

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
THIRD APPELLATE DISTRICT
(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GUADALUPE RAMIREZ,

Defendant and Appellant.

C066655

(Super. Ct. No.
NCR79642)

A jury convicted defendant Jose Guadalupe Ramirez of carjacking (Pen. Code,¹ § 215, subd. (a); count I), second degree robbery (§ 211; count II), and street terrorism (§ 186.22, subd. (a); count III). On counts I and II, the jury found true allegations that defendant personally used a firearm (§ 12022.53, subd. (b)), a principal used a firearm (§ 12022.53,

¹ Further statutory references are to the Penal Code unless otherwise indicated.

subd. (e)(1)), and the crime was committed for the benefit of a criminal street gang (§ 186.22, subs. (b)(4) (count I), (b)(1)(c) (count II)).

Defendant was sentenced to state prison on count I for an indeterminate term of 15 years to life plus 10 years for personal use of a firearm. Sentences on the remaining counts and allegations were stayed pursuant to section 654.

On appeal, defendant contends (1) his count III conviction and the street gang enhancements on counts I and II must be reversed because there was insufficient evidence he actively participated in a criminal street gang or committed the carjacking and robbery for the benefit of a street gang, and (2) the trial court erred when it allowed the prosecution expert to testify, in response to a hypothetical question, that the crimes were committed for the benefit of a criminal street gang. We shall affirm the judgment.

FACTS

Prosecution Case-in-Chief

On June 7, 2009, Porche Hanna invited Bradley Brunson to her residence in Redding. They had known each other for only a couple of weeks. When Brunson arrived, Hanna gave him a hug and seemed to be "[a]cting weird."

There were two males (perpetrators) in the backyard. Hanna did not introduce them to Brunson or tell him their names. Both perpetrators wore Raiders jerseys, one white and the other black. Defendant wore the black jersey and blue jeans. The male in the white jersey was stockier than defendant. Brunson

assumed both perpetrators were Mexican based on their skin coloring.

Hanna asked Brunson to drive the perpetrators home to Red Bluff. When the perpetrators indicated they had money for gas, Brunson agreed to drive them home.

Brunson was driving a 1997 compact car. Hanna sat in the front passenger seat and the perpetrators sat in the back, with defendant directly behind Brunson. During the ride to Red Bluff, the perpetrators conversed in Spanish. As they entered Red Bluff, defendant told Brunson to exit the freeway on Jellys Ferry Road. When Brunson exited, defendant had him turn left and then make a few more turns. Brunson drove past a school and was told to make another turn onto Bend Ferry Road. At that point, defendant told him to stop the car. Defendant pressed a gun against Brunson's back and again told him to stop.

When the car stopped, defendant opened the door and pushed Brunson out and down to the ground. Defendant told Hanna to cover her ears. The man in the white jersey got out of the car and pinned Brunson to the ground while defendant pressed a pistol against Brunson's head and searched his pockets. Defendant removed and took Brunson's wallet and cell phone. Defendant told Brunson that, if he moved, he would be shot.

Both perpetrators returned to the car. Defendant drove the car a short distance, turned around and drove away, almost running over Brunson. Brunson ran to a residence, obtained a telephone, and called the police.

In response to the call, Tehama County Sheriff's Deputy Chris Pflager was dispatched to Bend Ferry Road. He met with Brunson, who reported receiving a phone call from "Porche" in which she requested a ride from Redding to Red Bluff. Brunson reported that he took Hanna and two males to Red Bluff. Brunson also described his car, including its license plate number. Pflager advised other officers to be on the lookout for the car.

Deputy Pflager brought Brunson to the Sheriff's Department. Brunson spoke with Tehama County Sheriff's Detective Rob Brinton. Brinton brought Brunson back to the robbery location to review the scene and then drove him home. Brinton then met with Hanna who provided physical descriptions of the two perpetrators. She also provided several nicknames including "Pelon" and "Preacher." "Preacher" was a moniker for Elfego Acevedo. While speaking with Hanna, Brinton learned that Red Bluff police had stopped Brunson's car.

Red Bluff Police Officer Aaron Murray had been informed of the alert for Brunson's car. While patrolling, Murray passed by Brunson's car headed in the opposite direction. The occupants appeared to be two Hispanic males in their early 20's. Murray made a u-turn and reported that he had seen the car. A civilian directed Murray to an alley where he found the car parked behind a business. By that time defendant was the sole occupant.

