

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE LUIS SUAREZ,

Defendant and Appellant.

D059907

(Super. Ct. No. SCD225416)

APPEAL from a judgment of the Superior Court of San Diego County, Desiree A. Bruce-Lyle, Judge. Affirmed.

INTRODUCTION

A jury convicted Jorge Luis Suarez of three counts of willful, deliberate, premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 189, 664)¹ and found true allegations the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) (gang benefit enhancement). The jury found not true allegations

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

Suarez personally used a firearm (§ 12022.5, subd. (a)), but found true allegations Suarez was a principal in the offenses and at least one principal discharged a firearm (§ 12022.53, subds. (c) & (e)) (firearm enhancement).

The trial court sentenced Suarez to seven years to life for the first count of attempted murder plus 20 years for the attendant firearm enhancement. The trial court sentenced him to identical concurrent terms for the second and third counts of attempted murder.

Suarez appeals, contending we must reverse the true finding on the gang benefit enhancement because there was insufficient evidence to satisfy the enhancement's primary activities element. He additionally contends we must reverse the true finding on the firearm enhancement because it depends on the existence of a valid gang benefit enhancement. Finally, he contends we must reverse his attempted murder convictions because the trial court misinstructed the jury on the elements of attempted murder. We conclude these contentions lack merit and affirm the judgment.

BACKGROUND

Prosecution Evidence

Shooting/Firearm Enhancement

Margarita H. went to the store with her friend Janet A.² to buy an item for Margarita's mother, Catalina Martinez. Janet's friend Ernestina, known as "Munchies," joined them. On the way, "Blackie" and "Hitz," two 19- to 20-year-old women,

² Both Margarita and Janet were minors at the time of the underlying crimes and at the time of trial.

approached them. Hitz, who did not get along with Munchies, confronted the girls and accused them of discussing the local "Southeast Lokos" gang. Although Margarita and Janet were not gang members, Janet's friends were. Hitz punched Munchies leading to a fight among the five girls. Martinez's housekeeper intervened and pushed the girls apart. Hitz and Blackie ran away. Margarita, Janet, and Munchies had been winning the fight.

Margarita, Janet and Munchies returned to Martinez's gated apartment home and told her what happened, after which Munchies left. About an hour later, a neighbor knocked on the door and told them one of the girls who participated in the fight was looking through Martinez's window. Martinez, Margarita and Janet went outside to see who the girl was. Martinez's two younger children followed them. Blackie and Hitz were in the street yelling insults, gang names, and challenges for Margarita and Janet to fight. Margarita and Janet screamed back at them.

Within a few minutes, Suarez and another man drove up to the apartment building and got out of their cars. Suarez, known as "Grifo," was short, heavysset, and wore a black-and-white flannel shirt. His head was shaved and he had a gang tattoo covering the back of it. He also had gang tattoos on the back of his hands. Martinez, Margarita and Janet recognized him from the neighborhood. The other man, known as "Flaco," was tall and skinny and wore a football team jersey.

Along with Blackie and Hitz, the two men followed a tenant through the building's security gate. Martinez ordered them out of the building and threatened to call the police. Suarez yelled, "Southeast Lokos" and other gang references. He said he was going to shoot up their home because of their encounter with his "homegirl."

Suarez then put his hands in his pants toward his buckle and began to pull his hand out as if he was getting a gun out of his waistband. As Martinez turned to scream for the children to run, Suarez raised his arm in front of his body and pointed up toward where Martinez, Margarita, and Janet were standing. There was a bright orange muzzle flash from the location of Suarez's hand and the sound of a gunshot. The flash obscured Suarez's face.

After seeing the flash, Martinez turned to leave and heard three more shots while moving away. Margarita saw two flashes and heard two gunshots. When she turned to run, she heard two more gunshots. After the fourth gunshot, a neighbor opened her door and let Martinez and her children in. Suarez and Flaco ran to their cars and drove away.

At some point during the incident, Janet saw a gun in Suarez's hand and Margarita saw a gun in Flaco's hand. A neighbor watched the confrontation from his doorway. He saw a heavyset man with a tattoo on the back of his shaved head pull out a gun and shoot three to four times at Martinez, following her as she was trying to get away.

A man who lived across the street from the apartment building heard the commotion and noticed two men in their mid-to-late 20's with shaved heads in front of the building. One wore a gray-and-black flannel shirt and the other wore a football jersey. The man in the football jersey pulled out a black, semiautomatic handgun, shot four times at the apartment building, and then both men ran away.

Police officers recovered four nine-millimeter caliber casings. They also found four bullet holes on the second floor of the apartment building. One was in front of a metal bar where Martinez had been standing, one was where Margarita had been

standing, one was in front of an apartment, and one was on the lower window close to Martinez's apartment.

