Filed 10/6/10 P. v. Preston CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KYLE NATHAN PRESTON et al., Defendants and Appellants.	B216752 (Los Angeles County Super. Ct. No. BA299472)

APPEAL from a judgment of the Superior Court of the Los Angeles County. William R. Chidsey, Jr. Affirmed with directions.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant Kyle Nathan Preston.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant Stephanie Carrillo.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellants Kyle Nathan Preston and Stephanie Carrillo were jointly charged with five counts of assault with a semiautomatic firearm. Preston was additionally charged with three counts that variously charged unlawful firing from a motor vehicle. Carrillo was charged with one additional count of permitting another to shoot from a motor vehicle. All of the offenses were alleged to have been committed for the benefit of a street gang. In one of the counts (shooting at an occupied vehicle), it was alleged that Preston personally used a firearm to cause great bodily injury.

A jury convicted appellants of all of the charges. On appeal, appellants' principal contentions are that their convictions, including the finding that the offenses were committed for the benefit of a gang, are not supported by substantial evidence.[1] We disagree and affirm the convictions.

Preston was sentenced on one count to 40 years to life, with the remainder stayed. Carrillo was sentenced to 17 years four months on two counts, the remainder running concurrently or stayed. Various fines were imposed on both appellants and custody credits were awarded.

There are four sentencing errors which respondent concedes. We remand with directions to resentence both appellants to give the trial court the opportunity to restructure its sentencing choices in view of the necessary alterations in these sentences.

---

[1] On appeal, Preston joins in Carrillo's arguments to the extent they accrue to his benefit. Although Carrillo's arguments on the gang enhancements generally apply equally to Preston, her substantial evidence arguments as to the underlying crimes are limited to the sufficiency of the identification of her as the driver. The prosecution did not try this case on the theory that Preston might have been the driver. Carrillo's arguments on the sufficiency of the evidence as to the substantive offenses, thus, have no application to Preston who was tried as the shooter. Accordingly, we do not address whether there is sufficient evidence to convict Preston of the crimes of which he was found guilty because he has not raised that point on appeal. (See *People v. Nero* (2010) 181 Cal.App.4th 504.)

FACTS

1. The Shooting

On July 4, 2005, at about 6:00 p.m., Jairo V., Marvin C., Elmer G., Gabriel C. and Carlos G., who were all friends, were driving to a party in Jairo's car (hereafter sometimes the victims' car); Elmer was driving and Jairo was in the front passenger seat. They pulled into a gas station at the corner of Virgil and Lockwood Avenues in Los Angeles. Jairo and Carlos stayed in the car and the other three went inside the gas station. Jairo's window was rolled down. The car was facing north, with the driver's side next to the pump and the passenger side next to the store.

Jairo saw a gold Honda pull into the service station and park, facing east. Appellant Preston got out of the Honda and walked up fast to the victims' car, all the while looking at Jairo. Preston stopped two feet from the car and said, "Where you guys from?" Jairo believed that Preston was asking him what gang he belonged to and he answered "I am from no where." Preston asked several more times where Jairo was from; Jairo thought that Preston was trying to provoke a fight. (Jairo did not know Preston and had not seen him before.) Preston appeared to be angry. Preston then said, "This is my hood," and he started to walk away, but, after taking a few steps, came back and said: "What did you say?" "Did you say something?" Jairo said nothing. "Hey, homie, you don't want to get shot," said Preston, who walked back to the Honda and got into the front passenger seat.

Marvin, Elmer and Gabriel returned to the car and one of them started to fill the gas tank. The Honda drove off, parked by a nearby laundromat and stopped, facing Virgil Avenue.

The five friends drove off, with Elmer driving and Jairo still in the front passenger seat. Gabriel, Carlos and Marvin were in the back seat. As they drove past the Honda, Jairo saw Carrillo in the driver's seat. Jairo was afraid that Preston was going to shoot them and told Elmer to make a U-turn.

The Honda started to follow and got very close. Elmer started to drive fast, with the Honda trying to edge in on the right side of the car. Jairo told Elmer to turn right, which he did.