Officer Murray held defendant at gunpoint until backup officers arrived. Then Murray directed him to come out of the car. Defendant, dressed in a black shirt, acknowledged that he had a firearm. Murray retrieved a gun from a holster on

defendant's waistband. The gun was loaded with five live rounds.

Tehama County Sheriff's Deputy Richard Ryan and his police dog tracked scents from Brunson's car across a street to a grassy area where a white football-type jersey was found.

When Detective Brinton arrived on the scene, he seized a cell phone from inside the car. In the phone's list of contacts, Brinton found Porche Hanna's telephone number. Fingerprints lifted from the phone were matched to defendant's right thumb.

Inside the car, Detective Brinton found two backpacks, neither of which belonged to Brunson. Inside one of the backpacks was a copy of a resume for Porche Hanna.

That afternoon, Brunson identified his car as the one police had located. Later, at a live lineup, Brunson identified defendant as the person who had worn the black jersey and had held the gun. Several days later, Brunson again identified defendant in a photographic lineup.

Juan Ramirez, the brother of defendant, testified that the day prior to the incident he had transported defendant and a man he knew as Elfego to a location in Redding. Later, Detective Brinton showed Ramirez a photograph of Elfego Acevedo, and Ramirez identified him as the person who had accompanied defendant.

Sheri Clayborne, the mother of Porche Hanna, testified that the day before the incident Hanna had brought two male friends to the house. The friends had tattoos on their arms and were

carrying backpacks. Clayborne recalled that Hanna had given the males a copy of her resume.

At some point after this visit, perhaps a few days or weeks, Clayborne discovered that gang-related signs had been painted on her fence.

Robert Marquez was a special agent assigned to the Special Service Unit of the Department of Corrections and Rehabilitation. His expertise was in gang identification. Defendant stipulated that Marquez was an expert on criminal street gangs.

A month prior to the incident, Agent Marquez had participated in a multi-agency operation that brought him into contact with defendant.² Defendant had visible tattoos. On his right elbow, defendant had the number "1" and "sur," the Spanish word for south. On his left elbow, he had the word "side" and the number "3." Defendant had a single dot and the number "1" on one ear lobe, and three dots on the other ear lobe. On the inside of one middle finger, defendant had a tattoo of the number "1," and on the other middle finger he had a "3." On his right forearm, defendant had a tattoo of large letters, "SSL," which Marquez understood to stand for South Side Locos, a Sureno gang operating in Tehama County. Marquez noted that gang members show their gang affiliation through tattoos that would be visible to others.

² Agent Marquez also described his contact with a Sureno gang member other than defendant and Acevedo.

Defendant admitted to Agent Marquez that he was an active member of the SSL gang. Defendant's gang moniker, or nickname, was "Lil Bird."

Tehama County Sheriff's Sergeant David Kain supervised the department's gang investigations. Defendant stipulated that Kain was an expert on Hispanic gangs in Tehama County. Kain described a criminal street gang as a group of three or more people who have a common name, sign, or symbol, and who engage in a pattern of criminal activity. Members of the Sureno gang commonly use the color blue to show their involvement or affiliation. Members also use the numbers "13" or "3," the letter "S," and the terms "Sureno" and "Sur."

Sergeant Kain testified that tattoos are significant in gang culture as a form of identification. Tattoos often are placed on hands, forearms, ears, neck, head, and calves; thus, some tattoos are visible when the person is clothed.

Sergeant Kain reviewed the taking of Brunson's car to determine whether it was gang related. He reviewed the reports prepared by the various deputies and officers, including the follow-up by Detective Brinton. Kain reviewed the Tehama County Jail classification forms, photographs of tattoos, and other photographs and cell phone ring tones. Kain noted that defendant had tattoos of the numbers "1" and "3," symbolizing the number 13, which in turn represents the letter "M," for "La Eme," or Mexican Mafia, the prison gang that started the street gang. Kain testified that the letters "Sur" tattooed on defendant's right arm were a common abbreviation for Sureno.

Combined with the tattoo of "Sides" on the left arm, the tattoo symbolized "Southside" or "Southsiders." Another tattoo on the right arm, "SSL," referred to a local gang, the Southside Locos.

Sergeant Kain viewed photographs of compact discs and testified that they bore blue handwriting; one disc had the name "Mr. SSL," and the other had the number 13.