Martinez and Margarita each identified Suarez as the shooter from photographic lineups shown to them. Janet was not able to identify anyone from the photographic lineup shown to her. Shortly after the shooting, before the photographic lineups, Martinez, Margarita and Janet viewed the Southeast Lokos gang's page on a social networking website and saw photographs of Suarez, Flaco, Blackie, Hitz, and other gang members not involved in the shooting.

Gang Benefit Enhancement

A gang expert testified Southeast Lokos is a relatively new gang, having started in 1990. It has 55 documented members, including women. It goes by the names Loketown, Lokos, Sureste, Southeast Trece, Loketown Trece, Southeast X3, and SE X3. Gang members use these names as well as "LKS" in their graffiti and tattoos. The gang has two common hand signs and its other common signs and symbols are "LKS," "SE X3," and the number 13.

The gang expert also testified about multiple offenses committed by Southeast Lokos gang members, each of which he personally investigated. The offenses included: (1) a robbery, assault with a deadly weapon and grand theft committed in 2008 when a gang member and others approached four men and stole from them; (2) a robbery committed in 2006 when a gang member and others went into the victim's home, held the victim against his will and lived in his home without his consent for a short time period while possessing weapons and conducting gang and drug activity; and (3) a murder

committed in 2005 when four gang members jumped and killed a person they mistakenly thought was a rival gang member. The gang expert believed these offenses showed Southeast Lokos was an active criminal street gang.

The gang expert explained gang members move up the ranks by "putting in work" for the gang, meaning promoting the gang with graffiti and committing crimes on behalf of the gang, which garners respect for the gang. Respect is the gang's driving force. The more "work," the more respect. Violence, including fighting and shooting, also garners respect for the gang. More violence equates to more respect. Shooting at an enemy of the gang earns the greatest level of respect, both for the gang and the shooter. In addition, shooting puts rivals on notice of the gang's violent power by letting them know the gang has a gun and will use it.

Suarez, who as noted is called Grifo, had been a documented member of the Southeast Lokos gang since 2007. He admitted his gang membership to law enforcement officers on 10 occasions between 2005 to 2010 and associated with known gang members. In addition, he had gang tattoos on his head, hands, and the crook of his right arm. He also had gang memorabilia, writings, and rosters inside his home and gang graffiti inside and outside his home. Among the memorabilia was a photograph of Suarez making one of the gang's hand signs.

Flaco and Hitz were also members of the Southeast Lokos gang. Blackie was a member of the Southeast Rat Killers gang, which is affiliated with the Southeast Lokos gang. Flaco, who was tall and skinny, did not have a tattoo on the back of his head.

Suarez was the only known Southeast Lokos gang member with "LKS" tattooed on the back of his head.

In response to hypothetical questions based on the evidence presented in this case, the gang expert testified the shooting was committed for the benefit of or in association with the Southeast Lokos gang. Specifically, he believed it was a retaliatory act for a perceived slight on the gang.

Defense Evidence

A neurophysiologist testified there are many factors potentially impacting a person's ability to accurately observe and identify another person, including lighting, distance, distractions, multiple viewing targets, stress, and the presence of weapons. He additionally explained people tend to fuse information collected before and after an event into their memory of the event. The process of memory recall in a criminal investigation may also inaccurately skew witnesses' memories, as they may be influenced by an expectation of making a positive identification, a reluctance to identify an innocent person, or the way in which a lineup was conducted. For instance, if a witness views photographs of the person whom she believes is the suspect in a crime and then is shown a photographic lineup including that person, it is not possible to know whether the witness's identification of the person is due to the witness's original observation or the subsequent viewing of the person's photograph.

The tenant who opened the gate for the perpetrators testified the shooter had a tattoo across the back of his head; however, she did not believe Suarez was the shooter because the shooter was a thinner, younger man. Another tenant testified one of the male

perpetrators wore a white T-shirt and dark jeans and the other wore a dark-hooded sweatshirt with the hood pulled up over his head. She initially testified she could not tell which man was the shooter, but later testified the man in the white T-shirt seemed to be the shooter.

DISCUSSION

I

Sufficiency of Evidence for Gang Benefit Enhancement

Suarez contends we must reverse the true finding on the gang benefit enhancement because there was insufficient evidence to satisfy the enhancement's primary activities element. "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." (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.) "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, 357.)

Among the elements the prosecution must prove to establish the truth of a gang benefit enhancement is that the gang's primary activities include committing one or more of the crimes specified in section 186.22, subdivision (e). (*People v. Sengpadychith*

(2001) 26 Cal.4th 316, 322 (*Sengpadychith*); § 186.22, subd. (f).) The prosecution may prove this element with testimony from a gang expert and with evidence of past or present conduct by gang members involving the commission of one or more of the specified crimes. (*Sengpadychith*, at pp. 322-323.) Whether the prosecution may prove this element with evidence of past or present conduct alone depends on whether the evidence shows the commission of one or more specified crimes is the gang's chief or principal occupation. (*Id.* at p. 323.) Sufficient proof might consist of evidence the gang's members have *consistently* and *repeatedly* committed specified crimes. (*Id.* at p. 324.) The factors relevant to determining consistency and repetition include the gang's size, the length of its existence, the patterns of its members' criminal activities (see, e.g., *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224-1226), and whether its members conduct their criminal activities in groups (see, e.g., *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465-1466).

