given the overwhelming evidence of defendant's guilt, there could be no prejudice either.

Imposition of a Consecutive Sentence for Street Terrorism Did Not Constitute Impermissible Multiple Punishment

Defendant contends the imposition of a consecutive sentence for street terrorism punishes the same conduct as the attempted premeditated murder, thereby violating section 654. Defendant is wrong.

Another panel of our court addressed this argument in *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*), a case neither party has cited. In *Herrera* the court held that a defendant convicted of attempted murder and street terrorism may be punished for both crimes notwithstanding the fact they arose from a single act or an indivisible course of conduct because the perpetrator possessed "two independent, even if simultaneous objectives." (*Id.* at p. 1468; *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1393-1394.) "In the attempted murder[], [defendant's] objective was simply a desire to kill." (*Herrera, supra*, 70 Cal.App.4th at p. 1467.) "[U]nder section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively

participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense." (*Id.* at p. 1467.) "Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,] thereby precluding application of section 654.'" (*Id.* at p. 1468.)

We agree with the *Herrera* decision. (See also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935.) As the *Herrera* court concluded: "[I]f section 654 were held applicable here, it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. . . . We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*Herrera, supra*, 70 Cal.App.4th at p. 1468.) The court did not err by imposing a consecutive sentence for street terrorism.

Substantial Evidence Supports Defendant's Convictions of Street Terrorism and the Gang Enhancements

Defendant contends the evidence was insufficient to support his conviction for street terrorism under section 186.22, subdivision (a), or the enhancements attached to the remaining counts and imposed under section 186.22, subdivision (b)(1). He argues the prosecution failed to prove the crimes were "gang related." We disagree.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that 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. Rodriguez* (1999) 20 Cal.4th 1, 11.) We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.) And it is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The substantive offense of street terrorism is defined in section 186.22, subdivision (a). “Any 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 gang sentencing enhancement attached to the remaining counts is defined in section 186.22, subdivision (b)(1). “[A]ny person who is convicted of a felony committed for the benefit of, at the direction 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”

Defendant’s challenge to the sufficiency of the evidence is limited to the requirement that he must have “promote[d], further[d], or assist[ed]” in felonious criminal conduct by gang members. He does *not* assert the evidence was insufficient to support findings that 11 Deuce Hoover was a criminal street gang, or that he had knowledge that members of the 11 Deuce Hoover gang engage in or have engaged in a pattern of criminal gang activity. In making his argument, however, defendant improperly asks us to reweigh the evidence.

Officer Smerdel testified as a gang expert and expressed her opinion that the crimes were gang-related. She based her opinion on evidence of the participants’ membership in gangs (defendant was a member of 11 Deuce Hoover, Alashanti was a

member of the Rolling 30's, and DeAngelo Clay was associated with several Crip gangs); the pre-planning of the crime as shown by evidence of the surveillance of the site the day before the crime and the discovery of gloves, bags, and a pry bar in the stolen vehicle; the extent of violence involved; and the fact the crime was committed for financial gain (typical of the Crips generally). Further, she testified the type of crimes committed in this case benefited both gangs because, in the gang culture, violent crime brings a heightened respect and status to the gangs and its members.

Officer Smerdel's "fact-based specific opinion" (*People v. Augborne* (2002) 104 Cal.App.4th 362, 373) constituted substantial evidence supporting the jury's implied finding that defendant actively participated in the 11 Deuce Hoover gang, and the evidence was sufficient for the jury to find defendant's involvement in the gang was "more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 752.) Moreover, the evidence supports the jury's implied finding that defendant willfully promoted, furthered, or assisted felonious criminal conduct by a member of his gang, namely, himself.

A true finding on the gang enhancement must be also be supported by evidence that the felony was also committed for the benefit of, at the direction of, or in association with a street gang. (See *People v. Gardeley, supra*, 14 Cal.4th 605, 622 ["the Legislature made it clear that a criminal offense is subject to increased punishment under the STEP Act only if the crime is 'gang related,' that is, it must have been committed, in the words of the statute, 'for the benefit of, at the direction of, or in association with' a street gang".])

