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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. ALBERTO FRANCISCO BRICENO and EVARISTO LANDIN, Defendants and Appellants.	G029525, G029607 (Super. Ct. No. 00NF3394) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Reversed and remanded for resentencing.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant Alberto Briceno.

Frederick L. McBride, under appointment by the Court of Appeal, for Defendant and Appellant Evaristo Landin.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil P. Gonzalez and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

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

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A jury convicted Alberto Briceno and Evaristo Landin of four counts of second degree robbery and street terrorism and found allegations the robberies were committed for the benefit of a criminal street gang were true. The court found Briceno had suffered two prior serious felony convictions and a prior prison term. Defendants complain of the admission of gang expert testimony, instructional error, and the insufficiency of the evidence to support various convictions and enhancements.

Because a criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) cannot be used to transform an unenumerated offense into a "serious" felony, we agree the prosecution failed to prove Briceno suffered a "strike" prior under the Three Strikes law, and remand for a new sentencing hearing. For the reasons set forth below, we affirm the balance of the judgment.

I

Briceno and Landin launched a grinchly crime wave on Christmas Day 2000, divesting four individuals of their cash and property. Around 1:00 a.m., defendants stopped their first victim, Ross Lambert, at gunpoint outside a Costa Mesa bar. Lambert relinquished the cash in his pocket ($10.50). A sharp object was placed against his neck when one of the culprits demanded more loot. Lambert saw the men decamp in a Cadillac, recorded the license number, and contacted the police.

Approximately 90 minutes later, Richard Jess saw a parked sedan with its headlights on as he walked into the Comfort Inn parking lot. Approaching from the rear, Landin put his arm around Jess's neck, stuck a gun into his ribs, and demanded his valuables. As the sedan crept forward into an adjoining parking lot, Landin searched the victim for loot, but Jess had only $2 on his person. Jess saw Landin, then wearing designer jeans and a stocking cap, run over and get inside the sedan.

Within an hour, Judy Yonamine arrived at her Garden Grove residence. A car passed as she was unloading some items from her car trunk, then stopped, with its

engine and lights still running. The front seat passenger, Landin, emerged and asked for money, but Yonamine indicated she had none. Landin produced a handgun and took her wallet, containing $25. He ran back to the car and it sped away. Minutes later, the scenario repeated itself. This time, Landin approached Jesus Mendoza as he was unloading his van in Anaheim. Mendoza surrendered his wallet, and $18 in cash, when Landin pointed a pistol at him.

Anaheim Police Officer Raymond Drabek stopped the Cadillac as it made a U-turn on Harbor Boulevard near Disneyland. Landin was in the passenger seat and Briceno was behind the wheel. The car and license plate number matched the description furnished by the robbery victims; $300 in cash and a pellet gun were found under the front passenger seat. A beanie cap worn by one of the perpetrators and identified by one of the victims was also found inside the Cadillac. Small amounts of cash were found on both defendants.

Waiving his *Miranda* rights, Landin agreed to talk to an investigator. He admitted approaching Jess and Mendoza with a BB gun and taking money from them. Landin and Briceno planned to split the proceeds "50/50" and use the money for Christmas gifts. Landin also admitted his membership in the "Hard Times" gang, and sported tattoos with that name on his forearms. During a second interview, Landin admitted robbing Lambert but denied using a knife in the commission of the crime.

Based on his training and experience, the prosecution's gang expert, Investigator Peter Vi, confirmed Hard Times was a criminal street gang, some 200 members strong, and its turf was a three-block area in Garden Grove. The gang's primary activities included attempted murder, robberies, possession and use of firearms, and graffiti. Landin was an active member of the Hard Times gang and the Christmas Day robberies were committed for the benefit of that group. According to Vi, these crimes enhanced not only the status of the two participants, but of the entire gang as well.

That Landin may have had a secondary motive (to get cash to purchase presents) was of no moment.

II

Defendants complain the trial court erred in permitting the prosecution's expert to testify that these robberies were committed for the benefit of a criminal street gang, i.e., that the Penal Code section 186.22, subdivision (b)(1) allegations were *true*. They also argue this evidence should have been excluded under Evidence Code section 352. Neither contention has merit.

As *People v. Olguin* (1994) 31 Cal.App.4th 1355 explains, "[t]he requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.] Such evidence is admissible even though it encompasses the ultimate issue in the case. [Citations.]" (*Id.* at p. 1371.) For example, "where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Based on his knowledge of gang culture and his experience with Hard Times and its particular cast of characters, Vi concluded the robberies were committed for the benefit of a criminal street gang. As we noted at the outset, Vi explained how gang members enhance their individual and collective status through the commission of violent crimes. Given hypothetical facts similar to the case at issue, Vi testified the crimes were committed to "benefit the gang itself, [it is an] action that they have done to glorify the gang." As Vi commented, "Not only do they glorify the gang but personally they increase the[ir own] status . . . in the gang . . . ."