Here, the People sought to prove that the Southeast Lokos gang's primary activities were the commission of murder, robbery, and grand theft from a person. The People's evidence showed Southeast Lokos is a newer, relatively small gang. Between 2005 and 2009, its members committed two robberies, an assault with a deadly weapon, grand theft from a person, a murder, and, with the inclusion of this case, three attempted murders. All of the crimes involved group rather than individual action. In our view, the commission of such serious offenses in a relatively short period of time by groups of members and associates of a newer, relatively small gang provides sufficient evidence for a reasonable jury to conclude the commissions of murders, robberies, and grand thefts

were not merely occasional activities, but consistent and regular activities of the Southeast Lokos gang.

People v. Perez (2004) 118 Cal.App.4th 151 and *In re Alexander L.* (2007) 149 Cal.App.4th 605, upon which Suarez relies, are distinguishable. In *Perez*, the evidence of the gang's primary activities consisted of retaliatory shootings committed by a few individuals over a period of less than a week and a beating committed six years earlier. (*Perez*, at p. 160.) Thus, the evidence in *Perez* did not show the continuity of criminal activity present in this case.

Similarly, in *Alexander L.*, the gang expert's testimony about the gang's past criminal activities was equivocal, contradictory and lacked foundation. (*In re Alexander L., supra*, 149 Cal.App.4th at pp. 611-612.) The criminal history evidence in this case suffers no such infirmities.

Accordingly, we conclude Suarez has not established there was insufficient evidence to support the gang benefit enhancement. Given our conclusion, we need not address Suarez's related contention that the lack of a valid gang benefit enhancement requires reversal of the firearm enhancement.

II

Adequacy of Attempted Murder Instructions

A

"[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Smith* (2005) 37 Cal.4th 733, 739.) The trial court instructed the jury on these requirements

using a tailored version of CALCRIM No. 600. The instruction informed the jury, "To prove that the defendant is guilty of attempted murder, the People must prove that:

[¶] 1. The defendant took at least one direct but ineffective step toward killing another person; [¶] [and] [¶] 2. The defendant intended to kill that person. [¶] A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. **A direct step indicates a definite and unambiguous intent to kill.** It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (Boldface added.)

B

Suarez contends we must reverse his attempted murder convictions because the boldface text in the trial court's instruction misinformed the jury that proof of a direct step established intent to kill. "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

As Saurez acknowledges, this precise issue was raised and rejected in *People v. Lawrence* (2009) 177 Cal.App.4th 547 (*Lawrence*). As the *Lawrence* court explained, "The challenged language is virtually identical in meaning to the analogous portion of CALJIC No. 8.66 (attempted murder), which states: 'However, acts of a person who

intends to kill another person will constitute an attempt *where those acts clearly indicate a certain, unambiguous intent to kill.*' (Italics added by [Lawrence].) That portion of CALJIC No. 8.66 was derived from the more general attempt instruction, CALJIC No. 6.00 (attempt—defined). (See *People v. Beck* (2005) 126 Cal.App.4th 518, 522.) The California Supreme Court has held that CALJIC former No. 6.00, which instructed in pertinent part that acts are sufficient when they ' "clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design," ' correctly stated the law. (*People v. Dillon* (1983) 34 Cal.3d 441, 452–453.) We see no substantive difference between the language of CALCRIM No. 600 and the language approved in *Dillon*." (*Lawrence*, at p. 557.)

The *Lawrence* court further explained, "When the challenged portion of CALCRIM No. 600 is considered in context, it is clear there is no reasonable likelihood jurors understood it as appellant asserts. [Citations.] The instruction as a whole makes it clear that in order to find an attempt, the jury must find two distinct elements: an act and an intent. These elements are related; usually, whether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. [Citation.] Read in context, it is readily apparent the challenged language refers to the act that must be found, and is part of an explanation of how jurors are to determine whether the accused's conduct constituted the requisite direct step or merely insufficient planning or preparation." (*Lawrence, supra*, 177 Cal.App.4th at p. 557.)

Although Suarez contends the *Lawrence* case was wrongly decided, we find its reasoning persuasive. Moreover, we note the trial court instructed the jury with

CALCRIM No. 252, informing it that, for Suarez to be guilty of attempted murder, he must have intentionally committed the prohibited act and must have done so with an intent to kill. The prosecutor's closing argument to the jury further emphasized attempted murder required both a direct but ineffective step toward killing Martinez, Margarita, and Janet, and an intent to kill them. Accordingly, we conclude it is not reasonably likely the jury applied the attempted murder instruction in an impermissible manner.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

AARON, J.