As described *ante*, Officer Smerdel opined these crimes were committed for the benefit of, and in association with both the Rolling 30's *and* the 11 Deuce Hoover gangs. Officer Pickett, an expert on the 11 Deuce Hoover gang, also opined that these crimes were committed for the benefit of, and in association with, both the Rolling 30's and the 11 Deuce Hoover gangs. Smerdling and Pickett noted all of the crime's

participants were gang members, the gang culture brings respect and status to those who participate in violent crimes, and the crimes were committed for financial gain, which is typical of the Crips primary criminal activities. In *People v. Valdez* (1997) 58 Cal.App.4th 494, a car caravan comprised of members of several different gangs engaged in an altercation with rival gangs resulting in a murder. Although the evidence was insufficient to show the gathering of members from several different gangs to form one caravan constituted a “criminal street gang,” a gang expert testified the caravan “acted for the benefit of, in association with, or at the direction of all seven gangs of which they were variously members or associates.” (*Id.* at pp. 503-504.) The court held the expert opinion testimony was not only sufficient to establish the crime was “gang related,” but, in view of the congregation of such a diverse group, expert opinion testimony was permitted *because* the matter was “far beyond the common experience of the jury and justified expert testimony.” (*Id.* at p. 509.) Here, the expert testimony on the issue of the “gang related” nature of the offense paralleled the type of expert testimony received in *Valdez*. Smerdel’s and Pickett’s opinions constituted substantial evidence from which the jury could find these crimes were committed for the benefit of, and in association with, both the Rolling 30’s and the 11 Deuce Hoovers.

Defendant Has Withdrawn His Argument Regarding Multiple Section 12022.53, Subdivision (d) Enhancements for a Single Injury

Defendant originally argued the court erred by imposing an enhancement for personally discharging a firearm causing great bodily injury under section 12022.53, subdivision (d) on multiple counts arising from a single injury. Defendant has correctly advised the court his argument has now been rejected by the California Supreme Court in *People v. Oates* (2004) 32 Cal.4th 1048. We deem this argument withdrawn.

The 25-Years-to-Life Firearm Enhancement Does Not Constitute Cruel and Unusual Punishment

Defendant next contends the 25-years-to-life firearm enhancement for personally and intentionally discharging a firearm during the commission of his crimes causing great bodily injury constitutes cruel and unusual punishment because it is imposed consecutively to his life term which carries a minimum parole eligibility period of 45 years under the Three Strikes law. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) Defendant complains the sentence amounts to a term of 70-years-to-life which he characterizes as a de facto term of life without parole for the attempted premeditated murder.

We begin by observing that section 12022.53 has repeatedly passed muster under challenges based on both state and federal guarantees against cruel and/or unusual punishment. (See, e.g., *People v. Zepeda* (2001) 87 Cal.App.4th 1183; *People v. Martinez* (1999) 76 Cal.App.4th 489; *People v. Felix* (2003) 108 Cal.App.4th 994; *People v. Gonzales* (2001) 87 Cal.App.4th 1.) The decision of the United States Supreme Court in *Ewing v. California* (2003) 538 U.S. 11, which concluded a sentence of 25-years-to-life for stealing three golf clubs was not cruel and unusual punishment under the Eighth Amendment, makes further discussion of defendant's challenge under the Eighth Amendment unnecessary given the serious nature of this case.

We turn to the California Constitution. "The main technique of analysis under California law is to consider the nature both of the offense and the offender. [Citation.] The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportion to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind." (*People v. Martinez, supra*, 76 Cal.App.4th 489, 494.) *In re Lynch* (1972) 8 Cal.3d 410, 426-427

also suggests we compare the punishment imposed in the instant case with the penalty imposed for more serious crimes in our jurisdiction, together with the punishment imposed in other jurisdictions for the same offense.

The punishment meted out here does not shock our conscience. Defendant's crime was callous and brutal. After preplanning the crime, defendant shot a vulnerable and unarmed older man through the head at point blank range, a man who posed no threat to defendant except for the threat of identification, and who was only minding his own business, conducting his sole proprietorship as he had for many years. Defendant left his victim without sight, his sense of smell and taste, and his property, and left him for dead after rifling through his pockets. The crime was horrific. We have no hesitation concluding the punishment here fits the crime.

