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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN HENRY DAVIS,

Defendant and Appellant.

B265580

(Los Angeles County
Super. Ct. No. BA419559)

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

James M. Crawford, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, and Steven D. Matthews
and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

Marvin Henry Davis appeals from his judgment of conviction of gross negligent discharge of a firearm (Pen. Code,¹ § 246.3, subd. (a)) and possession of a firearm by a felon (§ 29800, subd. (a)(1)) with true findings on gang enhancement allegations (§ 186.22, subd. (b)(1)). Davis contends that the evidence was insufficient to support the gang enhancement findings. Davis also claims that the prosecutor committed prejudicial misconduct by disparaging defense counsel during closing argument. We reverse the true findings on the gang enhancement allegations for insufficient evidence and remand for resentencing, but otherwise affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In an information, the Los Angeles County District Attorney charged Davis with the following counts: (1) attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664) [count 1]; (2) discharge of a firearm with gross negligence (§ 246.3, subd. (a)) [count 2]; (3) possession of a firearm by a felon (§ 29800, subd. (a)(1)) [count 3]; (4) assault with a semiautomatic firearm (§ 245, subd. (b)) [count 4]; and (5) shooting at an occupied vehicle (§ 246) [count 5]. As to each count, it was alleged that Davis committed the offense 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 (§ 186.22, subd. (b)(1)). As to counts 1 and 4, it was alleged that Davis personally used or discharged a firearm (§§ 12022.53, subs. (b)-(c), 12022.5, sub. (a)) in the commission of the offense. It also was alleged that Davis had two prior felony convictions within the meaning of section 1203, subd. (e)(4). Davis pleaded not guilty to each count and denied the enhancement allegations.

¹ Unless otherwise stated, all further statutory references are to the Penal Code.

II. The Prosecution's Evidence

A. The Shooting

On December 17, 2013, at approximately 9:00 p.m., Louis Clark and his cousin Menickey Ford went to the home of Clark's ex-girlfriend. Clark sought to collect a \$400 debt that his ex-girlfriend's mother, Qiana Jones, owed to him. Jones was not present in the home at the time; however, she spoke to Clark over the telephone and told Clark that she was not going to repay him. Clark and Ford then left Jones's home and returned to their family's residence on East 42nd Street in Los Angeles. Clark parked his car on the street directly in front of the home and stayed in the driver's seat listening to music while Ford went inside. After about 10 minutes, Jones and her boyfriend drove by the residence in a red truck and yelled threats at Clark and Ford, including telling them that they "better move up off the block." During the incident, Jones's boyfriend was holding a cell phone in his hand and appeared to be touching the screen of the phone. Jones and her boyfriend then drove away.

A short time later, as Clark remained seated in his car listening to music, the red truck returned to the area. At that time, the truck was accompanied by several other vehicles, including a white SUV, which stopped on the street surrounding Clark. Davis got out of one of the vehicles and walked toward the rear driver's side of Clark's car. As Davis approached, he leaned forward and held his right hand inside his waistband. Davis then asked Clark, "who you?" and "where you from?" Clark did not know Davis, but he understood these questions as asking for his gang affiliation. Clark, who was not a gang member, became frightened because he believed that Davis was going to shoot him. Clark also believed that Davis's actions were related to Clark's dispute with Jones based on her recent threats against him. Clark did not respond to Davis's questions and instead sped away in his car.

Ford was standing on the sidewalk outside her family's home when Davis approached Clark's car. She immediately recognized Davis as an acquaintance from the

neighborhood.² As soon as Clark started to flee the area in his car, Ford saw Davis run to the white SUV. Davis stood partially inside the rear passenger area of the SUV and fired six or seven shots into the air. He then got into the rear passenger seat of the SUV, which began chasing Clark's car. As the SUV sped down the street after Clark's car, Ford heard the sound of additional gunfire coming from the SUV and saw stray bullets strike a neighbor's car. Ford ran inside the house and her mother immediately called the police to report the shooting.

Clark heard multiple gunshots as he was driving away in his car. The shooting momentarily stopped when Clark drove his car down an alley, but resumed when he turned onto a nearby street. Some of the bullets struck the body of Clark's car and shattered the car's windows. Clark drove for 10 to 20 minutes until he could no longer hear any gunfire. He then stopped his car and continued to flee on foot. At some point, Clark called his aunt, who told him to return home. After Clark drove back to his home, he met with the police and provided them with a description of the person who had approached his car. Ford also spoke with the police and told them that she knew the shooter as "Buddy." Clark and Ford were later shown six-pack photographic lineups that included Davis, and they each separately identified Davis as the perpetrator.

