

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT LOPEZ,

Defendant and Appellant.

B236174

(Los Angeles County
Super. Ct. No. KA091626)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed in part, reversed in part, and remanded.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, David Zarmi, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Vincent Lopez (defendant) was convicted of first degree murder (Pen. Code, § 187, subd. (a)¹). On appeal, defendant contends that there is not substantial evidence to support the jury’s findings that he committed the crime for the benefit of the gang, and the trial court erred in imposing a 10-year section 186.22, subdivision (b)(1)(C) enhancement. We hold that there is sufficient evidence to support the jury’s findings that defendant committed the crime for the benefit of the gang, and that the trial court erred in imposing the 10-year section 186.22, subdivision (b)(1)(C) enhancement.

BACKGROUND

A. Factual Background

1. *The Shooting*

City of Pomona Police Department Officer Vaneric Mendoza testified that on August 14, 2010, just after midnight, he was dispatched to a “shots fired” and “man down” in the area of Holt Avenue and Weber Street in the City of Pomona. When Mendoza arrived at the location, he saw someone, later identified as Ramiro Chavez, lying face down on the ground, unconscious, and covered in blood from gunshot wounds. Alejandra Prado, Chavez’s girlfriend, was on top of Chavez crying hysterically.

Officer Mendoza testified that Prado told him the person who shot Chavez was, inter alia, an Hispanic male with a shaved head, and wearing a white shirt and traveling in a dark van. Officer Mendoza broadcasted that information over the police radio. Officer Mendoza testified that Prado told him one male initially shot Chavez, and then a second male exited the van and additional shots were fired.

¹ All statutory citations are to the Penal Code unless otherwise noted.

Prado testified that she was speaking with Chavez, who was wearing a hat with a “P” on it, on Weber Street near Holt Avenue when a blue van with its headlights off moved very slowly passed them and stopped. Chavez told Prado to walk home, which she started to do. Prado turned around and saw the van’s front seat passenger, later identified as defendant, exit the van, followed by a rear seat passenger of the van, later identified as Miguel Ayala. They approached Chavez and started to talk to him, but Prado was too far away to hear what was said. Officer Mendoza testified that Prado told him they were arguing with Chavez. Prado testified that she continued walking, but turned back when she heard three gunshots. Prado saw Chavez fall to his knees, and defendant had his right arm extended, holding and pointing something. Defendant had his shirt pulled up over his to his nose, covering the bottom portion of his face. Ayala fired three more shots at Chavez. Defendant and Ayala returned to the van and drove away, turning left onto Holt Avenue. City of Pomona Police Department Crime Scene Investigator Adam MacDonald testified that he went to the incident scene and found Chavez lying face down in a “pool of blood” surrounded by eight .40 caliber shell casings.

City of Pomona Police Department Officer Brad Paulson testified that he was in a patrol vehicle on his way to the scene of the shooting when he was advised that a blue van was possibly involved in the shooting, and it was last seen leaving the scene, traveling east on Holt Avenue. As Officers Paulson approached the intersection of White and Holt Avenues, he saw a blue van traveling east on Holt Avenue that Officer Paulson thought might match the description of the van involved in the shooting.

Officer Paulson testified that he activated the vehicle’s police lights and siren, and the van pulled over and stopped. Officer Paulson exited his vehicle and ordered that the van’s occupants put their hands up. Officer Paulson saw three occupants of the van: the driver, the defendant (who was a passenger in the front seat), and Ayala (the rear seat passenger). While waiting for other officers to arrive before ordering the van occupants out of the vehicle, Officer Paulson saw the van occupants moving around in the vehicle,

and that defendant “kept reaching down to the floorboard” of the van. Officer Paulson repeatedly ordered the van’s occupants to put their hands up.

Officer Paulson testified that when the other officers arrived, the van’s occupants were ordered to come out of the vehicle. The three van occupants “appeared very nervous and kind of scared.”

Investigator Adam MacDonald searched the van and found a .40 caliber semi-automatic Glock pistol underneath defendant’s seat, a .22 caliber revolver in the seat pocket behind defendant’s seat, and a baseball cap with a “B” on it. The .22 caliber revolver had in it one live cartridge and five spent casings. Officer Paulson testified that he searched the van occupants and found cellular telephones in the pockets of Ayala and the driver.