Jairo looked back and saw a hand with a gun come out of the passenger side of the Honda. Elmer ducked down and Jairo steered. Two or three shots were fired from about one car length away. One shot shattered the back window, showering Gabriel, Carlos and Marvin with broken glass. Marvin's cheek was hit by another shot.

Elmer drove to a hospital because Marvin was bleeding a lot; Marvin remained in the hospital overnight. Jairo found a bullet in the passenger door and gave it to the detectives. Jairo spoke to the police at the hospital and related what had occurred.

2. The Identifications

Jairo identified both appellants in six-packs of photographs in August 2005. Appellants were arrested in March 2006. At the time of Carrillo's arrest, she was seated in the gold Honda. In May 2006, Jairo failed to identify Carrillo in a live lineup. He did identify, however, both appellants in the preliminary hearing and the trial.[2]

Rampart Division detectives determined that Carrillo was the registered owner of a gold Honda.

Elmer identified Preston in a six-pack of photographs.

Marvin could not identify anyone.

Neither Carlos, Gabriel nor Elmer could identify Carrillo as being involved in the shooting.

3. The Search

Following appellants' arrest, the police searched the apartment where Carrillo lived with her mother, sister and Preston. No firearms were recovered.

As we discuss at greater length below, a gang expert concluded that both appellants belonged to the La Mirada Locos gang.

---

[2] Jairo was convicted of misdemeanor battery in 2007, convicted of felony vandalism to a vehicle in 2008 and of felony assault with a beer bottle in the same year.

The search of the apartment yielded various items bearing the words "La Mirada." Writing photographed at the apartment stated "Sneaks West Side La Mirada Locos." A shoe box lid had writing stating "West Side Varrio La Mirada" and "Baby G." and the inside of the box had writing "La Mirada," "Sporty," "Sneaky," "Sleepy" and other monikers. "Baby G." was the gang moniker of Carrillo's sister who admitted to being a member of the La Mirada Locos gang. "Maniac" was Carrillo's brother who was also a member of this gang.

Photographs showing Carrillo throwing gang signs were also found in the apartment.

4. The Gang Expert

Los Angeles Police Officer Matthew Vocke testified as a gang expert. He monitored the La Mirada Locos gang on a daily basis and had been doing so for five months when he testified.

Officer Vocke described the territory that this gang considered its own; the shooting took place within this area. The gang had about 100 members at the time of trial, both male and female, and was mostly Hispanic. La Mirada Locos gang was locked in a heated rivalry with the neighboring Temple Street gang and a tagging crew claiming to be a gang called the Blazing King.

The primary activities of the La Mirada Locos gang in 2005 ranged from robberies to assault with deadly weapons, attempted murders, carjacking, felony vandalism, drug trafficking and driveby shootings.

The primary purpose of the La Mirada Locos gang was to protect its territory and to make money by committing burglaries, robberies and narcotic sales. Territory was important to conduct drug sales and also for the safety of the gang members. Gang members commonly challenged people who came into their territory by asking "Where are you from?" The question was intended to be understood as asking which gang the person belonged to.

Preston admitted to a gang expert who testified at the preliminary hearing that he had been a member of the La Mirada Locos gang for 12 years; his gang moniker was

"Sporty." Carrillo admitted to the same expert that she had been a member of this gang for six years with the moniker "Sneaky."

In response to a hypothetical based on the facts of this case, Officer Vocke testified that the shooting was committed for the benefit of the Law Mirada Locos gang. The escalation of violence by actually shooting a victim told the community that the gang was in control of the area. The shooting dissuaded people in the community from calling the police by creating fear of retaliation. This allowed the gang to engage freely in criminal activity, such as narcotics sales and robberies.

Officer Vocke testified about two specific La Mirada Locos gang members, one of them Herman Sanchez, who had been convicted of attempted robbery, carrying a concealed weapon in a car and carrying a loaded firearm.