Sergeant Kain testified that weapons were important in gang culture because they were the means of applying force and intimidation. A gang member with a firearm is more intimidating than one with a bat, who in turn is more intimidating than one who has no weapon. Criminal street gangs are based on what Kain termed "respect," i.e., the fear that flows from the ability to beat or intimidate a rival gang or the general public and thus allows the gang member to do whatever he wants.

Sergeant Kain testified that graffiti, or "tagging," is part of gang culture. Graffiti is used as a signature to show who the gang members are and where they have been. Often gang graffiti will include a member's moniker or nickname as a means of taking credit for the work.

Based on his investigation, Sergeant Kain opined that defendant was an active member of the Sureno gang. Kain's opinion was based on defendant's tattoos; his associating with Acevedo, another known Sureno; the two Surenos, in concert, committing the crimes against Brunson; defendant's admission of gang membership when booked into jail; his continuing to reside with other Surenos in a segregated portion of the jail; his

admissions to Agent Marquez in May 2009; and his admission of membership when booked into jail on previous occasions.

Based on Acevedo's admission of gang membership and tattoos, Sergeant Kain opined that Acevedo was an active member of the Sureno gang on the date of the offenses.

Sergeant Kain was given a hypothetical carjacking and robbery in which two known gang members produce a firearm and force the driver to travel to a remote location. Once there, the driver is pushed out of the car and onto the ground. The driver is held at gunpoint while his clothing is searched and personal items are removed from his pockets. The driver is left on the ground and the gang members flee in his car.

Sergeant Kain opined that the crime benefited the gang in several respects: the person holding the gun would gain respect within his gang because of his intimidation of the victim; the two members of the same gang acting in concert would each "feed off of" the intimidation; and the gang members could later use the items, including the car, that were taken during the incident.

Sergeant Kain opined that the hypothetical crime promotes, furthers, and benefits the gang because gang members brag and take credit for the items stolen and for their actions taken against members of the general public or members of rival gangs. The gang as a whole will benefit from its members' conduct; moreover, each perpetrator will earn the respect of fellow gang members for his willingness to commit these types of violent acts.

Defense

The defense rested without presenting evidence or testimony.

DISCUSSION

I

Defendant contends his count III conviction and the street gang enhancements on counts I and II must be reversed because there was insufficient evidence he actively participated in a criminal street gang or committed the carjacking and robbery for the benefit of a street gang. Specifically, he claims (1) his gang membership was insufficient to prove he committed the crimes for the benefit of his gang, or that he actively participated in a gang; (2) Sergeant Kain's "unsupported" opinion was not substantial evidence that defendant committed the crimes for the benefit of a gang; and (3) the gang graffiti at Hanna's residence was not substantial evidence that the crimes were gang related. These contentions have no merit.

"On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the [judgment], and must presume every fact the jury could

reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury. [Citations.]” (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.) If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also be reconciled with a contrary finding. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) This standard of review applies to charged counts as well as enhancements. (*Ibid*; *People v. Wilson* (2008) 44 Cal.4th 758, 806.)

To establish the count III offense (§ 186.22, subd. (a)), the prosecution must prove that defendant (1) actively (as opposed to nominally or passively) participated in a criminal street gang, (2) knew that the gang’s members engage in or have engaged in a pattern of criminal gang activity, and (3) willfully promoted, furthered, or assisted in any felonious conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) The criminal conduct promoted, furthered, or assisted need not itself be gang-related. (*People v. Albillar, supra*, 51 Cal.4th at p. 55.)

Section 186.22, subdivision (b)(1) provides 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” (E.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 625.) Because there rarely is direct evidence that a crime was committed for the benefit of a gang,

the trier of fact may infer the requisite mental state from "how people act and what they say." (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 110.)

Gang Membership

Defendant notes that section 186.22 "does not criminalize mere gang membership." Specifically, he claims his "mere membership in a gang was insufficient, by itself, to prove" that the crimes were committed "for the benefit of" the gang. (§ 186.22, subd. (b)(1).) However, the statute is satisfied by evidence that the crime was (1) for the benefit of, (2) at the direction of, or (3) in association with, the gang. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).) Here, defendant committed the crime in concert with Acevedo, another member of his gang. "Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with [a] fellow gang member[]." (*Ibid.*) Evidence of "benefit" by the gang was not required.

