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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SAM J. VIERA et al.,

Defendants and Appellants.

B230802

(Los Angeles County
Super. Ct. No. BA354035)

APPEAL from the judgments of the Superior Court of Los Angeles County.

Leslie A. Swain, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant Sam J. Viera.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant Jose Rivas.

H. Russel Halpern for Defendant and Appellant Robert Gonzalez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendants and appellants Sam Viera, Jose Rivas and Robert Gonzalez were convicted by jury of one count of assault with a deadly weapon arising from the March 12, 2009 assault on Christopher Nolasco in which defendants beat and stabbed Mr. Nolasco repeatedly. The jury also found true the great bodily injury allegation, and the allegation the assault had been committed for the benefit of, at the direction of, or in association with a criminal street gang. Defendant Viera was sentenced to an aggregate state prison term of 19 years, defendant Rivas was sentenced to 17 years, and defendant Gonzalez to 21 years.

All three defendants contend there is no substantial evidence supporting the gang enhancement under the California Street Terrorism Enforcement and Prevention Act of 1988, or STEP Act. (Stats. 1988, ch. 1242, § 1, p. 4127.) Defendants argue there is no evidence establishing the “primary activities” element of the statute. (Pen. Code, § 186.22, subd. (f).) Defendant Gonzalez raises five additional arguments (in which defendant Rivas joins): the gang enhancement fails for lack of evidence establishing the statutorily required predicate offenses; his constitutional right to confront witnesses was violated by the admission of hearsay statements by defendant Viera regarding a separate incident; the court erred in admitting defendant Gonzalez’s black pants as the prosecution failed to establish a proper chain of custody for such evidence; his constitutional rights were violated by the court’s error in allowing another analyst to attest to the DNA results obtained on the black pants instead of requiring the testimony of the analyst who performed the testing; and, defendant Gonzalez was denied the effective assistance of counsel.¹

We find no error and affirm all three judgments.

¹ Defendant Rivas raised a second argument regarding calculation of his custody credits. During the pendency of this appeal he served a notice of errata withdrawing that argument, after the trial court corrected and amended the abstract of judgment. We therefore do not address that issue.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of March 12, 2009, Gustavo Ledesma was in his second-floor apartment on Harvard Boulevard when he heard yelling outside. He looked out his window and saw three young men chasing another young man down Fountain Avenue, through a parking lot and out onto Harvard Boulevard, heading in the direction of his apartment building. Mr. Ledesma went outside because he thought the person being chased might be his neighbor. When he got outside, Mr. Ledesma saw that the chase had ended in the driveway across the street from his building. The man being chased was on the ground, being punched and kicked by the three individuals who had been chasing him.

After about 30 seconds or so, a gray Nissan Altima with chrome rims drove up and pulled over next to the driveway. The three attackers got into the car; before getting in, one of them made a motion with his hand like he was wiping something off. Mr. Ledesma did not see a knife or weapon in the man's hands, but he saw the wiping motion clearly before that individual got into the car. The car then drove off.

The young man who had been attacked had blood on his face, his chest, "everywhere" and yelled for help. Mr. Ledesma attempted to call the police, but could not get a call through. He put the injured man in his car and drove him to the emergency room at the Kaiser hospital on Sunset Boulevard.

Christopher Nolasco, a White Fence gang member, was the victim of the assault. Mr. Nolasco was walking down Hobart Street that evening heading toward a girlfriend's house, in an area claimed as territory by the White Fence gang. As he approached the intersection with De Longpre Avenue, a four-door car with four male occupants drove by and one of the men yelled at Mr. Nolasco, "Where you from?" Mr. Nolasco understood that to be a question asking him what gang he "represents." Mr. Nolasco responded "White Fence."

Three of the individuals in the car jumped out and Mr. Nolasco started running. He heard them yell out "UG" or "Underground." Mr. Nolasco had seen "UG" graffiti in the neighborhood. Mr. Nolasco ran toward Fountain Avenue, and then eventually ran up

Harvard Boulevard and into a driveway. The three individuals caught up with him at that point and “jumped” him. Mr. Nolasco was pepper-sprayed in the face, punched, kicked and stabbed multiple times while he lay on the ground.

At some point, the three attackers ran back to the waiting car and took off. “Some guy” he did not know took him to the hospital. Mr. Nolasco had several stab wounds to his abdomen, including a stab wound that nicked his liver, and other abrasions and lacerations about his head and torso.