City of Pomona Police Department Officer Christopher Blank testified that he drove Prado to the scene of the shooting and Prado identified defendant as the first person who shot Chavez. Prado testified that she identified defendant based on his clothing, his muscular body, and the top portion of his face. Prado also identified the van as the vehicle involved in the shooting incident.

City of Pomona Police Department Officer Jaime Martinez testified that he participated in a search of defendant’s residence, and his partner found a yellow container in defendant’s bedroom. It contained live ammunition of various calibers, two letters addressed to defendant, and defendant’s school identification. In another bedroom across the hall from defendant’s bedroom, Officer Martinez found photographs of “what appeared to be gang members.”

City of Pomona Police Department Detective Tim Aguirre testified that he found a third cellular telephone on the van’s floorboard between the driver’s seat and the front passenger seat. The screen saver on that cellular telephone was a photograph of defendant and a fist on which a blue “B” was painted. Officer Aguirre testified that defendant identified that telephone and told Officer Aguirre he, defendant, left it in the van.

Detective Aguirre testified that he found a text message on Ayala's cellular telephone, addressed to Tony Main, stating, "My neighbor's house with Vincent, correct?"² Text messages were found on both defendant's cellular telephone and Ayala's cellular telephone. On August 13, 2011, Ayala sent a text message addressed to Vincent, stating, "I think Luis is going over there. Don't tell them that you have the .40, right there." Vincent responded by texting Ayala, stating, "Don't trip." Shortly thereafter, Ayala sent a text to Vincent, stating "Tell this fool let's go to the west."

Los Angeles County Sheriff's Department Deputy Sheriff Edmund Anderson testified as the prosecutor's firearms identification expert. Sheriff Anderson analyzed the two handguns, the spent casings, and the fired bullets recovered from the coroner's office removed from Chavez during his autopsy. He opined that all eight of the spent casings were ejected from the .40 caliber Glock pistol recovered from under defendant's seat, one of the bullets was fired from that pistol, and three of the bullets "could have been" fired from it. Sheriff Anderson also opined that two of the bullets recovered from the coroner's office had been fired from the .22 caliber revolver.

Susan Frances Selser, a Los Angeles County Coroner's office medical examiner, testified that she performed an autopsy on Chavez. She observed 14 gunshot wounds. She determined that the cause of death to be multiple gunshot wounds; of the 14 gunshot wounds, seven were fatal.

2. *Gang Expert Testimony*

City of Pomona Police Department Detective Greg Freeman and Los Angeles County Sheriff's Department Detective Gerald Groenow testified as the prosecution's gang experts. Detective Groenow opined that defendant was a member of the Bassett Grande Los Night Owls gang (Bassett).

Detective Groenow testified that Bassett had over 300 members. Bassett used, inter alia, the symbol "B." Bassett's primary activities included vandalism, robbery,

² Vincent is defendant's first name.

murder, attempted murder, and narcotic offenses. Detective Groenow identified two Bassett members who, in 2008, were convicted of murder, and another Bassett member who, in 2008 was convicted of attempted murder.

Detective Groenow testified that Frank Lira, a Bassett member, wrote defendant a letter stating that when defendant was released from prison “they’re gonna get together and kick it B style,” which means they’re going “to kick it” Bassett style. Lira wrote defendant another letter stating that Lira was giving defendant “his respects in a true blue fashion,” referring to the blue color to which Southern California gangs were aligned.

Detective Groenow testified that defendant had a tattoo of a “B,” aligning himself with Bassett, and an Aztec symbol, aligning himself with Latino gangs. Defendant’s screen saver on his cellular telephone was a picture of a fist with a blue “B” painted on it, which indicated Bassett affiliation. Detective Groenow identified three pictures found in defendant’s home as being of a former Bassett member, and other gang members. Defendant had a MySpace page on which defendant goes by the moniker “Little Husky” and made references to Bassett.