Morales acknowledged it was "conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (112 Cal.App.4th at p. 1198.) Defendant posits that this is what happened here. He notes that Brunson never observed any indication that either perpetrator was related to a gang. In his view, "[t]here was nothing to indicate that [the perpetrators'] intent was anything other than purely personal, that is, to carjack and rob for their personal gain."

However, defendant had visible gang tattoos on his fingers and ear lobes, and he took no evident steps to conceal those body parts. Brunson's failure to observe the tattoos may be attributed to his being seated in front of defendant in the car during most of their time together. Thus, reasonable jurors could deduce that defendant intended to instill fear and obtain compliance based upon his status as a gang member. The jury was not compelled to find that the incident was a purely personal frolic or detour unrelated to the gang. The fact the jury *could* have done so does not require reversal of the judgment. (*People v. Albillar, supra*, 51 Cal.4th at p. 60.)

Defendant may be understood to contend that there was insufficient evidence he acted "with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1).) The point has no merit.

"Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.'" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412, quoting *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see *Morales, supra*, 112 Cal.App.4th at p. 1198 ["very fact that defendant committed the charged crimes in association with fellow gang members" supports the enhancement].) In *Miranda*, the defendant and two codefendants were members or associates of the same gang. (192 Cal.App.4th at p. 412.) In *Villalobos*, a non-gang member's

commission of the crime in concert with her known gang member boyfriend was sufficient evidence of specific intent to promote, further, or assist criminal conduct by a gang member.

(145 Cal.App.4th at p. 322.) In *Morales*, the defendant and two co-participants were members of the same gang. (112 Cal.App.4th at p. 1183.) Here, defendant's commission of the crime with Acevedo was sufficient to show specific intent to assist a gang member in the commission of a crime.

Expert Opinion

Defendant argues Sergeant Kain's opinion that defendant's "crimes were committed for the benefit of a street gang" is "not entitled to any weight" because it is "inconsistent with the evidence and purely speculative." (Citing, e.g., *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-662; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) Because, as we have seen, there was sufficient evidence the crimes were committed *in association with* the gang (*Morales, supra*, 112 Cal.App.4th at p. 1198), it is not necessary to consider the sufficiency of evidence on the alternative issue of *benefit*.

Gang Graffiti

This leaves defendant's contention that the evidence of gang graffiti at Hanna's residence was not substantial evidence that the crimes were gang related. He notes that the graffiti appeared days or weeks following the offense while he was incarcerated. In his view, even if the graffiti was made by members of his gang, in support of him, the graffiti's presence

is not probative of whether defendant had committed the present crimes for the benefit of the gang.

For the reasons we have stated, it is not necessary to consider whether the present crimes were committed for the benefit of the gang. Thus, we need not address whether the graffiti is relevant to the benefit issue. The conviction and true findings are not based upon the graffiti and are supported by substantial evidence.

II

Defendant contends the trial court violated Evidence Code section 801 and the federal due process clause when it allowed Sergeant Kain to testify, in response to a hypothetical question, that the crimes were committed for the benefit of a criminal street gang. Defendant claims the error was prejudicial as to the count I and II enhancements because "Kain's opinion that [defendant] committed the crimes to benefit a gang was the only basis upon which the jury could have found the gang allegations true."³ He argues the error was prejudicial as to count III because "[Sergeant] Kain's opinion was also the only basis upon which the jury could have found [defendant] participated in the activities of a criminal street gang." We find no error.

³ We have already rejected the premise of the prejudice claim; proof of benefit to the gang was not required. (See part I, *ante*.)

Background

On direct examination, Sergeant Kain opined that defendant "is a member of the Sureno criminal street gang." Following an unreported bench discussion, the prosecutor asked whether, as of the date of the offense, defendant "was an active participant in" the gang. Defendant objected that Kain could not answer the question "[w]ithout the proper foundation." The court ruled the prosecutor could ask whether defendant was "actually a member" but not whether he was an "active participant." The court initially sustained, but ultimately overruled, the foundational objection explaining "I believe the foundation for [Kain] to give that opinion has already been laid by the fact you have stipulated to him as an expert." Following the ruling, Kain opined that defendant "was an active Sureno criminal gang member during that time frame on June the 7th, 2009." As noted, Kain's opinion was based on defendant's tattoos; his associating with Acevedo, another known Sureno; the two Surenos, in concert, committing the crimes against Brunson; defendant's admission of gang membership when booked into jail; his continuing to reside with other Surenos in a segregated portion of the jail; his admissions to Agent Marquez in May 2009; and his admission of membership when booked into jail on previous occasions.