Later that same evening, after Mr. Ledesma returned home from the hospital, he spoke with police officers who were on the scene outside his apartment, including Jeff Castillo, an officer with the Hollywood division of the Los Angeles Police Department (LAPD). A radio broadcast went out identifying the Nissan Altima. LAPD Officer John Downey, also of the Hollywood division, heard the broadcast and shortly thereafter saw a car fitting the description driving down Normandie Boulevard. Officer Downey, and his partner Officer Blanco, pulled the car over. There were four occupants in the car. Codefendant Brian Wilson (who is not a party to this appeal) had been driving the car, defendant Viera was seated behind the driver, defendant Rivas was in the front passenger seat, and defendant Gonzalez was behind the passenger seat.

Officers Downey and Blanco ordered the four occupants to get out of the car and line up against a chain-link fence on the side of the road. Officer Castillo arrived shortly thereafter with Mr. Ledesma. Mr. Ledesma was shown each of the four individuals and asked if he recognized any of them. He recognized the Nissan Altima, as well as defendant Rivas as the individual who had made the wiping motion with his hand before fleeing in the car.

LAPD Officer Ciro Ochoa arrived on the scene as backup, as did Officer James Fillmore. Officer Fillmore searched the car and found a folding knife in the rear pocket of the driver’s seat, a cap that appeared to have blood on it, and a notepad with various writings containing “UG” and other marks that appeared to be gang-related. Written into the dust on the back window of the car were the letters “UG” and “LS” and the number

“13.” Officer Fillmore also went to the hospital to obtain a cheek swab from the victim, Mr. Nolasco, to be processed for DNA analysis.

Officer Fillmore was familiar with defendant Viera and codefendant Wilson, having encountered both of them on previous occasions. Both had admitted to Officer Fillmore they were members of a street gang called the Underground Kings. Wilson told Officer Fillmore that his gang moniker was “Drone,” and Viera told Officer Fillmore his moniker was “Dex” or “Deckster.”

Defendants and codefendant Wilson were taken to the police station and booked. Officer Ochoa and his partner took each defendant separately into an interview room, photographed the clothes each defendant was wearing, and had each defendant take off his outer garments to be booked into evidence. Each item of evidence was placed individually in a separate bag and then into sealed boxes.

LAPD Officer Matthew Delao, the lead investigating officer, and his partner Officer Schlegel, took oral cheek swabs from each defendant to be processed for DNA analysis. Officer Delao also booked into evidence the clothing and other items packaged by Officer Ochoa.

Stacy Vanderschaaf, a criminalist in the LAPD’s Serology and DNA Unit, examined the items of clothing taken from defendants and found evidence on certain items that appeared to be blood or some type of biological fluid. Several items of evidence she analyzed tested presumptively positive for blood, including defendant Gonzalez’s black pants, defendant Viera’s plaid shorts, defendant Rivas’s pants, one of codefendant Wilson’s shoes, and the knife recovered from the car. Ms. Vanderschaaf took “cuttings” or samples from the clothing and prepared swabs from the shoe and the knife. Those samples, as well as the oral cheek swabs obtained from the defendants and Mr. Nolasco, were packaged and forwarded to Bode Technology Group to be analyzed for DNA.

In July 2009, an information was filed charging defendants and codefendant Wilson, the alleged driver of the Altima, with the attempted first degree murder of Mr. Nolasco. A mistrial was declared when the jury was unable to reach a verdict.

The prosecution filed an amended information on August 9, 2010, restating the attempted first degree murder charge (Pen. Code, §§ 187, 664) against defendants and codefendant Wilson, and adding a second count jointly charging defendants and codefendant Wilson with assault with a deadly weapon, a knife (§ 245, subd. (a)(1)). The amended information also contained the special allegations that defendants Viera, Rivas and Gonzalez inflicted great bodily injury within the meaning of section 12022.7, and that the assault was committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of the STEP Act (§ 186.22, subd. (b)). It was further alleged that defendants Viera and Gonzalez had suffered prior convictions for serious felonies (§§ 667, 1170.12).

During pretrial argument on various motions, defendant Viera moved to exclude any evidence of the assault on him by a White Fence gang member which took place about one month before the assault on Mr. Nolasco. Defendant Gonzalez joined in the motion. The trial court denied the motion, determining that the evidence of the prior incident was admissible.