Detective Groenow testified that Bassett had an antagonistic relationship with the West Side Pomona gang (WSP) resulting from a deadly shooting of one or more Bassett members that occurred in 2007. Detective Groenow would expect that Bassett would retaliate by going into WSP’s territory and “shoot somebody.”

The prosecutor asked Detective Groenow to assume, hypothetically, facts closely tracking the evidence concerning the shooting of Chavez. Based on those facts, Detective Groenow opined that the shooting would be done for the benefit of the Bassett gang, stating, “[I]t benefits the person that’s shooting because it shows that this guy’s willing to put in work for the gang. He’s willing to go out there and put in the work, to do the shootings or whatever he’s doing. [¶] That basically gives him more prestige, more—he’s glorified into the gang. People look up to him for what he’s doing. He’s looked up to by the other gang members. That makes him look good with the other gang members. [¶] The gang, it benefits them because everybody knows Bassett did this. Bassett is the gang. They retaliate, they’re willing to put in work. So everybody in the

area knows that Bassett is willing to defend their selves, defend their area and do what's necessary, you know, as a gang. [¶] Makes it easier for them to recruit. People look up to these guys. Gangs work on fear and intimidation. They believe that, you know, people fearing them and being intimidated is respect for them. They take respect as the same thing. So they believe they're being respected for what they're doing. But actually what they're doing is causing fear and intimidation is the area." In response to being asked by the prosecutor how people in the area would know that Bassett committed the crime, Detective Groenow testified, "Oh, it gets back. Pomona will find out. If this guy was a Pomona gang member, it'll spread through there. It just spreads."

Detective Freeman testified that Bassett members lived in the City of Pomona. Bassett was feuding with the WSP gang resulting from a deadly shooting of one or more Bassett members that occurred several years ago. Gang members in the City of Pomona, of any gang, often wore baseball caps with a "P" on them to represent Pomona. Weber Street in the City of Pomona was the eastern border of WSP territory. In the City of Pomona, the phrase "let's go to the West" meant to go to WSP territory.

Based on the prosecutor's question posed to Detective Freeman asking him to assume, hypothetically, facts closely tracking the evidence concerning the shooting of Chavez, Detective Freeman opined that the shooting was "gang purposeful," stating, "[W]hen you referenced to let's go to the West Side, and then you're identifying a target or a local area or a turf, and then ultimately the same person goes into that turf and they kill a young man wearing a "P" hat, I mean those are pretty big indicators that it's gang related or benefits the gang." The prosecutor asked Detective Freeman whether gang members always first determine whether the "target" of the shooting is actually a member of a rival gang, Detective Freeman responded that, "[T]hey assume. . . . [T]hey see what they perceive to be an enemy or a possible target and go about their mission."

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with murder in violation of section 187, subdivision (a) (count 1). The District Attorney alleged that defendant committed the crime for the benefit of a criminal street gang with the intent to assist in the criminal conduct of its members in violation of section 186.22, subdivision (b)(1)(C), and that he personally used a firearm within the meaning of section 12022.53, subdivisions (b)-(d), and (e)(1).

Following a trial, the jury found defendant guilty of first-degree murder, and found that the special allegations were true. The trial court sentenced defendant to state prison for a term of 50 years to life, consisting of a term of 25 years to life on count 1, and 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). A 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), and the other enhancements, were imposed and stayed.

DISCUSSION

A. Gang Enhancement

Defendant contends that there is not substantial evidence to support the jury's finding that he committed the murder for the benefit of a gang. We disagree.

1. Standard of Review

Defendant's contention that insufficient evidence supported the jury's findings on the gang enhancement is reviewed under a substantial evidence standard. "In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "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.'" ([*People v. Rowland* [(1992)] 4 Cal.4th [238,] 269) We apply an identical standard under the California Constitution. (*Ibid.*) "In determining whether a reasonable trier of fact could

have found defendant guilty beyond a reasonable doubt, the appellate court “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738].)” (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) In reviewing the sufficiency of the evidence, “a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]” (*Id.* at p. 1181.) We will reverse for insufficient evidence only if “““upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].””” (*People v. Manriquez* (2005) 37 Cal.4th 547, 577.) This standard of review applies to gang enhancement findings. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