During the investigation of the shooting, the police recovered seven expended bullet casings from the street near Clark's home. A forensic analysis showed that six of the recovered casings had been fired from the same .38-caliber semiautomatic firearm, and the remaining casing had been fired from a different nine-millimeter firearm.

² According to Ford, Davis lived in the neighborhood and she regularly had seen him in the local area. A few months prior to the shooting, Davis sold marijuana to Ford and they spent time together at Ford's house. On that occasion, Davis showed Ford YouTube videos of his friends rapping and flashing 4-Deuce and 4-Trey gang hand signs. Ford did not have a history of any problems with Davis, and she was not aware of any connection between Davis and Jones or Jones's family.

B. The Gang Expert Testimony

Los Angeles Police Officer Dennis Walden testified as a gang expert for the prosecution. Officer Walden explained that a gang's reputation for violence is an important aspect of gang culture because it instills fear in the surrounding community and among rival gangs, which allows the gang to protect its territory and engage in criminal activities. A gang enhances its reputation for violence by marking its territory with gang graffiti, displaying prominent gang tattoos, and committing crimes in public. These gang-related activities deter community residents from reporting the gang's crimes and rival gangs from attacking the gang's territory. A gang member's willingness to "put[] in" work for the gang by committing violent crimes can elevate both the reputation of the individual gang member and the reputation of the gang.

Officer Walden testified the "4-Pack" gang is a criminal street gang comprised of three subsets: the 4-8 Gangster Crips, the 4-Deuce, and the 4-Trey. The 4-Pack gang has about 250 members and the 4-8 subset has about 45 members. The gang uses the letters "C" and "G" as a common sign or symbol, and its members also tend to identify themselves by their subset in their clothing, tattoos, and hand gestures. Members of the three subsets often live in the same neighborhoods, socialize with one another, and commit crimes together. The primary activities of the 4-Pack gang include vandalism, drug sales, robbery, burglary, firearm possession, assault, and murder. The shooting in this case took place in 4-Pack gang territory. Officer Walden opined that Davis was an active member of the 4-8 subset of the 4-Pack gang. In forming his opinion, Officer Walden considered Davis's multiple tattoos signifying his 4-8 gang membership, as well as Davis's appearance in a June 2013 rap video posted on YouTube during which he displayed 4-8 gang hand signs. The officer also relied on prior police documentation in which Davis admitted he was a 4-8 gang member.

When presented with a hypothetical based on the facts of the case, Officer Walden opined that the shooting would have been 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. Officer Walden reasoned that the

shooting occurred within the territory claimed by a criminal street gang, and that the shooter was a gang member responsible for protecting his gang's territory from potential disputes. When the shooter approached the victim and asked him where he was from, the shooter was trying to determine the victim's gang affiliation and whether the victim was a rival or threat to the shooter's gang. Additionally, when the victim drove off without answering and shooter responded by firing a gun and then pursuing the victim in a car chase, the shooter was demonstrating his gang's reputation for violence and willingness to openly commit acts of violence in a public residential area. The presence of the other vehicles at the scene of the shooting served as a "show of force," and the persons in those vehicles may have been there to provide backup for the shooter or to vouch for his violent act. In addition to enhancing the reputation of the shooter as a member of the gang, the shooting would benefit the gang by instilling fear in community residents and rival gang members, thus enabling the gang to continue its criminal activities with impunity.

III. The Defense Evidence

Garryion Daniel testified on behalf of the defense. Daniel was a long-time friend of Davis and his sister, Leticia, was Davis's girlfriend. Daniel testified that, on December 17, 2013, Davis spent the day at Daniel's house to celebrate Leticia's upcoming birthday, and did not leave the house until 11:00 p.m. that night. Daniel believed that Davis was an inactive 4-8 gang member at the time of the shooting.

IV. Verdict and Sentencing

At the conclusion of the trial, the jury found Davis guilty of discharge of a firearm with gross negligence and possession of a firearm by a felon. As to these two counts, the jury also made true findings on the gang enhancement allegations. The jury found Davis not guilty of attempted murder, assault with a semiautomatic firearm, and shooting at an occupied vehicle. As to each of the counts for which Davis was found guilty, the trial court imposed a term of eight years in state prison, consisting of three years on the underlying charge and five years on the gang enhancement finding. The court stayed the sentence on the firearm possession count pursuant to section 654.

