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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA



THE PEOPLE,

D050380

Plaintiff and Respondent,

v.

(Super. Ct. No. RIF 120872)

OSCAR S. JIMENEZ,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Riverside County, W. Charles Morgan, Judge. Reversed in part and affirmed in part.

A jury convicted Oscar Jimenez of numerous offenses, including transportation of methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a), count 1), possession of methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a), count 2), participation in a criminal street gang (Pen. Code, § 186.22, subd. (a), I count 3), and

All statutory references are to the Penal Code unless otherwise specified.

being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1), count 5).<sup>2</sup> The jury also found true that Jimenez committed counts 1, 2 and 5 for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b).

Jimenez contends the evidence was insufficient to support the true finding he committed counts 1, 2 and 5 for the benefit of a criminal street gang, and was insufficient to support his convictions of counts 1, 2 and 3. He also contends the court committed prejudicial error by admitting evidence of prior acts under Evidence Code section 352.

## FACTS

### A. Jimenez's Background

Jimenez and his girlfriend (Rocio) lived with his parents in a trailer in Mead Valley (the trailer). At the time of his arrest, Jimenez's parents were on a trip to Mexico and his friend Mr. Yescas (along with Yescas's girlfriend Joselyne) were staying at the trailer with Jimenez. Yescas had previously claimed affiliation with Clique Los Primos, a subset of a gang known as East Side Riva (ESR), a predominately Hispanic gang operating in Riverside. In the fall of 2003, Jimenez told police he belonged to ESR.

### B. The Arrest

On December 15, 2004, at approximately 2:00 a.m., Deputy Morovich saw a car run a stop sign. Morovich activated his lights and tried to effect a stop, but the car continued for one or two more blocks before it pulled into a long dirt driveway.

<sup>2</sup> Jimenez was convicted of other offenses but raises no claim of error as to those offenses.

Morovich continued to follow the car into the driveway until it stopped outside the trailer owned by Jimenez's parents. Morovich called for backup.

Morovich ordered Jimenez, who was riding in the front passenger seat, to get out of the car. Morovich searched and handcuffed Jimenez; the search produced no contraband or weapons. Morovich then ordered Yescas, the driver, to get out of the car. Morovich conducted a patdown search of Yescas and found a switchblade and in the car found several baggies containing methamphetamine. An expert testified the methamphetamine was packaged for sale.<sup>3</sup>

Morovich placed Jimenez and Yescas in the back of his patrol car. Yescas was shouting toward the trailer, speaking loudly and urgently in Spanish, prompting Morovich to tell Yescas to be quiet. Rocio emerged from the trailer, had a conversation with Morovich, and returned inside. Morovich learned Jimenez and Rocio lived in the trailer with Jimenez's parents.

After back-up arrived, police entered the trailer. Joselyne was sitting on the living room couch and Rocio was in the kitchen. An open black bag on the couch next to Joselyne was empty but contained flakes of a white substance that appeared to be methamphetamine. Joselyne testified that, while the police were outside, Rocio had

The materials seized from Yescas's car included one baggie containing three smaller baggies, each containing smaller amounts of methamphetamine; a second baggie holding slightly more than 2 grams of marijuana; and a third baggie containing several empty smaller baggies and another larger quantity of methamphetamine. The packaging-by-weight, coupled with the presence of scales subsequently discovered when officers searched inside the trailer, led the expert to conclude the drugs were held for sale.

taken the black bag into the master bedroom's bathroom and flushed the methamphetamine down the toilet. Rocio also threw a black scale out the window and hid a shotgun in the master bedroom.

Morovich searched the master bedroom and found a black box on top of the bed that had held a manual gram scale. Morovich also found luggage in the master bedroom belonging to Joselyne and Yescas; Joselyne told Morovich that she and Yescas had been staying in the trailer while Jimenez's parents were in Mexico. Inside the luggage was a red box, of approximately the same dimensions as the black box, which contained another grain scale.

Morovich also found a loaded double-barreled shotgun inside the closet of the master bedroom. 4 Earlier that day, Jimenez and Yescas had played with the shotgun and smoked methamphetamine together.

### **C. The Gang Evidence**

ESR is a gang operating in Riverside. ESR engages in assaults, methamphetamine sales, and thefts. Yescas admitted being an associate of ESR.

Jimenez has twice been stopped in the company of Raul Vallejo, a documented ESR affiliate, while carrying or wearing gang paraphernalia. In February 2003, Jimenez and Vallejo were stopped. Jimenez was wearing a belt buckle made up of an "E" and an

The stock was cut down and, although it would not be considered a sawed-off shotgun by criminal standards, the reduced size of the stock made the gun shorter and easier to conceal. Jimenez's father claimed the shotgun belonged to Jimenez's uncle but that he had been storing it at the house.