At trial, the prosecution called Officer Fillmore as its gang expert. At the time of Officer Fillmore's testimony, he had been a police officer for almost eight years. He had been assigned to the LAPD's Hollywood division almost seven years. He spent four years working gangs in Hollywood and had been a gang investigator for almost two years. He had testified as a gang expert concerning the Underground Locos, White Fence and various other Hollywood-area gangs. Officer Fillmore explained that the Underground Kings started when two groups of taggers got together sometime in the 1990's. The Underground Kings were involved with tagging and graffiti. Then in the "late mid[-2000's]" the Underground Kings changed their name to the Underground Locos and started using the number 13 as well.

Officer Fillmore explained that the letters "UG" and "LS" and the number 13 that were drawn in the dust on the rear windshield of the Altima on the night defendants were arrested were gang symbols. The letters stand for "Underground Locos," and the number 13 signifies UG's alliance with a Hispanic prison gang. The notepad that Officer

Fillmore found in the driver-side door panel compartment of the Altima had pages filled with the letters “UG” and “LS” and the numbers 13 and 84 (the telephone touch pads with the letters “U” and “G”), as well as other gang symbols and the monikers of defendants Wilson, Viera and other gang members. Officer Fillmore explained it is “a significant thing” for a Los Angeles street gang to get permission to use the number 13. Use of the number 13, together with the change in the name of the gang to include the word “Locos,” signified to other gang members that the Underground Locos had become a bona fide, recognized Los Angeles street gang.

The Underground Locos was an active gang in March 2009, but it was a relatively small gang of approximately 20 to 30 members. Officer Fillmore discussed defendants’ status as members of UG, their respective tattoos and monikers, explained their logos and use of “UG,” “LS” and “13” in their graffiti, and identified the boundaries of their claimed territory. He explained that UG’s territory bordered and partially overlapped with White Fence, a larger, more established gang, which had resulted in an ongoing rivalry. Officer Fillmore offered his opinion that the assault on Nolasco was committed for the benefit of UG, to retaliate against White Fence, to earn respect and establish themselves in the neighborhood, and that the primary activities of UG in 2009 were assaults, robberies, car thefts, and vandalism. Officer Fillmore also verified two predicate offenses committed by Underground Kings members in 2005 and 2007, a burglary and making criminal threats.

The prosecution also called Susan Bach, a forensic analyst from Bode Technology Group, a private DNA laboratory located in Virginia. Ms. Bach testified about the DNA analyses she performed and the reports she generated regarding the evidence samples received from the LAPD. She stated that the blood samples taken from defendant Gonzalez’s black pants, from defendant Viera’s plaid shorts, and from the knife recovered in the car all matched the DNA profile of Mr. Nolasco, the victim. She also stated that the blood sample taken from codefendant Wilson’s shoe contained a mix of DNA which included Mr. Nolasco’s profile.

Mr. Ledesma, Mr. Nolasco, a treating doctor from the Kaiser emergency room, and numerous employees and officers from the LAPD also testified.

Following lengthy deliberations, the jury returned partial verdicts, finding defendants Viera, Rivas and Gonzalez guilty on count 2, assault with a deadly weapon. The jury also found true the great bodily injury enhancement and the gang enhancement. After further deliberations, the jury indicated it was unable to reach a verdict as to codefendant Wilson, or on the attempted murder charge as to any defendant. A mistrial was declared as to the murder count and as to Wilson. The prosecutor ultimately moved to dismiss the murder count and the court granted the motion.

At the sentencing hearing, defendant Viera was sentenced to an aggregate state prison term of 19 years, calculated as follows: the high term of 4 years on count 2, plus 3 years for the great bodily injury enhancement, and 10 years for the gang enhancement. An additional consecutive 2-year term was added pursuant to an agreement reached with the prosecution for defendant to plead no contest to an unrelated pending weapons charge. Defendant Viera was awarded 801 days of custody credits and ordered to pay various fines and restitution. The prosecution's motion to dismiss the prior strike allegation against defendant Viera on the grounds it was not a qualifying prior was granted.