DISCUSSION

I. Sufficiency of the Evidence Supporting the Gang Enhancements

On appeal, Davis challenges the sufficiency of the evidence supporting the jury's true findings on the gang enhancement allegations. Davis specifically contends that the evidence was insufficient to support the findings that he committed the underlying crimes for the benefit of, at the direction of, or in association with a gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. We conclude that the gang enhancement findings were not supported by substantial evidence.

A. Applicable Law

The California Street Terrorism Enforcement and Prevention Act was enacted by the Legislature with the express purpose “to seek the eradication of criminal activity by street gangs.” (§ 186.21.) One component of the statute is a sentence enhancement for felonies 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.” (§ 186.22, subd. (b)(1).) As the California Supreme Court has made clear, however, section 186.22 “does not criminalize mere gang membership; rather, it imposes increased criminal penalties only when the criminal conduct is felonious and committed not only ‘for the benefit of, at the direction of, or in association with’ . . . a ‘criminal street gang,’ but also with the ‘specific intent to promote, further, or assist in any criminal conduct by gang members.’ [Citation.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624, disapproved on other grounds by *People v. Sanchez* (2016) 63 Cal. 4th 665, 686, fn. 13.) The statute thus applies only “when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang.” (*People v. Albillar* (2010) 51 Cal.4th 47, 68.)

“In order to prove the elements of the criminal street gang enhancement, the prosecution may . . . present expert testimony on criminal street gangs. [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) Indeed, “[e]xpert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be

sufficient to support [a] gang enhancement.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) “Generally, an expert may render opinion testimony on the basis of facts given “in a hypothetical question that asks the expert to assume their truth.” [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]” (*People v. Ward* (2005) 36 Cal.4th 186, 209.) An “expert’s opinion may not be based ‘on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors.’” (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.)

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that 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. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]” (*People v. Albillar, supra*, 51 Cal.4th at pp. 59-60.) However, “[a] trier of fact may rely on inferences to support a conviction only if those inferences are “of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt” that the inferred facts are true. [Citation.]” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.) Moreover, a reviewing court “may not . . . “go beyond inference and into the realm of speculation in order to find support for a judgment. A finding . . . which is merely the product of conjecture and surmise may not be affirmed.” [Citations.]” (*Id.* at pp. 947-948.)

B. The Gang Enhancements Were Not Supported by Sufficient Evidence

To prove the elements of the gang enhancement allegations, the prosecution relied on the expert testimony of Officer Walden. In rendering an opinion that the crimes in this case were committed for the benefit of, at the direction of, or in association with a gang, and with the specific intent to promote, further, or assist in criminal conduct by gang

members, Officer Walden reasoned that gangs commit violent crimes, such as shootings, to instill fear in community residents and rival gangs, which enhances the reputation of the gang and its members and enables the gang to continue its criminal activities.

With respect to the benefit to the gang, Officer Walden specifically testified: “[T]his type of crime will be talked about throughout the community. The police showed up, there was a shooting, and just the violence of the crime—through the residents, you know, they’ll be shocked and in awe that this happened, and it just goes to reinforce the fact that they are fearful of retaliation and it prevents them from speaking to the police and coming forward when they observe crime. And ultimately, it allows the gang to paralyze the community and to continue on their criminal activity with little interference.” With respect to the intent of the gang member committing the crime, Officer Walden further stated: “The gang member’s responsibility within the street is to protect his territory usually at all costs from rivals—any kind of actions or disputes within the territory; so by this gang member taking the initiation [sic] to approach this gentleman, he is thereby protecting his territory. Furthermore, he initiates the contact with the victim. He takes it upon himself to approach the victim in the car and asks him who he is and ‘where are you from?’ [A]nd ‘where are you from?’ is a huge, significant question in gang lifestyle. It’s a gang member trying to establish . . . ‘Is he a rival? Is he an enemy? Is he some kind of threat to me or my territory or my gang?’ . . . The victim speeds off and the first reaction of the gang member is to fire and return back to his vehicle and continue pursuing the victim through the streets as he continues to fire. Now, this action clearly shows that regardless of the victim’s response, the gang members are already mentally and physically able to carry out an attack.”