**"S" and a baseball cap with "ESR" and "Riva Side" written on the underside of the bill.**

**Vallejo was wearing a similar hat and belt buckle. Vallejo was carrying keys to a car that contained in eth amphetamine.**

**In April 2003, Jimenez was again stopped. He was riding in a truck owned by his mother, and was accompanied by Vallejo. The truck contained gang clothing, a pad of paper with the letters "ESR" on it, and Jimenez was carrying a wallet with the letters "ES" on it. The wallet also appeared to have the letters "VT" on it, which stands for "Vario Trece," evidencing an allegiance to the Mexican Mafia. Police found a large quantity of methamphetamine and a loaded handgun. This incident apparently resulted in Jimenez's conviction for possession of methamphetamine for sale. 5**

**The expert concluded that, at the time of his December 2004 arrest, Jimenez was an active member of ESR and possessed the drugs for the benefit of ESR. Experts testified that ESR funds its purchases of weapons and cars with the proceeds of narcotics sales, and gang members typically sell methamphetamine in pairs to protect themselves against clients who might try to steal the drugs, and to keep a lookout for police.**

**5 Both parties on appeal agree that the fact and nature of Jimenez's conviction was before the jury, but the only reference in the appellate record is to an exhibit admitted at trial (Exhibit 29), described as "Abstract of Judgment," without further reference to its contents. We presume, for purposes of our evaluation, that Jimenez was convicted of possession of methamphetamine for sale and this information was before the jury.**

## ANALYSIS

### A. Evidence Supporting the Convictions for Transportation and Possession for Sale

Jimenez asserts there is no substantial evidence he was even aware that Yescas was in possession of drugs for sale, much less that Jimenez aided or abetted Yescas's possession for sale or transportation for sale of the drugs found in the car Yescas was driving and in which Jimenez was a passenger. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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. [Citations.]" (*People v. Bolin* (1998) 18 Ca1Ath 297, 331.) We must decide whether, on the evidence presented, a rational trier of fact could have found beyond a reasonable doubt that each element of the offense had been proved. (*Schlup v. Delo* (1995) 513 U.S. 298, 330.)

A conviction for possession of an illegal drug for sale requires proof (1) the defendant exercised dominion and control over the controlled substance, (2) the defendant was aware that he or she was in possession of a controlled substance, (3) the defendant was aware of the nature of the controlled substance, (4) the controlled substance was in an amount sufficient to be used for sale or consumption, and (5) the defendant possessed the controlled substance with the specific intent to sell it. (See, e.g., *In re Christopher B.* (1990) 219 Ca1.App.3d 455, 466.) The evidence supports the jury's conclusion that Yescas possessed and transported the drugs for purposes of sale, and the

issue is whether there was substantial evidence to support the conclusion Jimenez aided and abetted Yescas's criminal undertaking. 6

The jury was instructed that Jimenez could be liable as an aider and abettor if it found he had knowledge of the perpetrator's unlawful purpose and he aided, promoted or encouraged the principal with the intent to encourage or facilitate the crime. Whether a person aided and abetted a crime is a question of fact and the conclusion of the trier of fact will not be disturbed if supported by substantial evidence. (*In re Juan G.* (2003) 112 Cal.AppAth 1, 5-6.) The jury may consider such factors as the defendant's presence at the scene of the crime, his companionship with the principal, and his conduct before and after the offense. (*Ibid.*)

Here, the evidence showed Yescas and Jimenez were companions who resided together in a trailer in the days prior to the arrest, and the close proximity of this living arrangement permitted the inference Jimenez was aware of Yescas's activities inside the trailer. A jury could infer, from the presence of one scale, the packaging for a second scale, and the residue in the black bag, that Yescas's activities encompassed weighing out and bagging the quantities he was carrying to sell that evening. Moreover, the jury could infer these activities were not hidden from Jimenez, because the testimony of his ingestion of methamphetamine demonstrated he was not averse to drug activity in his

Jimenez need not have had the specific intent to sell the controlled substance *personally*. It is sufficient if he aided the possession and transportation "with the specific intent that they be sold, regardless of whether the possessor intends to sell them personally." (*People v. Consuegra* (1994) 26 Cal.AppAth 1726, 1732, fn. 4; accord, *People v. Parra* (1999) 70 Cal.AppAth 222, 227.)

trailer. Additionally, the jury could infer Jimenez was actively involved in preparing the drugs for sale because there was evidence it was Jimenez's girlfriend who knew the black bag contained the cache of drugs and the scale for weighing it into marketable portions, and took the initiative to dispose of that evidence, and the jury could infer Jimenez's girlfriend chose to act because she wanted to protect him (rather than her boyfriend's acquaintance) by disposing of the evidence. Finally, the jury could consider the friendship and companionship between Jimenez and Yescas to reinforce the inference they had acted as a team when marketing the drugs. We conclude there was sufficient evidence to support Jimenez's convictions of possession for sale and transportation for sale in violation of Health and Safety Code section 11379, subdivision (a).