As to the nature of the individual, defendant was a criminal street gangster, who had suffered felony convictions for burglary, grand theft and vehicle theft, as well as several sustained petitions as a juvenile, and had previously served a 40-month prison sentence. The punishment meted out does not shock the conscience, nor does it offend fundamental notions of human dignity. (*In re Lynch, supra*, 8 Cal.3d at p. 424.)

Defendant's Sixth Amendment Right to a Jury Trial Was Not Violated

The gang enhancements on counts 3 (vehicle taking) and 4 (receiving) carried terms of 2, 3, or 4 years. (§ 188.22, subd. (b)(1).) The court selected the upper term of 4 years as to enhancement for each count because it found in aggravation the crime was callous and vicious. The court also imposed consecutive sentences on count 3 (vehicle taking) and 7 (street terrorism) based on a finding that the crimes were committed at separate times and "other factors in aggravation." In supplemental briefs, defendant argued the court violated his Sixth Amendment right to a jury trial by sentencing him to the upper term based on factual determinations that should have been found by a jury beyond a reasonable doubt. (See generally *Blakely v. Washington* (2004)

542 U.S. 296 [124 S.Ct. 2351] (*Blakely*); *United States v. Booker* (2005) 543 U.S. ____ [125 S.Ct. 738] (*Booker*.) But Sixth Amendment challenges to California’s determinate sentencing law based on *Blakely* and *Booker* have now been resolved. The California Supreme Court has squarely held that “the judicial factfinding that occurs when a judge exercises discretion to impose an upper term or consecutive term under California law does not implicate a defendant’s Sixth Amendment right to a jury trial.” (*People v. Black* 35 Cal.4th 1238, 1244.) That being the decision of California’s high court, we are bound by it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Although the parties have extensively briefed this issue (for which we thank them), further discussion of the effect of *Blakely* and *Booker* on California’s determinate sentencing law is not necessary in light of the unambiguous decision in *People v. Black*. Defendant’s Sixth Amendment right to a jury trial was not violated by the court’s selection of the upper term for the gang enhancements, nor by the consecutive sentences.

IKOLA, J.

WE CONCUR:

O’LEARY, ACTING P. J.

ARONSON, J.

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.

JOE BABY BURNELL,

Defendant and Appellant.

G032634

(Super. Ct. No. 02WF1367)

ORDER GRANTING PARTIAL
PUBLICATION; MODIFICATION
OF OPINION; NO CHANGE IN
JUDGMENT

Respondent has requested that our opinion, filed on August 19, 2005, be certified for publication. It appears that portions of our opinion meets the standards set forth in California Rules of Court, rule 976(c). The request is GRANTED for partial publication pursuant to rule 976.1(a).

The first three introductory paragraphs, the facts section, the sections of the discussion titled "*Attempted Murder, Robbery, Vehicle Theft, Receiving Stolen Property, and Mayhem Are Not Necessarily Included Offenses of Street Terrorism*," and "*Defense Counsel's Failure to Request Bifurcation of the Gang Count and Enhancements Caused No Prejudice to Defendant*," and the disposition title and paragraph set forth in the modification order below are ordered published in the Official Reports. The remaining

portions of the opinion are not to be published as they do not meet the standards for publication.

It is further ordered that the above opinion be modified in the following particulars:

1. The third introductory paragraph is replaced in its entirety with the following paragraph.

“On appeal, defendant asserts: (1) he cannot be convicted of both taking and receiving the same vehicle; (2) he cannot be convicted of both attempted murder and mayhem; (3) counts 1, 2, 3, 4, and 6 are necessarily included offenses of the street terrorism conviction on count 7; (4) counsel was ineffective for a variety of reasons; (5) the court committed several sentencing errors; (6) the street terrorism count and gang enhancements were not supported by substantial evidence; and (7) the 25-years-to-life firearm enhancements constitute cruel and unusual punishment. We reject all of defendant’s contentions and affirm the judgment.”

2. On page 13, line 6; after the word “theories,” add the following citation. (*People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 20 [“common gang membership may be part of circumstantial evidence supporting the inference of a conspiracy”].)

3. On page 24, following the last paragraph; add the following title and new paragraph.

“DISPOSITION

The judgment is affirmed.”

These modifications do not effect a change in the judgment.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.