Based on the totality of the record, however, we conclude that Officer Walden’s testimony did not provide sufficient evidence to support the true findings on the gang enhancement allegations. While there was substantial evidence that Davis was a 4-Pack gang member in his gang’s territory when he committed the crimes in this case, the prosecution failed to prove that Davis was acting for the benefit of, at the direction of, or in association with his gang. In particular, there was no evidence that either Qiana Jones

or her boyfriend was a gang member. There also was no evidence that any of the other people in the convoy of cars present at the scene were gang members or affiliated with Davis's gang. Although Officer Walden speculated in his direct testimony that these other individuals may have been members of the same gang as the shooter because "typically gang members commit acts with other gang members," he admitted on cross-examination that "we don't know if those other people are gang members." Accordingly, while the jury reasonably could have inferred that the individuals in the other vehicles directed or assisted Davis in his crimes, the evidence did not support an inference that any of these individuals were 4-Pack gang members or were acting on behalf of the 4-Pack gang. (See *People v. Franklin, supra*, 248 Cal.App.4th at pp. 950-951 [evidence was insufficient to support a finding that defendant committed the charged offenses in association with a criminal street gang where defendant was aided in his crimes by other individuals who were not members of defendant's gang].)

Additionally, there was no evidence that, during the commission of the crimes, Davis called out any gang names, displayed any gang signs, wore any distinctive gang clothing, or otherwise identified his affiliation with the 4-Pack gang. There also was no evidence that Clark, the victim of the shooting, was a rival gang member or associated with any gang. The evidence did establish that, prior to the shooting, Davis asked Clark where he was from, which, as Officer Walden explained, was a common gang challenge that often preceded an attack. Clark also testified that he understood Davis to be asking if he was in a gang. However, Davis never identified his own gang affiliation at any time during the confrontation, and there was no evidence that Clark was aware that Davis was a 4-Pack gang member.³ While Officer Walden testified that the shooter's crimes would benefit his gang by enhancing the reputation of the gang and instilling fear in the

³ There was evidence that Clark's cousin, Menickey Ford, was an acquaintance of Davis, and that on one prior occasion, Davis showed Ford a YouTube video of his friends rapping and flashing 4-Deuce and 4-Trey gang hand signs. However, Ford did not recall seeing Davis in the YouTube video, and she never testified that she was aware that Davis was a gang member at the time the shooting occurred.

community, he acknowledged that there was no evidence that any community residents or rival gang members knew which particular gang, if any, may have been involved in the shooting. It is thus difficult to discern how Davis's crimes would benefit the 4-Pack gang when, during his commission of those crimes, Davis never identified the gang to which he belonged through his words, actions, or appearance. Officer Walden's testimony that the shooting benefitted the 4-Pack gang by enhancing its reputation for violence was based solely on speculation, not evidence. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662-663 [where defendant gang member committed a carjacking unaccompanied by fellow gang members and without calling out a gang name, displaying gang signs, or otherwise identifying his gang affiliation, expert testimony that the crime was committed for the benefit of the gang was insufficient to support the gang enhancement findings].)

The evidence presented at trial was also insufficient to support a finding that Davis committed the crimes at issue with the specific intent to promote, further, or assist in criminal conduct by gang members. The evidence showed that Davis confronted Clark in his parked car shortly after a dispute arose between Clark and Jones about a personal debt. Although the jury reasonably could infer from the timing of the confrontation that Davis was acting at the behest of Jones or her boyfriend, there was no evidence that either of these individuals was a member of any gang or was even aware that Davis was a gang member. Indeed, the prosecution did not offer any evidence to establish the nature of the relationship, if any, between Davis and Jones, or between Davis and Jones's boyfriend. While Officer Walden opined that either Jones or her boyfriend would have had a "tight relationship" with Davis's gang in order to seek Davis's assistance in confronting Clark, such testimony was not supported by any evidence in the record. Officer Walden's testimony that the shooter would have been "enforcing some sort of dispute within his territory [as] part of his responsibility as a gang member" was likewise lacking in evidentiary support. Officer Walden merely speculated that, because Davis was a gang member who committed a crime in gang territory, Davis must have had a gang-related motive, rather than a personal motive, for his crime. Such speculation is insufficient, however, to support the specific intent element of the gang enhancement statute. (See

In re Daniel C. (2011) 195 Cal.App.4th 1350, 1363-1364 [where appellant, an active gang member, committed a robbery without identifying his gang affiliation or acting in concert with other gang members, expert testimony that robbery was committed to further interests of appellant's gang was not supported by substantial evidence]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 [where defendant gang member was found in possession of a stolen vehicle and unregistered firearm while in gang territory and with a fellow gang member, expert opinion that defendant was acting on behalf of his gang was speculative and insufficient to support gang enhancement findings].)