2. Discussion

Section 186.22, subdivisions (b)(1) and (b)(4) provide for a sentence enhancement for any person who is convicted of a felony “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” Section 186.22, subdivision (f) 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 criminal acts included in subdivision (e) include the commission of or attempted commission of robbery (§ 186.22, subd. (e)(2)), homicide or manslaughter (§ 186.22, subd. (e)(3)), the sale, possession for sale, transportation, manufacture, offer for sale, or

offer to manufacture controlled substances (§ 186.22, subd. (e)(4)), and felony vandalism (§ 186.22, subd. (e)(20)).

A gang expert properly may testify about gang affiliation and activity where such evidence is relevant to an issue of motive or intent. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657 (*Killebrew*)). A gang expert properly may testify about “whether and how a crime was committed to benefit or promote a gang.” (*Killebrew, supra*, 103 Cal.App.4th at p. 657.) Similarly, a gang expert may testify about whether a defendant acted for the benefit of a gang, even though the question is an ultimate factual issue in the case, if such matters are beyond the jury’s common experience. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506-509; *Killebrew, supra*, 103 Cal.App.4th at p. 651, citing Evid. Code, § 805 [“Otherwise admissible expert opinion testimony which embraces the ultimate issue to be decided by the trier of fact is admissible”].) “Expert opinion that particular criminal conduct benefited a gang’ . . . can be sufficient to support the . . . gang enhancement. (*People v. Albillar* [(2010)] 51 Cal.4th [47,] 63.)” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

There was substantial evidence to support the gang enhancement. Detective Groenow opined that defendant was a member of Bassett. Defendant made references to Bassett on his MySpace page. Detective Groenow testified that Bassett used, inter alia, the symbol “B,” and defendant had a tattoo of a “B,” and a screen saver on his cellular telephone depicting a fist on which a blue “B” was painted. Lira, a Bassett member wrote defendant a letter stating that when defendant was released from prison “they’re gonna get together and kick it B style,” which Detective Groenow testified means they’re going “to kick it” Bassett style. Lira wrote defendant another letter stating that Lira was giving defendant “his respects in a true blue fashion,” and Detective Groenow testified that refers to the blue color to which Southern California gangs were aligned. Pictures of a former Bassett member and other gang members were found in defendant’s home.

The record contains substantial evidence that the shooting was committed for the benefit of, at the direction of, or in association with Bassett, with the specific intent to

promote or further criminal conduct by Bassett members. Detective Freeman testified that Bassett was feuding with the WSP gang, whose “territory” was just west of Weber Street in the City of Pomona. Detective Groenow testified that because of the incident leading up to the “feud” between the two gangs, he would expect that Bassett would retaliate by going into WSP’s territory and “shoot somebody.” Defendant’s cellular telephone contained a text message from Ayala stating, “Tell this fool let’s go to the west.” Detective Freeman testified that in the City of Pomona, the phrase “let’s go to the West” means to go to WSP territory. The shooting occurred in WSP territory.

Detective Freeman testified that gang members in the City of Pomona, of any gang, often wore baseball caps with a “P” on them. Chavez wore a hat with a “P” on it when defendant shot him. In response to the prosecutor’s question of whether gang members always first determine whether the “target” of the shooting is actually a rival gang member, Detective Freeman testified that gang members “assume” that the target of the shooting is their “enemy or a possible target” based upon their perception.

Detective Groenow opined that the shooting would be done for the benefit of the Bassett gang. Detective Groenow said that the shooter is “looked up to” by the other gang members. The shooting benefits Bassett, Detective Groenow opined, because everybody in the area believes that Bassett is willing to defend themselves, defend their area, and “do what’s necessary.” Bassett also benefits from the shooting because “people fear[] them and are being intimidated [by them] which Bassett [considers to be] respect” The shooting, Detective Groenow explained, makes it easier for Bassett to recruit members.

Detective Freeman opined that the shooting would be done for the benefit of the Bassett gang because the text message on defendant’s cellular telephone saying “let’s go to the west,” and the shooting having occurred on the rival gang’s “turf” killing a young man wearing a “P” hat, “are pretty big indicators that it’s gang related or benefits the gang.”