Defendant Rivas was sentenced to an aggregate state prison term of 17 years, calculated as follows: the high term of 4 years on count 2, plus 3 years for the great bodily injury enhancement, and 10 years for the gang enhancement. Defendant Rivas was awarded 811 days of custody credits and ordered to pay various fines and restitution.²

Before being sentenced, defendant Gonzalez waived his right to a jury trial on the prior strike allegation and stipulated to the prior. Defendant Gonzalez was sentenced to an aggregate state prison term of 21 years, calculated as follows: the high term of 4 years

² The trial court subsequently corrected the number of custody credits awarded to defendant Rivas from 811 to 815 days.

on count two, doubled because of the prior strike, plus 3 years for the great bodily injury enhancement, and 10 years for the gang enhancement. Defendant Gonzalez was awarded 801 days of custody credits and ordered to pay various fines and restitution.

All three defendants timely appealed.

DISCUSSION

1. There Is Sufficient Evidence in Support of the Primary Activities and Predicate Offenses Elements of the Gang Enhancement Statute.

“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. [Citation.] . . . [R]eview for sufficiency of evidence entails . . . whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “The law regarding appellate review of claims challenging the sufficiency of the evidence in the context of gang enhancements is the same as that governing review of sufficiency claims generally.” (*People v. Leon* (2008) 161 Cal.App.4th 149, 161.)

a. Primary Activities

Defendants argue there is insufficient evidence supporting the “primary activities” element of the definition of “criminal street gang” under the STEP Act. We disagree. “To trigger the gang statute’s sentence-enhancement provision ([Pen. Code,] § 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang’s primary activities is the commission of one or more of certain crimes listed in the gang statute.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322 (*Sengpadychith*)). Subdivision (f)

of section 186.22 defines “criminal street gang” as “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.”

The Supreme Court has interpreted the “primary activities” element of the statutory definition of “criminal street gang” to mean that the commission of one or more of the statutorily enumerated crimes is one of the group’s “ ‘chief’ or ‘principal’ occupations.” (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) “That definition would necessarily exclude the occasional commission of those crimes by the group’s members.” (*Ibid.*) Adequate proof in support of the primary activities element “might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*)].” (*Sengpadychith*, at p. 324.) Both past and present offenses may be considered in determining the primary activities element. (*Id.* at p. 323.)

In *Gardeley*, the gang expert testified to numerous discussions with fellow officers and other law enforcement agencies, direct conversations with gang members, interviews of and prior contact with the defendants, as well his personal investigation of hundreds of gang-related crimes. The expert also attested to the three predicate offenses, and rendered his opinion that the primary activities of the defendant’s gang were selling narcotics, witness intimidation and acts of violence to facilitate its drug-selling business. (*Gardeley, supra*, 14 Cal.4th at pp. 611-613, 619-620.) The Supreme Court found this to be a proper subject of expert testimony and that such testimony provided a sufficient factual basis upon which the jury could reasonably have found the defendant’s gang met the definition of a criminal street gang within the meaning of the statute. (*Id.* at p. 620.)

Here, the prosecution also properly relied on the testimony of its gang expert, Officer Fillmore, to establish the primary activities element. The Crips gang involved in

Gardeley was older, larger and more established than the small, young, up-and-coming Underground Locos gang, but Officer Fillmore’s testimony displayed a level of expertise and experience in dealing with the Underground Locos that was comparable in character and quality to the testimony of the gang expert in *Gardeley*. The prosecutor specifically asked Officer Fillmore whether, based on his experience, he knew UG to have consistently and repeatedly engaged in any of the enumerated felonies:

“Q . . . With respect to the Underground Locos around the time of March of 2009, what were some of that gang[’]s primary activity – activities engaged in by its members? What – I mean [] by that what were some of the chief or principal occupations that its members would engage in consistently and repeatedly? [¶] A Primary to these, the Underground Locos that I found, is assault with weapons, robberies, vehicle theft, and felony vandalism, the most common activities. [¶] . . . [¶] Q . . . [¶] And you reached that opinion based on a personal knowledge that you have based on conversations with gang members of that gang, personal investigations of crimes committed by that gang, as well as information that you’ve obtained from colleagues in this area?” Officer Fillmore responded: “That’s correct.”