Put another way, Vi's expert testimony focused on whether these particular incidents were "gang-related activity." (*People v. Gardeley* (1996) 14 Cal.4th 605, 619.) *People v. Torres* (1995) 33 Cal.App.4th 37 (*Torres*) is distinguishable on this point. Vi did not offer opinions on the definitions of crimes, whether a crime had been committed, or on defendant's guilt. In *Torres*, the appellate court held it was improper for an expert to testify as to the meaning of the term "robbery" or to express an opinion that crimes committed in a particular case were robberies.[1]

Given Vi's particular knowledge and expertise in evaluating the behavior of street gangs in general and the Hard Times gang in particular, we cannot say the trial court abused its discretion in finding his expert opinion would be of assistance to the jury in determining whether the prosecution had proved the enhancement allegations. Similarly, the trial court could reasonably have concluded Vi's opinions were relevant to prove the gang enhancement allegation and the probative value outweighed any potential prejudice. There are no grounds for reversal on this point.

III

Briceno challenges the sufficiency of the evidence to support the Yonamine robbery conviction and the true findings on the criminal street gang enhancements. Neither contention has merit.

Our review of the record persuades us there is ample evidence — albeit circumstantial — to support the challenged robbery conviction. All four robberies were

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[1] Defendants — in a letter brief and again at oral argument — rely heavily on the recent case of *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*).) But *Killebrew* is distinguishable, and thus not the cure for what ails defendants' case. There, the prosecution's gang expert testified, through a series of hypothetical questions, as "to the subjective *knowledge and intent* of each" of the gang members involved in the crime. (*Id.* at p. 658.) As *Killebrew* explains, an expert's opinion regarding the defendants' subjective knowledge and intent is improper and "is much different from the *expectations* of gang members in general when confronted with a specific action." (*Ibid.*) Our review of the record persuades us only the latter occurred here.

committed within a relatively short time span. And Briceno does not challenge the sufficiency of the proof of his participation in no less than three of these crimes. The Yonamine robbery involved the same accomplice (Landin) and getaway vehicle used in all the other robberies. The perpetrators used the same modus operandi in each offense.

Yonamine positively identified Landin at a curbside show up and again at trial. She was able to identify their car (a Cadillac) as well. Any alleged inconsistencies in these descriptions was a matter for the jurors to consider. In sum, there was substantial evidence to support the robbery conviction. It is not our function to reweigh it.

Turning to the issue of the sufficiency of the evidence to support the criminal street gang enhancements, we reach the same conclusion. Defendants note there was evidence to show the crimes were committed for personal gain (money to buy Christmas gifts) rather than any gang-related purpose. The problem with this argument is that it ignores Vi's expert testimony explaining how the commission of these crimes would enhance the reputation not only of the gang itself but of the individual participants as well. Based on this evidence, the jurors could reasonably have found the gang enhancement allegations were true. It was for the jurors to resolve any credibility issues or conflicts in the evidence. We cannot second-guess their decision on appeal.

IV

At the court trial on the priors, the information was amended by interlineation to allege Briceno suffered a January 5, 1998 conviction for violations of Penal Code sections 12021, subdivision (a)(1)[2] (felon in possession of a firearm) and 12025, subdivision (b)(3) (active participant in criminal street gang found carrying a concealed firearm).[3] (Orange County Super. Ct. No. 97CF3057). At trial the prosecutor

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[2] All further statutory references are to the Penal Code.

[3] Section 12025, subdivision (b)(3) makes it a felony offense to carry a concealed firearm "[w]here the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22 . . . ."

produced, without objection, certified copies of state prison records documenting Briceno's guilty plea to both crimes. Briceno also admitted criminal street gang enhancements as to both offenses.

Briceno's prior convictions were alleged as "serious or violent felonies" under sections 667 and 1170.12. Section 667, subdivision (a)(1) mandates a five-year sentence enhancement for a repeat offender — a defendant convicted of a "serious felony" offense (listed in section 1192.7, subdivision (c)) who has been previously convicted of a serious felony.[4] Similarly, section 1170.12 (the Three Strikes law) requires increased punishment when a defendant convicted of any felony has been previously convicted of either a serious felony under section 1192.7, subdivision (c), or a "violent" felony under section 667.5, subdivision (c).