Defendant relies on *In re Frank S.* (2006) 141 Cal.App.4th 1192. In that case, the police conducted a traffic stop of a minor riding a bicycle, and discovered that the minor

possessed a knife. The minor admitted gang membership. The juvenile court sustained a petition alleging that the minor carried a concealed dirk or dagger, and found true a gang enhancement allegation. (*Id.* at pp. 1194-1195.) The only evidence offered to support the gang enhancement was the fact of the minor's gang affiliation, and the testimony of a gang expert that "a gang member would use the knife for protection from rival gang members and to assault rival gangs. When asked how the minor's possession of the knife benefited the [minor's gang], [the expert] responded it helps provide them protection should they be assaulted." (*Id.* at pp. 1195-1196.) The court stated, "The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Id.* at p. 1199.) The court reversed the gang enhancement, holding such "weak inferences and hypotheticals" insufficient to establish the minor possessed the knife for the benefit of the gang. (*Ibid.*)

In re Frank S., *supra*, 141 Cal.App.4th 1192, bears no resemblance to the facts in this case. Here, substantial evidence—not mere speculation—supported the inference that defendant committed his crimes for the benefit of his gang. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1333.) There was sufficient evidence that defendant shot an apparent City of Pomona gang member in WSP territory.

People v. Ramon (2009) 175 Cal.App.4th 843, upon which defendant relies, is distinguishable. In that case, the defendant and his co-defendant were stopped in a stolen truck. The defendant was charged and convicted for, *inter alia*, receiving a stolen vehicle (§ 496d), and the jury found that crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. (*Id.* at p. 846.) A gang expert testified that because the defendant and his co-defendant were gang members and they were stopped in the heart of gang territory, the circumstances of the present crimes would benefit their gang. (*Id.* at pp. 847-848, 849.) The court found the expert's opinion testimony did not constitute substantial evidence to support the jury's finding on the gang enhancement. (*Id.* at p. 852.) The court stated that the analysis might have been different

had the expert identified the crime the defendant committed as one of the activities of the gang. (*Id.* at p. 853.) Here, defendant was found guilty of murder, and Detective Groenow testified that murder was one of Bassett’s primary activities.

Defendant’s reliance on *People v. Ochoa* (2009) 179 Cal.App.4th 650, is also misplaced. In that case, the court reversed the jury’s true findings on gang allegations in connection with the defendant’s conviction for carjacking and being a felon in possession of a firearm stating, in part, that “there was no evidence that the victim of the crimes was a gang member” (*Id.* at p. 662.) Here, defendant shot one who appeared to be a City of Pomona gang member in WSP territory.

B. Section 186.22, Subdivision (b) Enhancement

Defendant contends, and the Attorney General concedes, that trial court erred in imposing a 10-year section 186.22, subdivision (b)(1)(C) enhancement because it should have imposed instead a minimum parole eligibility term pursuant to subdivision (b)(5). We agree.

Defendant was convicted of murder and the trial court sentenced him to state prison for an indeterminate term of 25 years to life, and imposed and stayed a ten-year section 186.22, subdivision (b)(1)(C) enhancement. Subdivision (b)(5) provides, as relevant here, “any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.” A defendant who commits a gang-related first degree murder, punishable by imprisonment in the state prison for life, is not subject to a 10-year enhancement under section 186.22(b)(1)(C), but instead is subject under subdivision (b)(5) to a minimum term of 15 years before defendant may be considered for parole. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004, 1010.)

The abstract of judgment should be amended to delete the section 186.22, subdivision (b)(1)(C) enhancement and to impose instead a minimum parole term of 15 years pursuant to section 186.22, subdivision (b)(5).

DISPOSITION

We reverse the section 186.22, subdivision (b)(1)(C) enhancement imposed and stayed by the trial court. We remand the matter to the trial court to amend the abstract of judgment to delete the section 186.22 (b)(1)(C) enhancement and to impose instead a minimum parole term of 15 years pursuant to section 186.22, subdivision (b)(5). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.