DISCUSSION

1. There Is Substantial Evidence That Carrillo Was the Driver of the Gold Honda

Carrillo was tried and convicted on the theory that she aided and abetted the commission of the substantive crimes as the driver of the car and therefore her identification as the driver was the key evidence to support her culpability.

"In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

After both cars left the gas station and the gold Honda had stopped in a parking lot and was facing Virgil Avenue, the victims' car approached the Honda, with Jairo in the passenger seat. We set forth Jairo's trial testimony that relates what ensued.

"Q [by the district attorney] As you are approaching the Honda, do you see the driver of the vehicle? [¶] A [by Jairo] Yes. [¶] Q Is the window rolled up or down? [¶] A It was down. [¶] Q It was down? [¶] A Yes. [¶] Q Did you notice it was a male or female driving at the wheel of the car? [¶] A Yes. [¶] Q It was -- [¶] A A

female." Jairo then identified Carrillo, seated in the courtroom, as the driver. "Q [by the district attorney] Did Ms. Carrillo have on glasses? [¶] A No. [¶] Q Was her hair -- do you recall her hair if it was pinned up or down? [¶] A It was down." Jairo went on to state that they got "real close to their car," i.e., the gold Honda.

Under the settled principles that we have set forth above, the foregoing is substantial evidence that Carrillo was the driver of the Honda.

Carrillo cites to a number of factors that she claims show that Jairo's identification of her was tenuous.

In the first place, we do not agree that Jairo's testimony was tenuous on the point that Carrillo was the driver; rather, it is direct and unequivocal.

We address the factors that Carrillo claims denigrate Jairo's identification.

When Jairo identified Carrillo in the six-pack, he stated that she "kind of looks" like the girl that was driving the Honda. Carrillo claims that this indicates that Jairo was not sure about his identification of Carrillo as the driver. While it is true that this identification is somewhat tentative, it does not take away from Jairo's testimony that we have cited, which was unequivocal.

It is a fact that Jairo picked the wrong person in the live lineup conducted in May 2006. While Carrillo is correct that this is inconsistent with the times that Jairo identified Carrillo as the driver, inconsistencies in testimony are for the jury to sort out. (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.)

Carrillo writes that only Jairo identified her as the driver; none of the other four victims did so. But the testimony of a single witness is sufficient to support a conviction. (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.)

Carrillo writes that it is "unlikely that a quick glimpse of the driver, under the circumstances of this case, would have allowed Jairo to be able [to] see the driver with sufficient detail so that he would later be able to accurately identify that individual." But we do not address credibility issues or evidentiary conflicts. (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.) Importantly, we draw inferences in favor, and not in opposition, to the jury's verdict. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) We will therefore not

presume that it was "unlikely" that Jairo got a good look at Carrillo. In any event, he had a good enough look to see that she wore no glasses and that her hair was down.

There is substantial evidence that Carrillo was the driver of the gold Honda.

2. There Is Substantial Evidence That Supports the Gang Enhancement

While Officer Vocke testified that in 2009 the La Mirada Locos gang had around 100 members, he could not say how many members it had in 2005, when the shooting occurred. Both appellants contend that there is no evidence, as required by subdivision (f) of Penal Code section 186.22, that the gang had three or more members in 2005.[3]

We are not required to leave our common sense at the door. It is hardly likely that in 2005 this gang was composed of less than three persons, when it had around 100 in 2009, having started out in the 1980's. As noted, we must draw inferences that support the verdict and it is certainly a reasonable inference that in 2005 the gang had more than three members. In fact, as respondent points out, the materials uncovered in the search of the apartment where Carrillo and Preston lived showed monikers of more than three gang members and a photograph with five people throwing the gang sign. And, as of 2010, Preston had been a gang member for 12 years, Carrillo for 6 years, Herman Sanchez[4] for 10 years and Carrillo's sister for 5 years.

Appellants contend that there is insufficient evidence that the primary activities of this gang fell within the gang enhancement statute.[5]

---

[3] All statutory references are to the Penal Code.

[4] Officer Vocke testified about Sanchez's felony convictions.