During cross-examination, defense counsel asked Officer Fillmore a few questions regarding the primary activities of the Underground Locos. When asked if he looked to the police reports and information contained in the gang history book at the station to assist in determining the UG’s primary activities, Officer Fillmore responded that they were “factored in” but that they were “not the only thing [he used] to determine primary activities in [*sic*] a gang.” Defense counsel then asked Officer Fillmore to reconfirm that the UG’s primary activities were assaults, robberies, car thefts and graffiti. Officer Fillmore stated: “That’s the primary activities, meaning in my mind it’s been done more than once by a member of that specific gang.” Defendant Gonzalez argues this testimony necessarily means that UG did not consistently and repeatedly commit crimes listed in the gang statute and that the prosecutor therefore failed to establish the primary activities element of the gang enhancement.

With this argument, the defense invites us to reweigh the reliability and credibility of Officer Fillmore's testimony and substitute our judgment for that of the jury in deciding whether the prosecution proved the gang enhancement beyond a reasonable doubt. That is something we cannot do on appeal. Officer Fillmore offered significant testimony regarding the history of UG, including its evolution from a tagging crew to a recognized street gang seeking to establish itself in the neighborhood, the gang rivalry between White Fence and UG, the identification of UG's graffiti, his familiarity with defendants Viera and Wilson from having spoken with them on the street, and defendants' tattoos. He explained that while he had attended numerous hours of formal training from LAPD concerning gangs, had discussed them with seasoned gang officers and former gang members who became informants, had read many books about gangs, and was familiar with LAPD's gang books on White Fence and UG, the members of White Fence and UG offered him the best information as they are often proud to talk about their gangs during consensual encounters with police officers.

When asked to identify some of the chief or principal occupations that the UG members engaged in consistently and repeatedly, Officer Fillmore answered: "Primary to these, the Underground Locos that I found, is assault with weapons, robberies, vehicle theft, and felony vandalism, the most common activities." This is substantial evidence supported by a factually detailed foundation demonstrating Officer Fillmore's expertise and knowledge about the primary activities of the Underground Locos. "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.) We conclude the evidence here was sufficient.

b. Predicate Offenses

Defendant Gonzalez also contends there was insufficient evidence establishing the requisite predicate offenses. We disagree.

The STEP Act defines “pattern of criminal gang activity” to mean “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.” (Pen. Code, § 186.22, subd. (e).)

Officer Fillmore attested to the two predicate offenses: (1) a 2007 conviction of an Underground Kings gang member named Julio Palomo for criminal threats; and (2) a 2005 conviction of an Underground Kings gang member named Eric Panic for burglary. Both are among the enumerated offenses in the statute. (Pen. Code, § 186.22, subd. (e)(8) & (11).)

Defendant contends the evidence is insufficient because Officer Fillmore testified that the Underground Kings was a tagging crew and no evidence was offered that members of the Underground Locos or UG had committed predicate offenses. This does not accurately describe the testimony of Officer Fillmore. He explained that the Underground Kings had been formed from two tagging crews that had been active in the 1990’s and, in the 2005-2007 time frame (the “late mid[-2000’s]”), they achieved recognition on the streets as a bona fide gang and so changed their name to the Underground Locos, authorized to use the number 13. The predicate offenses were committed in 2005 and 2007, during the evolution of the gang into a recognized Los Angeles street gang. Officer Fillmore’s testimony, along with the testimony of the victim who heard defendants yell out “UG” or “Underground” as they chased him, and other evidence, including for instance the writings in the dust of the Altima and in the notebook found in the Altima, established that the gang often referred to itself simply as UG or Underground. There is nothing in the record indicating the membership of the relatively small gang had changed once they began calling their gang UG, Underground and Underground Locos. There is substantial evidence to support that the requisite predicate offenses were committed by UG members.

2. The Admission of Testimony Regarding the Prior Incident Involving Defendant Viera Was Not Error, Nor Did It Violate Defendant Gonzalez's Right to Confront Witnesses.

During the first trial which ended in a mistrial, the prosecution presented evidence that approximately one month before the attack on Mr. Nolasco, defendant Viera was shot and stabbed by a White Fence gang member, and that the attack on Mr. Nolasco, a member of White Fence, was in retaliation for the attack on Viera. Before the start of the second trial, counsel for defendant Viera made a motion pursuant to Evidence Code section 402 to exclude any evidence of the White Fence attack on Viera. Counsel for defendant Gonzalez also raised objections to the evidence based on the confrontation clause of the Sixth Amendment, in which counsel for defendant Rivas joined. The court took the matter under submission, and the following morning ruled the evidence was admissible as it was highly probative of motive, outweighing any prejudicial value.