In sum, the evidence was not sufficient to support a finding that Davis committed the crimes for the benefit of, at the direction of, or in association with a gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. The jury's true findings on the gang enhancement allegations must therefore be reversed.

II. Alleged Prosecutorial Misconduct

Davis argues that the prosecutor committed prejudicial misconduct in violation of his federal constitutional rights by attacking the personal integrity of defense counsel. Davis specifically asserts that the prosecutor made the following statement during his rebuttal closing argument to imply that defense counsel had misled the jury: "And the reality is, again, it's an adversarial system. So regardless of the evidence that you get, at the end of the day the defense attorney has to stand up and say this is ridiculous. There's not enough evidence." We conclude that this claim lacks merit.

A. Applicable Law

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.' [Citations.] 'In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks' [citation], and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion [citation]." (*People v. Edwards* (2013) 57 Cal.4th 658, 738.) "We accord the prosecutor wide latitude in describing the factual deficiencies of the defense case.' [Citation.]" (*Id.* at p. 740.) "To prevail on a

claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337.)

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so “egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 506.) Reversal for prosecutorial misconduct is not required unless the defendant has been prejudiced thereby, that is “unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.” (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

B. No Prejudicial Misconduct Occurred

In this case, Davis has failed to demonstrate that the prosecutor committed any prejudicial misconduct. The record reflects that, at the start of his rebuttal argument, the prosecutor addressed defense counsel’s assertion during her closing argument that none of the witnesses to the shooting saw Davis’s face. After pointing out that the eyewitness testimony directly contradicted that claim, the prosecutor stated: “Now, our system is set up as an adversarial system, and [defense counsel] has a job to do. I’m not saying she did something wrong, but you have to take that step back and say my role is not to pick sides. That’s not the point. The point is you listen to the evidence, and you say, does the evidence show that this occurred?” The prosecutor then addressed defense counsel’s assertions that the police investigation of the shooting and evidence offered by the prosecution at trial were deficient in several respects. In the context of explaining that the jury’s role was to determine whether Davis was guilty of the charged crimes and not whether the police did a good job investigating the case, the prosecutor made the

complained-of comment that “regardless of the evidence . . . , at the end of the day the defense attorney has to stand up and say this is ridiculous.”

When the prosecutor’s statement is considered in context, his remark appears to be a rebuttal to defense counsel’s characterization of the evidence during her closing argument. The comment specifically was directed at the argument that had been made by defense counsel about alleged deficiencies in the police investigation and the prosecution’s case-in-chief, and was not aimed at defense counsel personally. The prosecutor’s statement therefore did not constitute an improper attack on defense counsel’s personal integrity, and there is no reasonable likelihood the jury would have construed the comment in an objectionable manner. (See, e.g., *People v. Charles* (2015) 61 Cal.4th 308, 328-329 [prosecutor’s statement that “I tip my hat to the job the defense did in this case when they had no evidence that went their way” was not misconduct because it “was aimed solely at the persuasive force of defense counsel’s closing argument, and not at counsel personally”]; *People v. Huggins* (2006) 38 Cal.4th 175, 207 [no misconduct where prosecutor stated that defense counsel “has a tough job, and he tried to smoke one past us” because “prosecutor simply used colorful language to permissibly criticize counsel’s tactical approach”].) Moreover, even assuming any error, this isolated remark by the prosecutor did not constitute a pattern of conduct so egregious that it rendered the trial fundamentally unfair, nor was it reasonably probable that Davis would have obtained a more favorable result had the comment not been made. On this record, no prejudicial misconduct occurred.

DISPOSITION

The true findings on the gang enhancements (§ 186.22, subd. (b)(1)) are reversed and the matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

ZELON, J.

I concur:

GARNETT, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PERLUSS, P. J., Dissenting in part.

Louis Clark unsuccessfully sought to collect a debt from his ex-girlfriend's mother, Qiana Jones, during the evening of December 17, 2013. When he returned home, Clark sat in his car in front of the family residence listening to music. About 10 minutes later, Jones and her boyfriend drove by the residence and yelled threats at Clark, demanding he "move up off the block." They then drove away.