B. Evidence Supporting the Conviction on Count 3 and the Gang Allegations Appended to Counts 1, 2 and 5

Jimenez asserts the evidence was insufficient to support either his conviction on count 3, alleging violation of section 186.22, subdivision (a), or the true finding on the enhancing allegations appended to counts 1, 2 and 5, alleging he committed those offenses for the benefit of the gang within the meaning of section 186.22, subdivision (b).

The section 186.22, subdivision (a) offense required evidence that Jimenez (1) was an " 'active participant' " in a criminal street gang as defined by the statute, (2) had

7 Indeed, the fact Rocio successfully disposed of the scale from the black box, but overlooked the second scale (the one inside Yescas's luggage), strengthens the inference that the scale she disposed of was the only one she knew of because it was the only one that belonged to Jimenez.

"knowledge that its members engage in or have engaged in a pattern of criminal gang activity,' " and (3) "'willfully promot[ed], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang.'" (*People v. Robles* (2000) 23 Ca1Ath 1106, 1115-1116.) The absence of substantial evidence on any of these elements precludes a conviction under section 186.22, subdivision (a). (*Robles*, at pp. 1115-11116.) The section 186.22, subdivision (b) enhancement required proof the crimes were committed (1) for the benefit of, at the direction of, or in association with a criminal street gang; and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

Jimenez argues there was insufficient evidence from which a jury rationally could have found beyond a reasonable doubt that in late 2004 he was an active participant in ESR. The total evidence Jimenez was *ever* connected to ESR was that (1) nearly two years earlier he was stopped by police wearing clothing indicative of gang loyalty<sup>8</sup> while in the company of Mr. Vallejo (an ESR member); (2) two months later Jimenez was again stopped while in Mr. Vallejo's company and Jimenez's wallet had the letters "ES" on it; and (3) Jimenez told police on one occasion in September 2003 that he was affiliated with ESR.

However, at the time of Jimenez's arrest, it had been nearly 20 months since his last documented association with any ESR members. When he was arrested, neither he

<sup>8</sup> Jimenez was wearing a belt with the letters "E" and "S" on them and a hat with letters "ESR" and "Riva Side" written in felt pen.

nor his companion were attired in gang clothing or paraphernalia, Jimenez was not carrying any items suggesting gang affiliation, he was not tattooed with gang symbols, he had not been conveying (by word or deed) gang slogans or signs, and he was not even within the boundaries of the turf claimed by ESR. Moreover, when his trailer was searched, there was no evidence Jimenez had stashed any of the traditional accoutrements of gang membership (clothing, jewelry, writings, pictures, etc.) where he resided. Jimenez's sole connection to the gang at the time of his arrest was his association with Yescas.<sup>9</sup> However, a defendant's association with a gang member does not alone suffice to permit conviction under section 186.22, subdivision (a). (*People v. Gamez* (1991) 235 Cal.App.3d 957, 972-973, disapproved on other grounds by *People v. Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10.)

Officer Impola, the expert from the Gang Intelligence Unit, conceded that persons who may have been previously associated with a gang can leave the gang, and the lengthy lack of documented activity (as well as Jimenez's full-time employment) would militate in favor of a conclusion that he had left the gang. Impola nevertheless testified Jimenez was still an active participant in ESR and committed the offenses for the benefit of the gang because Jimenez associated with Yescas to commit a crime that other ESR

Yescas was apparently documented as a gang member because, during six contacts in the preceding four years (including one contact just months before the current offenses), he had been found in the company of ESR members, and/or had claimed membership in ESR or its subgroups, and/or was found with gang paraphernalia or writings suggesting membership in ESR. However, even Yescas was bereft of any gang paraphernalia when he and Jimenez were arrested.

members have committed. However, this testimony required the jury to speculate both that Jimenez remained active in ESR (notwithstanding all contemporaneous evidence to the contrary) and, despite the absence of any evidence proclaiming their gang association on the night of their arrest, Jimenez and Yescas had not been "freelancing" when they possessed and transported the methamphetamine for sale. " '[S]peculation is not evidence, less still substantial evidence.' " (*People v. Waidla* (2000) 22 Ca1Ath 690, 735; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 998, 1004-1005 [reversing § 186.22 finding as insufficiently supported by expert's testimony where expert's testimony was based on speculation].) Indeed, "[s]ubstantial evidence does not mean any evidence, or a mere scintilla of evidence. It is 'evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Quoting *People v Thomas* (1992) 2 Cal Ath 489, 514.]" (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 614 [reversing gang enhancement].) We conclude Impola's speculations do not provide substantial evidence from which a jury could find beyond a reasonable doubt that Jimenez was guilty of the gang offense or enhancements, and therefore we reverse that conviction and true findings.