During the testimony of Officer Fillmore, the prosecution asked about the attack on Viera. Officer Fillmore testified about the ongoing rivalry between UG and White Fence. In explaining the rivalry, Officer Fillmore testified that a month before the March 2009 assault on Mr. Nolasco, defendant Viera was shot in the face and stabbed in the neck by a White Fence gang member. Officer Fillmore stated that defendant Viera had cooperated with police in prosecuting the White Fence gang member who attacked him. The only arguable reference to any statement by defendant Viera, during prosecution questioning, was as follows: "Q: Did you actually talk about this incident with Mr. Viera? [¶] A: I did, yes. [¶] . . . [¶] Q: He [(Viera)] did provide your [*sic*] some information when you spoke to him, correct? [¶] A: Yes." No hearsay statement by defendant Viera was repeated in court by Officer Fillmore.

On cross-examination, counsel for defendant Viera asked additional questions to elicit from Officer Fillmore that defendant Viera had known the identity of the gang member who had attacked him and had been cooperative with the police during the investigation. Defendant Viera also had agreed to testify, but the case was resolved by way of plea bargain. Counsel for defendant Gonzalez did not raise any objections to this

testimony, and no hearsay statement by defendant Viera was repeated by Officer Fillmore during cross-examination.

Defendant Gonzalez nonetheless contends Officer Fillmore's testimony violated his rights under the Sixth Amendment of the United States Constitution to confront the witnesses against him because he was denied the opportunity to question defendant Viera on the stand, as Viera could not be compelled to testify in violation of his own constitutional rights.

The argument is not persuasive. Officer Fillmore did not repeat any statements made by defendant Viera. Officer Fillmore merely stated his knowledge about the incident, gleaned from his work as a gang officer, including that defendant Viera had cooperated with the police. This testimony was presented as part of his expert opinions about gang culture generally, and the ongoing rivalry between White Fence and UG specifically. There is nothing in the record suggesting Officer Fillmore learned what he knew about the previous incident only from statements by defendant Viera under police interrogation. And, even assuming some of his knowledge about the gang rivalry was based on out-of-court statements by defendant Viera, Officer Fillmore's testimony was proper in the context of his expert opinions. (Evid. Code, § 801.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 (*Ramirez*); accord, *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153; see also *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 (*Crawford*) [confrontation clause does not bar admission of testimonial statements for purposes other than establishing the truth of the matter asserted].)

The facts here are similar to *Ramirez, supra*, 153 Cal.App.4th 1422. The defendant in *Ramirez* contended his Sixth Amendment rights were violated by admission of hearsay statements regarding predicate offenses through testimony by the gang expert. In rejecting the defendant's confrontation clause challenge to the expert's testimony, the Court of Appeal explained: "Here Ramirez does not identify any out-of-court statement that Detective Morales repeated during his testimony. Instead, Ramirez's complaint

appears to be that Detective Morales relied on hearsay in forming his opinion that the predicate crimes were committed for the benefit of a gang. He argues that Morales's knowledge of the facts of the predicate crimes must have been based on testimonial hearsay or statements made during police interrogation. But Morales testified as an expert on gangs. An expert may give opinion testimony that is based on hearsay.” (*Ramirez*, at p. 1426.)

Defendant Gonzalez has not shown a violation of his Sixth Amendment rights arising from any of the limited evidence admitted concerning the White Fence attack on defendant Viera. The trial court did not err in admitting such testimony.

3. The Admission of the Black Pants and DNA Evidence.

Defendant Gonzalez raises two issues concerning the admission of his black pants and the related DNA evidence showing that Mr. Nolasco's blood was found on those pants. First, he contends the prosecution failed to establish a proper chain of custody for the black pants, such that the court abused its discretion in allowing the pants to be received into evidence. Second, defendant Gonzalez argues it was error to allow forensic analyst Susan Bach to testify about the results of the DNA testing on the black pants as Ms. Bach did not conduct the testing. We address each argument in turn.

a. Chain of Custody

“A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].” (*People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.) We find no abuse in the admission of the black pants.