Briceno argues the section 12021 and 12025 convictions do not qualify as serious or violent felonies. Along these lines, he notes these offenses are not among the enumerated serious felonies listed in section 1192.7, subdivision (c), or classified as "violent" felonies under section 667.5, subdivision (c).[5]

Based on the plain language of the statutes, we agree neither of these crimes is an enumerated offense. But the Attorney General argues it is possible the

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[4] Section 667, subdivision (a)(1) reads, "In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

[5] Section 1170.12, subdivision (b) states, "for the purposes of this section, a prior conviction of a felony shall be defined as: [¶] (1) [a]ny offense defined in subdivision (c) of [s]ection 667.5 as a violent felony or any offense defined in subdivision (c) of [s]ection 1192.7 as a serious felony in this state." Section 667.5, subdivision (c) enumerates 23 offenses defined as "violent felonies." Similarly, section 1192.7, subdivision (c) specifies 42 "serious" felonies.

offenses might qualify as serious or violent felonies if the "conduct" underlying these crimes fits within the description of criminal conduct set forth in the relevant statutes. In this regard, the Attorney General relies on section 1192.7, subdivision (c)(28), which states the term "serious felony" includes "any felony offense, which would also constitute a felony violation of Section 186.22." Based on this provision, the People argue the priors qualify as serious felonies because they were accompanied by section 186.22, subdivision (b)(1) *enhancements*. Such an enhancement, we are told, is sufficient to prove that the prior offense involved conduct qualifying it as a serious felony under section 1192.7, subdivision (c)(28).

Briceno's 1998 guilty plea included a section 186.22, subdivision (b)(1) *enhancement*. Rule 4.405(c) of the California Rules of Court defines the term "enhancement" as "an additional term of imprisonment added to the base term." Put another way, it is a *penalty provision*, not a substantive *offense*: "[A] penalty provision prescribes an added penalty to be imposed when the offense is committed under specified circumstances. A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged." (*People v. Bright* (1996) 12 Cal.4th 653, 661; *People v. Wims* (1995) 10 Cal.4th 293, 304 ["California courts have long recognized that '[a]n enhancement is not a separate crime or offense'"].) Thus, sentence enhancements are not the same as, and do not function as a substitute for, substantive offenses. In fact, "[e]nhancements typically focus on *an element of the commission of the crime* or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves." (*People v. Hernandez* (1988) 46 Cal.3d 194, 207.) In sum, "'[e]nhancements *are not offenses*, they are punishments . . . .'" (*People v. Bracamonte* (2003) 106 Cal.App.4th 709, 711, italics added.)

Section 186.22, subdivision (b)(1) calls for increased punishment where the underlying offense is committed for the benefit of, and with the specific intent to

promote, a criminal street gang. It does not set forth elements of the underlying offense (§ 186.22, subd. (a)) or divide that offense into degrees. In other words, California law leads to the following inescapable conclusion: A section 186.22, subdivision (b)(1) enhancement cannot be used to bootstrap an unenumerated offense into a "serious" felony for purposes of the Three Strikes law.

Citing *People v. Haykel* (2002) 96 Cal.App.4th 146 (*Haykel*), the Attorney General argues section 1192.7, subdivision (c)(28) makes no specific distinction between substantive offenses and enhancements under section 186.22. In *Haykel*, a panel of this court held an assault by means of force likely to produce great bodily injury is *not* a "serious" felony as defined by section 1192.7, subdivision (c)(31). That particular subdivision explains the term "serious" felony includes an "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245."

Given the plain language used, this court concluded there was nothing ambiguous or unclear in the statute, as it clearly did not include an assault by means of force likely to produce great bodily injury. Rejecting an argument that Proposition 21 voters intended to drastically expand the list of serious felonies that could be invoked as strikes, the panel compared the language of section 1192.7, subdivision (c)(31) — listing some, but not all, violations of section 245 — with contemporaneously enacted subdivision (c)(40), which unambiguously declares "*any violation* of Section 12022.53" to be a serious felony. (Italics added.) Our court saw it this way: "That similar language is absent from section 1192.7, subdivision (c)(31), declaring *any* violation of section 245 a serious felony, demonstrates an intent *not* to incorporate the entire section." (*Haykel, supra,* 96 Cal.App.4th at p. 150.)