### C. The Evidentiary Rulings

Jimenez argues the evidence of two prior incidents should have been either excluded under Evidence Code section 352 or (at a minimum) "sanitized," and the trial court abused its discretion under Evidence Code section 352 by admitting the evidence. He contends reversal is required because the error was not harmless beyond a reasonable doubt.

### *The Evidence and Rulings*

The defense objected to the evidence of two prior incidents: Jimenez's April 2003 encounter with police that led to his conviction for possession of methamphetamine for sale, and an earlier February 2003 encounter with police that did not result in criminal charges. In both instances, Jimenez was in the company of Mr. Vallejo, a documented member of ESR, and wearing or in possession of gang clothing and paraphernalia. In both instances, police found methamphetamine that appeared to be held for sale. Jimenez was apparently charged only in connection with the April 2003 encounter.

The court permitted evidence of the conviction resulting from the April encounter because (1) Jimenez's status as a convicted felon was an element of count 5 and (2) his prior conviction involved possession of methamphetamine and was relevant to show he knew the nature of the substance he was charged with transporting and possessing in connection with counts 1 and 2. The court permitted evidence of the details of the April and February encounters because the evidence was probative of the allegation that Jimenez was a member of ESR and therefore was acting for its benefit in committing the offenses, and this probative value outweighed its prejudicial impact.

### *Legal Framework*

When a trial court is asked to exclude evidence under Evidence Code section 352, it must balance the probative value of the evidence against its prejudicial impact. Where the evidence is "relevant to the issues before the jury, that is, had any tendency in reason to prove or disprove a disputed fact in issue [citation], it [is] admissible" and probative. (*People v. Padilla* (1995) 11 Ca1.4th 891, 925, overruled on other grounds by *People v.*

Hill (1998) 17 CalAth 800, 823, fn. 1.) On the other side of the balance sheet, the "prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]II evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.* In applying section 352, "prejudicial" is not synonymous with "damaging.'" [Citation.]" (*People v. Karis* (1988) 46 Ca1.3d 612, 638, italics added.)

On appeal, we may not reverse the trial court's ruling under Evidence Code section 352 unless it abused its discretion. (*People v. Hart* (1999) 20 Ca1Ath 546, 606.) We will not disturb the ruling "*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

#### *Analysis*

Jimenez's prior conviction was admissible because relevant to his knowledge of the narcotic nature of the substance. <sup>10</sup> (See, e.g., *People v. Perez* (1974) 42 Ca1.App.3d

<sup>10</sup> The prior conviction was also admissible on Jimenez's status as a felon in connection with count 5. Although the court recognized it could have "sanitized" the conviction if it had been relevant only to this issue, it recognized the nature of the other disputed issues made that approach moot because the nature of the conviction was relevant to these other disputed facts.

760, 763-764.) Jimenez argues the evidence was cumulative because "that particular element was not in dispute" because of testimony he had been seen smoking methamphetamine earlier that day, and therefore the prejudicial impact far outweighed its probative value. However, testimony of his use was not unchallenged: his girlfriend testified she had never seen Jimenez consume or even possess methamphetamine. Accordingly, the evidence was probative on a disputed issue on which the evidence was in conflict.

The prior conduct evidence was also admissible on the gang issues. Jimenez's alleged active membership in ESR was a matter that was properly the subject of expert testimony (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506) and an expert is permitted to describe the information on which he or she relied to form the opinion the defendant is a member of a gang and that the crime was gang related. (See, e.g., *People v. Gardeley, supra*, 14 Cal.4th at pp. 618-626.) Here, the requirement of proving Jimenez's active participation in ESR, his knowledge that its members engage in criminal gang activity, and his willful promotion or assistance in felonious criminal conduct by other gang members (*People v. Robles, supra*, 23 Cal.4th at pp. 1115-1116) made relevant the evidence showing his prior association with gang members while felonies were in progress. Although we have concluded the evidence of prior offenses was insufficient, it was not irrelevant to the disputed issues, and it was therefore not an abuse of discretion to allow this evidence to be introduced at trial.

DISPOSITION

The guilty verdict on count 3, and the true findings on the gang allegations appended to counts 1, 2 and 5, are reversed. In all other respects, the judgment is affirmed. The matter is remanded for resentencing.



McDONALD, Acting P. J.

WE CONCUR:

  
McINTYRE, J.

O'ROURKE, J.