Outside the jury's presence following cross-examination, the trial court reiterated that Sergeant Kain could opine that defendant "is a member of a gang," but Kain could not opine as to defendant's "[a]ctive participation in a criminal street gang," because questioning on the latter issue comes "very close

to laying out Count III and asking in those absolute words if the Defendant were guilty of such a crime" The court ruled that the prosecutor could ask "hypotheticals" regarding whether defendant "acted . . . for the benefit of and in association with or at the direction of a street gang." Both counsels indicated that they understood the court's ruling.

On redirect examination, Sergeant Kain was asked a hypothetical question based on the evidence. Kain opined that the hypothetical crime benefited the gang in several respects: the person holding the gun would gain respect within his gang because of his intimidation of the victim; the two members of the same gang acting in concert would each "feed off of" the intimidation; gang members could later use the items, including the car, that were taken during the incident; the two perpetrators would brag and take credit for the items stolen and for their actions against the public; and each perpetrator will earn the respect of fellow gang members for his willingness to commit these types of violent acts.

Analysis

Defendant's sole objection was to the foundation for Sergeant Kain's opinion. That objection was initially sustained but ultimately overruled. Defendant did not object to either of Kain's opinions, i.e., that defendant was a gang member, and that the hypothetical crime would benefit the gang. In particular, defendant did not object on the specific ground asserted here, that Kain's response to the hypothetical scenario was improper opinion testimony. (Evid. Code, § 353; *People v.*

Geier (2007) 41 Cal.4th 555, 609.) Thus, the claim is forfeited on appeal. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 505 [failure to object to gang expert's testimony forfeits issue].)

Defendant's federal due process claim is forfeited for the same reason. In *People v. Partida* (2005) 37 Cal.4th 428, on which defendant relies, "a timely and specific objection to the admission of evidence was made on state law grounds. The issue was whether that objection was sufficient to preserve a federal due process claim where the due process claim was merely 'an additional legal consequence of the asserted [state] error' [Citation.] Here there was no specific or timely objection from which it could be argued that the constitutional claim flowed. Accordingly, we conclude that defendant's failure to object forfeits his [federal due process] claim on appeal." (*People v. Geier, supra*, 41 Cal.4th at pp. 610-611.)

In any event, defendant's argument has no merit. The trial court did not allow Sergeant Kain to "render the opinion that [*defendant*] committed the crimes for the benefit of his gang." (Italics added.) Rather, Kain opined that a *hypothetical crime* benefited a hypothetical gang in several respects. "Even if expert testimony regarding the defendants themselves is improper, the use of hypothetical questions is proper." (*People v. Vang* (2011) 52 Cal.4th 1038, 1047, fn. 3 (*Vang*).)⁴

⁴ *Vang, supra*, 52 Cal.4th 1038 was decided after the completion of briefing in this case.

Thus, Sergeant Kain did not offer an improper opinion on defendant's guilt, either of count III and the enhancements as a whole or of the particular elements of knowledge and specific intent. Opinions on guilt or innocence are inadmissible because the trier of fact is as competent as a witness to weigh the evidence and draw conclusions on the issue of guilt. (*Vang*, *supra*, 52 Cal.4th at p. 1047.) "But [Kain] properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the [offenses], if the jury found [they] in fact occurred, would have been for a gang purpose." (*Id.* at p. 1048.)

Defendant complains that the prosecutor used "a blatant hypothetical where it is clear to everyone in the courtroom that the person at issue in the hypothetical question was the defendant." In his view, it is "disingenuous" to allow experts to testify to the ultimate facts at issue under the "guise" of hypothetical questions. *Vang* rejected identical contentions explaining: "Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence." (52 Cal.4th at p. 1051.)

Finally, for the reasons expressed in *Vang*, admission of Sergeant Kain's opinion was not fundamentally unfair and did not violate defendant's federal right to due process of law. (E.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [116 L.Ed.2d 385, 397].) Reversal is not required.

III

The relevant 2010 amendment to section 2933 does not entitle defendant to additional conduct credit because he was committed for serious felonies. (§ 1192.7, subds. (c)(8), (c)(19), (c)(27); former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

Part 14 of the abstract of judgment must be corrected to reflect that defendant's conduct credits were calculated pursuant to section 2933.1, not section 4019.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.