[5] Subdivision (f) of section 186.22 provides: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Subdivision (e) of section 186.22 lists 33 crimes.

When asked what the primary activities of this gang were, Officer Vocke replied that these were robberies, assaults with a deadly weapon, carjacking, felony vandalism, drug trafficking, and driveby shootings. These offenses are all listed in subdivision (e) of section 186.22. (See fn. 4, *ante*.)

Citing *In re Alexander L.* (2007) 149 Cal.App.4th 605, 612 (*Alexander L.*), appellants contend that, as in *Alexander*,[6] Vocke's testimony lacked foundation. That is incorrect. Officer Vocke stated that he personally monitored this gang on a daily basis and that he had done so for five months, that he had contact with this gang's members almost daily, that he reviewed crime reports, that he spoke to people in the community and that he observed the graffiti. This is an adequate foundation for his testimony about the gang's primary activities.[7]

Preston seizes on the phrase used by Officer Vocke that the primary activities "range anywhere" from robberies to assaults with a deadly weapon and the other crimes enumerated to make the point that Vocke's testimony was conclusory. This is not so. That there is a range of crimes that the gang commits does not mean that Vocke does not know the specific crimes that this gang commits. Vocke's testimony is quite precise on this point and there is nothing conclusory about the list that he gave. A gang expert's testimony about the primary activities of the gang, supported, as it is in this case, by a proper foundation, is sufficient to prove these activities. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 372.)

---

6 "We cannot know whether the basis of Lang's testimony on this point was reliable, because information establishing reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay." (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 612.)

7 Vocke has been working in gang details for about four years, has had hundreds of contacts with gang members, and has received training on this subject.

Appellants contend that there is insufficient evidence that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.[8]

A notable aspect of this case is that it is practically the paradigm of a crime committed for the benefit of a criminal street gang. From the very first when Preston approached the victims' car in the gas station until the last shot was fired, it was all about protecting the turf of the La Mirada Locos gang. When Preston first spoke ("Where you guys from?"), it was to ask what gang the five friends belonged to, which shows that Preston was thinking about the interests of the La Mirada Locos gang. He aggressively continued to press Jairo on this point which only confirms what was on his mind. When he changed his approach ("This is my hood") he affirmed that this was his gang's territory. As if to remove any doubt what was at issue, Preston finished by threatening: "Hey, homie, you don't want to get shot." And of course there was never a doubt in Jairo's mind that Preston was acting as a member of a gang, as indeed there could have been no doubt about that.

Another way of looking at these facts is to note the absence of any nongang motivation for the shooting. There was no attempt to rob the victims or to extort anything of value from them. The shots were fired to terrorize the victims and the neighborhood, as Officer Vocke explained. Indeed, the facts speak so clearly that Vocke's explanations are hardly needed, although of course they were necessary in light of the body of law that governs these cases.

Appellants contend that there was no evidence that anyone in the community or the neighborhood witnessed any of the foregoing, including the shots that were fired.

---

8 "Except as provided in paragraphs (4) and (5), any 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 as follows: [punishments follow]." (§ 186.22, subd. (b)(1).)

A car chase through the streets of Los Angeles at 6:00 p.m. with shots being fired at the car that is being pursued is not a sequence of events that is going to be overlooked. The vicinity of Virgil and Lockwood Avenues in Los Angeles, where these events took place, is an urban, densely populated area where people abound, especially around 6:00 p.m. The reasonable inference is that the five victims were not the only ones who witnessed these events.

Finally, appellants contend that there was insufficient evidence that the crimes were committed with the specific intent to promote any criminal conduct by gang members. (See fn. 7, *ante*.)

"Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Preston and Carrillo lived together and obviously knew that they were La Mirada Locos gang members. The claim that there is insufficient evidence of their specific intent to promote or assist in any criminal conduct is once again at war with the realities of this case. Pursuing another car and maneuvering so as to allow the shooter to get the best angles for a shot or shots is about as laden with specific intent as it is possible to imagine.