Clark's home is in territory controlled by the 4-Eight Gangster Crips criminal street gang. Shortly after Jones and her boyfriend threatened Clark, Marvin Henry Davis, an active member of the 4-Eight Gangster Crips criminal street gang, arrived on the scene with a number of other individuals, including Jones and her boyfriend, in several vehicles. Davis approached Clark on foot and issued a widely known and well-understood gang challenge: "Who you? Where you from?" As he spoke those words, Davis's hand was inside his waistband; Clark believed Davis was holding a gun. Rather than respond to what he recognized as gang-banging terms and fearing he would be shot, Clark quickly drove away. Davis fired his gun multiple times as Clark fled. Davis then got into one of the waiting vehicles (not the one in which he had arrived) and gave chase. Additional shots were fired as Davis and his confederates followed Clark.

Based on a hypothetical that tracked these facts, Los Angeles Police Officer Dennis Walden, a gang expert, opined such a shooting would have been committed for the benefit of the shooter's gang and with the specific intent to further or assist in criminal conduct by the gang's members. Officer Walden explained a gang member's open commission of acts of violence in a residential neighborhood within his gang's territory benefited the gang by instilling fear in the community, thereby enhancing the gang's reputation and enabling it to continue its criminal activity with impunity.

Given the evidence about the December 17, 2013 incident and Officer Walden's expert testimony, a reasonable jury could have found the shooting by Davis was gang related—that is, it was done for the benefit of a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the

meaning of Penal Code section 186.22, subdivision (b) (section 186.22(b)(1)).¹
(See *People v. Vang* (2011) 52 Cal.4th 1038, 1048 [“[e]xpert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement”]; *People v. Albillar* (2010) 51 Cal.4th 47, 63 [“[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1)”]; see generally *People v. Manibusan* (2013) 58 Cal.4th 40, 87 [“[a] reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’” the jury’s verdict”]; *People v. Zamudio* (2008) 43 Cal.4th 327, 358 [“[w]here the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal”]; *People v. Livingston* (2012) 53 Cal.4th 1145, 1170-1172 [applying the substantial evidence standard of review to a challenge to the sufficiency of the evidence to support true findings that the underlying offenses were committed on behalf of a criminal street gang].)

To be sure, aspects of the hypothetical that formed the basis for Officer Walden’s opinion were based on surmise rather than evidence. Although it was reasonable to infer that the shooting incident was prompted by Clark’s attempt earlier that evening to collect a debt from his ex-girlfriend’s mother, there was no evidence the ex-girlfriend’s mother, her boyfriend or any of the other individuals who arrived with Davis in front of Clark’s home were gang members or affiliated in some manner with 4-Eight Gangster Crips. Thus, as the majority observes, it is only speculation whether Davis committed his

¹ Section 186.22(b)(1) enhances the sentence 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” (See *People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

firearm-related offenses “in association with” a criminal street gang. But a crime committed by a single gang member can qualify for the criminal street gang enhancement under section 186.22, subdivision (b), if there is evidence—as there was in this case—that it was done, at least in part, for the benefit of the gang and with the specific intent to further or assist criminal conduct by gang members. (See *People v. Rios* (2013) 222 Cal.App.4th 542, 546, 572 [an individual who acts alone for the benefit of a criminal street gang and with the specific intent to further criminal conduct by gang members is subject to the gang enhancement in section 186.22(b)(1)]; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 (lead opn. of Corrigan, J.); *id.* at pp. 1140-1141 (conc. opn. of Baxter, J.)) Davis’s use of the “where-you-from” gang challenge when confronting Clark reasonably supports Officer Walden’s conclusion there was a gang-related motive for Davis’s actions, even if there was also some aspect of personal motive for his crimes.

Similarly, although Davis did not identify his specific gang affiliation during the commission of his crimes by flashing gang signs or calling out his gang’s name, evidence of such conduct is not required for a true finding on a gang enhancement allegation, particularly where, as here, the offenses were committed within the territory claimed by the perpetrator’s gang by someone who unequivocally made his gang status known to the victim. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 621.) It is a reasonable inference from this evidence that Davis’s acts of violence would become known in the neighborhood as the work of a member of the 4-Eight Gangster Crips and would, as a result, enhance the gang’s reputation within the territory it claimed.

Accordingly, I respectfully dissent from the majority’s decision to reverse the true findings on the criminal street gang enhancement and would affirm the judgment in its entirety.

PERLUSS, P. J.