The Attorney General argues "[s]ection 1192.7, subdivision (c)(28)[] was added by the electorate as part of Proposition 21. [Citation.] The voters designated *any* offense constituting a felony under section 186.22 to be a serious felony." As the

Attorney General sees it, the wording of section 1192.7, subdivision (c)(28) is "nearly identical" to subdivision (c)(40), and that statute should be interpreted in the same fashion. We are not so persuaded. Unlike subdivision (c)(40), the plain language of subdivision (c)(28) does not make *any* violation of section 186.22 a serious felony. That subdivision specifically indicates a "serious" felony is "any felony *offense*, which would also constitute a felony violation of Section 186.22." Again, as *Haykel* explains, had the drafters of the initiative intended that all violations of section 186.22 qualify as "serious" felonies, "they were certainly well aware of how to say so, but did not." (*Haykel, supra,* 96 Cal.App.4th at p. 150.)

As if this were not enough, the Attorney General's argument is derailed when his interpretation is compared with the language in section 186.22, subdivisions (b)(1)(B) and (C). Subdivision (b)(1)(B) provides that "If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years." Subdivision (b)(1)(C) similarly states, "If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

If we were to conclude, as the Attorney General suggests, that any felony carrying a section 186.22, subdivision (b) enhancement is a serious felony, then section 186.22, subdivisions (b)(1)(B) & (C) would be surplusage. It is well-settled law that "We will avoid an interpretation that makes surplusage of a portion of a statute. [Citation.]" (*People v. Johnson* (2002) 28 Cal.4th 240, 247.) Thus, it seems clear that the voters did not intend to make any felony involving a section 186.22, subdivision (b) enhancement a serious felony under section 1192.7.

As further support for the notion there is no distinction between enhancements and convictions, the Attorney General cites section 1192.7, subdivisions (c)(8) ["any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a

firearm"], (c)(23) ["any felony in which the defendant personally used a dangerous or deadly weapon"], and (c)(40) ["any violation of Section 12022.53," an enhancement punishing the discharge of firearm]. The difference is that these subdivisions describe *conduct*, as opposed to other subdivisions, like (c)(28), which describe *crimes*.

Based on this analysis, we are forced to conclude there was insufficient evidence Briceno's prior convictions qualified as serious felonies under the Three Strikes law or violent felonies under sections 667, subdivision (a)(1) and 667.5, subdivision (c). Accordingly, the matter must be remanded for resentencing.

V

Defendants contend the court misinstructed the jurors on the specific intent required for the criminal street gang enhancements. The trial court gave instructions on the necessity for concurrence of act and specific intent (CALJIC No. 3.31), the sufficiency of circumstantial evidence to prove specific intent (CALJIC No. 2.02), and a special instruction on the requisite intent for the criminal street gang allegations.

The argument is based on the trial court's failure to fill in a blank space following the word "allegation" in the CALJIC No. 2.02 instruction.[6] This omission, we are told, failed to inform the jury "that the principals [*sic*] imbodied [*sic*] in CALJIC [No.] 2.02 applied equally to the finding of specific intent as to the gang enhancement. The term 'allegation' would have had no specific meaning to the jury."

As the Attorney General correctly notes, "the [criminal street] gang allegations were the only allegations submitted to the jury." The special instruction governing the section 186.22, subdivision (b) enhancement specifically used the term

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[6] As given, the relevant portion of the instruction reads as follows: "The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendants guilty of the crimes charged in Counts 1-8, or find the allegation _____ to be true, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent but (2) cannot be reconciled with any other rational conclusion."

"allegation" rather than "enhancement." A weapons allegation (use of a knife) was dismissed during trial per section 1118.1. The jury was not concerned with the truth of Briceno's prior convictions and prison term. These issues were decided by the court as part of a bifurcated proceeding.

Defendants cite *People v. Salas* (1976) 58 Cal.App.3d 460 (*Salas*) in support of their contention. But *Salas* is distinguishable on this point. In that case, the trial court gave a version of CALJIC No. 2.02 that referred to the robbery charge but made no mention of an accompanying great bodily injury allegation. Because the trial court failed to incorporate the allegation into the instruction, it was error not to repeat the specific intent instruction for the allegation as well. (*Id.* at p. 474.)

Here, the instruction given specifically referred to an "allegation" and there was no need to repeat CALJIC No. 2.02. In any event, any potential confusion was subject was dispelled by the text of CALJIC No. 3.31: "In the crimes and allegations charged in Counts 1-8, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the crime or allegation to which it relates is not committed or is not true. [¶] The specific intent required is included in the definitions of the crimes and allegations set forth elsewhere in these instructions." Read as a whole, the instructions given were more than sufficient to inform the jurors of the specific intent required for the gang allegations. There are no grounds for reversal on this point.

The true finding as to the allegation that Briceno suffered a 1998 conviction under the Three Strikes law and section 667, subdivision (a)(1) is reversed, his sentence is vacated, and the matter is remanded for a new sentencing hearing. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.