Appellants cite two federal cases (*Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 and *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099) for the proposition that there must be specific intent to commit crimes *other* than the charged offense. But, as respondent points out, California state courts have pointed out that these federal cases are wrongly decided as subdivision (b)(1) of section 186.22 speaks of "any criminal conduct," not "other" criminal conduct. (E.g., *People v. Vasquez* (2009) 178 Cal.App.4th 347, 353-355.)

3. In Preston's Case, the Section 12022.55 Enhancement of Count 1 Must Be Stricken

In count 1, Preston was convicted of assault with a deadly weapon. This count was enhanced for gang activity and for infliction of great bodily injury by discharging a

firearm from a motor vehicle under section 12022.55.[9] Preston points out, correctly, that section 12022.55 does not apply because shots were fired at persons in a motor vehicle. (See fn. 7, *ante*.) Respondent agrees, as do we.

4. In Preston's Case, Count 9 Cannot Be Enhanced Under Both Sections 186.22, Subdivision (b)(1)(C) and 12022.53, Subdivision (d)

In count 9, shooting at an occupied vehicle, the trial court sentenced Preston to the midterm of five years. Added to this sentence were the 10-year gang enhancement of section 186.22, subdivision (b)(1)(C) (section 186.22(b)(1)(C)) and the 25 year-to-life firearm enhancement (§ 12022.53, subd. (d)).

Preston contends, and respondent agrees, that only one enhancement can be imposed. This result is required by subdivision (f) of section 1170.1.[10] The case on point is *People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509. As respondent notes, in this case the gang enhancement came about as a result of the gun use.

Only the greater of the enhancements can be imposed on count 9.

5. In Preston's Case Stayed Counts 2, 3, 4, 5, 7 and 8 Are Not Violent Felonies, Hence Section 186.22(b)(1)(C) Does Not Apply

Respondent agrees with Preston that counts 2, 3, 4, 5, 7 and 8 are not violent felonies under section 667.5. The 10-year enhancement under section 186.22(b)(1)(C) therefore cannot be applied to these counts.

---

9 "Notwithstanding Section 12022.5, any person who, with the intent to inflict great bodily injury or death, inflicts great bodily injury, as defined in Section 12022.7, or causes the death of a person, *other than an occupant of a motor vehicle*, as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony, shall be punished by an additional and consecutive term of imprisonment in the state prison for 5, 6, or 10 years." (§ 12022.55, italics added.)

10 "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (§ 1170.1, subd. (f).)

6. In Carrillo's Case, the Section 186.22(b)(1)(C) 10-year Enhancement Cannot Be Applied As She Was Not Convicted of Violent Felonies

For the same reason set forth in part 5, the enhancements under section 186.22(b)(1)(C) cannot be applied to Carrillo's convictions. She agrees, however, that counts 1 through 5 were serious felonies for which an additional five years can be imposed. (§ 186.22, subd. (b)(1)(B).)

7. Carrillo's Presentence Custody Credits Must Be Corrected

As noted, Carrillo was not convicted of violent felonies; thus, the limitation under section 2933.1, subdivision (c) of 15 percent does not apply. Carrillo and respondent agree that she is entitled to 1,742 days of presentence credit, not 1,336.

8. The* Pitchess *Motion

We have augmented the record with the files of the complaints that related to the officers that were the subjects of the *Pitchess*[11] motion. We have independently examined these files and conclude that the matters contained in these files do not come within the scope of the trial court's inquiry. We conclude that the trial court's orders relating to these materials were within the scope of the trial court's discretion. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.)

9. We Remand with Directions to Resentence Appellants

The correction of the errors noted in parts 3, 4, 5 and 6 will produce fundamentally altered sentences for both appellants. Accordingly, as was done in *People v. Rodriguez*, *supra*, 47 Cal.4th at page 509, we remand with directions to correct the sentences and to resentence both appellants, which will give the trial court the opportunity to restructure its sentencing choices.

---

11 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

DISPOSITION

The case is remanded with directions to correct the sentences and to resentence appellants. In all other respects, the judgments are affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.