The chain of custody evidence presented by the prosecution can be summarized as follows: After assisting in the arrest of defendants, Officer Ochoa returned to the station where he and his partner took photographs of defendants in their clothes and then processed the clothes to be booked into evidence. Wearing a new pair of gloves before handling the clothing of each defendant, Officer Ochoa had each defendant separately take off his outer garments and place them on a piece of butcher paper laid out on the

table in the interview room. A new piece of butcher paper was used with each defendant. Each item of clothing was placed in a separate bag, and the bags of clothing were placed in four separate boxes, marked separately with each defendant's name. The lid of each box was sealed onto the box with tape. Officer Ochoa gave the sealed boxes to Officer Downey to provide to Officer Delao.

Officer Delao retrieved the evidence from a room "being watched" by uniformed gang officers. Officer Delao believed Officer Ochoa packaged the evidence. Officer Delao, as lead investigating officer, then booked the items into evidence with his partner.

Ms. Vanderschaaf, the criminalist, attested to her receipt of the black pants, and other items of evidence, from the property division of the LAPD. Ms. Vanderschaff explained that when she received the box which contained the black pants (People's exh. 25) it was duly sealed, although several of the brown bags inside the box containing individual items of clothing were not separately sealed. Ms. Vanderschaaf tested the pants for the presence of biological fluids. She obtained a presumptively positive result for blood, and therefore took a small cutting of fabric from the pants. She packaged and sealed the sample and sent it to Bode Technology Group for DNA analysis.

"The rules for establishing chain of custody are as follows: ' "The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." ' [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 444.)

The only purported missing link in the chain of custody was testimony from Officer Downey regarding his transfer of the sealed evidence boxes from Officer Ochoa to Officer Delao. However, Officer Delao testified he retrieved the evidence from a room

being guarded by uniformed gang officers. There was no evidence the seals were broken. We have no trouble concluding that any contention there was tampering with the black pants was pure speculation, and that the court correctly ruled there was no missing “vital link” in the chain of custody warranting exclusion. At best, the lack of testimony from Officer Downey about his minor role in the transfer of evidence went to the weight to be afforded such evidence, not to its admissibility. (*People v. Lucas, supra*, 12 Cal.4th at p. 444.) The court clearly indicated defense counsel was free to argue there could have been tampering, but there were no grounds to exclude the evidence outright. We find no error in the court’s ruling.

b. Testimony of Forensic Analyst Susan Bach

Defendant Gonzalez argues it was error, of constitutional dimension, to allow Ms. Bach from Bode Technology Group to attest to the results of the DNA testing performed on the black pants as Ms. Bach did not personally perform all of the tests and another analyst involved in the process did not testify. Specifically, defendant Gonzalez contends his Sixth Amendment right to confront witnesses was violated by the admission of Ms. Bach’s testimony regarding the DNA test results which showed that Mr. Nolasco’s blood was found on defendant Gonzalez’s black pants. Respondent contends the argument has been waived by defendant’s failure to object in the trial court.

“ ‘No procedural principle is more familiar . . . than that a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’ [Citation.]” (*United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Saunders* (1993) 5 Cal.4th 580, 590.) The record reveals no objection to the testimony of Ms. Bach regarding the testing performed on the black pants. Defendant Gonzalez even acknowledges the only objection came five days *after* Ms. Bach’s testimony when a chain-of-custody objection was stated during the parties’ discussion with the court as to which items of evidence were to be formally admitted. We conclude defendant Gonzalez has forfeited his objections, including any confrontation clause objection, to the Bach testimony.

4. The Ineffective Assistance Claim

Defendant Gonzalez argues, in the alternative, that if waiver is found as to the Bach testimony, reversal is nonetheless warranted based on the ineffective assistance of counsel for failing to properly and timely object. Defendant contends the law was clear that an objection based on Sixth Amendment grounds was proper to exclude Ms. Bach's testimony and defense counsel's failure to object was unequivocally below the standard of care as there could be no good faith tactical reason for failing to do so. Defendant relies primarily on *Crawford, supra*, 541 U.S. 36 and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*).

The burden is on defendant to establish ineffective assistance by a preponderance of the evidence. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.) There are two elements to an ineffective assistance claim. "[A] defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*).

On direct appeal, as here, this burden can be stringent. When the record on appeal " " "sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," *the claim on appeal must be rejected.*" [Citation.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267, italics added; *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [ineffective assistance claim properly resolved on direct appeal only where record affirmatively discloses no rational tactical purpose for counsel's actions].)

Defendant Gonzalez has failed to establish the *Strickland* elements. Defendant finds fault with Ms. Bach's testimony because she testified that when all of the samples were received from the LAPD for DNA testing, she had another analyst in the lab *extract*

the DNA from the black pants sample. Defendant contends that the analyst who performed the extraction was the analyst who was required to testify as to the results of testing on the black pants so that he or she would be available for cross-examination as to what was done. Defendant further argues that any competent lawyer, keeping abreast of the law, would have known Ms. Bach's testimony ran afoul of *Crawford* and *Melendez-Diaz* and that a confrontation clause objection was mandated.

We disagree. Ms. Bach did not testify to the testimonial statements and reports of other analysts who were not available for cross-examination. On direct examination, Ms. Bach explained she is a DNA analyst responsible for processing case work, that she regularly conducts peer reviews of other analysts' work, that she is the client services manager for Bode Technology Group, and that she provides expert testimony regarding DNA analyses performed at the lab. Ms. Bach also testified to general background information regarding DNA analysis. When asked if she performed "DNA analysis in this case," Ms. Bach responded, "Yes, I did."

Ms. Bach explained that LAPD forwarded five "known samples" (the cheek swabs from Mr. Nolasco, the three defendants, and codefendant Wilson), as well as ten "unknown samples" lifted from various items of evidence (one of which was the cutting from defendant Gonzalez's black pants). Ms. Bach explained that she generated reports showing the DNA profiles for the five known samples, compared them with the unknowns, and personally determined and identified the matching profiles. With respect to defendant Gonzalez's black pants, Ms. Bach determined the sample contained DNA matching the victim, Mr. Nolasco. Ms. Bach's testimony shows her personal involvement in the DNA analyses performed, the generation of the reports offered as evidence, and her experience and knowledge to testify as an expert about the DNA profiles.

The fact Ms. Bach stated that one aspect of the process, the extraction of material from the black pants sample, was handled by another analyst did not raise any obvious red flags that her overall testimony was in violation of the confrontation clause. Defendant Gonzalez has not shown ineffective assistance of counsel warranting reversal

of his conviction based on the failure to object to the Bach testimony. Defendant has not shown there was no rational tactical purpose for declining to assert a confrontation clause objection to that portion of the Bach testimony related to the extraction of the DNA evidence from the black pants, that such an objection would more likely than not have been sustained, and that a more favorable outcome was reasonably probable if counsel had not failed to object. (*People v. Beagle* (1972) 6 Cal.3d 441, 458 [failure to make certain objections to evidence ordinarily within realm of trial tactics over which court will not engage in “judicial hindsight”]; see also *People v. Zimmerman* (1980) 102 Cal.App.3d 647, 658 [failure to object to evidence ordinarily “held insufficient to establish an unconstitutional impairment of the right to effective counsel”].)

And, to the extent a portion of Ms. Bach’s testimony was based in part on the laboratory work of the nontestifying technician who performed the extraction, as an expert, her testimony could properly include reference to hearsay matters upon which she relied in performing her work and rendering her opinion without offending the confrontation clause. (Evid. Code, § 801; *Crawford, supra*, 541 U.S. at p. 59, fn. 9; *Williams v. Illinois* (June 18, 2012, No. 10-8505) __ U.S. __ [132 S.Ct. 2221].)³

³ We note for the record the California Supreme Court granted review in several cases raising confrontation clause challenges to admission of hearsay evidence in medical or forensic laboratory reports and requested the parties to brief the impact of *Melendez-Diaz* on the court’s decision in *People v. Geier* (2007) 41 Cal.4th 555. (*People v. Rutterschmidt*, review granted Dec. 2, 2009, S176213; *People v. Gutierrez*, review granted Dec. 2, 2009, S176620; *People v. Dungo*, review granted Dec. 2, 2009, S176886; *People v. Lopez*, review granted Dec. 2, 2009, S177046.) Those cases remain pending and the Supreme Court has requested supplemental briefing (in all cases except *Gutierrez*) addressing the United States Supreme Court’s recent decision in *Williams v. Illinois*. As noted above, we do not find the Bach testimony runs afoul of *Melendez-Diaz*. And, to the extent *People v. Vargas* (2009) 178 Cal.App.4th 647 also addresses the constitutional issue, we do not find it applicable to our analysis in light of the significantly different facts.

DISPOSITION

The judgments as to Sam Viera, Jose Rivas and Robert Gonzalez are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.