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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE PEINADO,

Defendant and Appellant.

D060790

(Super. Ct. No. SCN277132-2)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed.

A jury convicted defendant Jose Peinado of one count of battery with serious bodily injury (Pen. Code, § 243, subd. (d),¹ count 2), one count of active participation in a criminal street gang (§ 186.22, subd. (a), count 3), and one count of giving false information to a peace officer (§ 148.9, subd. (a), count 4). The jury found true the enhancement, alleged in connection with count 2, that Peinado committed the offense in

¹ All further statutory references are to the Penal Code.

furtherance of a street gang within the meaning of section 186.22, subdivision (b)(1).

The court sentenced Peinado to eight years in prison. On appeal, Peinado contends the court erred by permitting the prosecution to introduce expert testimony focused on the issue raised by the gang count and gang enhancement.

I

FACTS

A. Prosecution Evidence on the Attack

On the night of the attack, the victim (Jose Juarez) went to a 7-11 store with two friends (Cesar and Alexa) and, while Cesar was in the store, Juarez saw "Gremlin" and began talking to him. When Cesar emerged, Gremlin appeared unhappy and said he did not like Cesar, and Cesar and Gremlin had words. Gremlin seemed upset and told Juarez to accompany Gremlin. Juarez thought he could diffuse the confrontation by agreeing to accompany Gremlin, so Juarez went with Gremlin and got into a car with Gremlin, Mr. Cruz, and two others.

The group went to an apartment and, when they arrived, Peinado and others were present. The group hung out and drank beer together. Gremlin kept bringing up Cesar's name, but Juarez tried not to talk about Cesar. It became apparent to Juarez that Gremlin, Peinado and Cruz were members of the Diablos gang because they mentioned "Diablos" many times during the course of the evening.

Just before the attack, Gremlin "wrapped" his hand with something used by boxers, and told Juarez they should go outside together. Juarez and Gremlin, accompanied by Peinado and Cruz, walked downstairs together. Gremlin, Peinado and

Cruz circled Juarez, said something "like, a gang or whatever," and began assaulting Juarez. He was struck repeatedly but was able to escape when a girl came out and told the group to stop. Juarez suffered substantial injuries.

One of the attackers, Cruz, testified everything seemed to be going all right while the group was drinking but Gremlin and Juarez started having words and someone said something about "Diablos." Before the group went outside, Cruz saw Gremlin and Peinado talking in a back bedroom and Peinado putting on gloves. Cruz told an investigator that Gremlin told Juarez that Juarez was "not going to come into his neighborhood and disrespect him."² He also told the investigator that Cruz asked Peinado what happened and Peinado replied that it had been Gremlin's "call."

B. Gang Evidence

The parties stipulated the Diablos was a criminal street gang as defined by the Penal Code and Peinado was a member of the Diablos. An expert testified Peinado's fellow attackers (Gremlin and Cruz) were also members of the Diablos gang, and that the assault on Juarez occurred on Diablos turf, which members refer to as "their neighborhood." The expert explained the importance to gang members of immediately responding to being disrespected in their neighborhood, and that gang members rely on

² Cruz, a longtime member of the Diablos gang, testified the term "neighborhood" means "gang." He also testified that part of the gang culture is to protect the neighborhood and make sure the gang is not disrespected, and if someone disrespects the Diablos he or she may get beaten up.

and expect fellow members to join them in fights.³ The expert explained how the attack can benefit the gang by enhancing its reputation and instilling fear in the victim and those who learn of the attack.

C. The Defense

Shanice H. was at the apartment with Peinado when Juarez, whom she did not know, arrived with other people. Juarez started "running his mouth" and "talking smack about the hood." She left the room, and when she returned everyone had gone outside. She looked out and saw Peinado trying to break up a fight involving Juarez, Gremlin and Cruz. She and Peinado tried to have Juarez come back inside so they could help clean him but, instead, Juarez walked away.

Peinado testified on his own behalf and admitted he was associated with the Diablos gang. He was at the apartment but did not recall any discussion about the gang or any arguments. Peinado remained behind in the apartment when Juarez, Gremlin and Cruz went outside. However, when Shanice told him to come outside, he saw the fight and tried to break it up. Juarez declined Peinado's offer to assist him in cleaning up and instead walked away. Peinado denied participating in the attack on Juarez. However, he admitted that, when police came to the apartment later that night, he lied to them about his identity. Peinado also admitted he lied when he later told a detective that he was having sex during the fight.

³ Cruz verified that if a gang member chooses *not* to join a fellow gang member in an assault on a victim, the passive gang member can suffer "a consequence."

ANALYSIS

Peinado contends it was error to admit any expert evidence concerning gangs because there was no "foundation" for the evidence. He asserts there was no evidence the underlying assault was triggered by gang-related motivations, and therefore the expert evidence concerning gangs was irrelevant to any disputed issue.

Law Applicable to Gang Allegations

The California Street Terrorism Enforcement and Prevention Act (the STEP Act) (§ 186.20 et seq.) includes both a substantive offense (under § 186.22, subd. (a)) and an enhancement (under § 186.22, subd. (b)(1)). Peinado was charged with both the substantive offense of violating section 186.22, subdivision (a), and a gang enhancement alleged in connection with count 2 that he committed the battery in furtherance of a street gang within the meaning of section 186.22, subdivision (b)(1). We outline the elements of each of the charges against Peinado.

A person is guilty of the substantive offense (§ 186.22, subd. (a)) when he or she "actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and . . . willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang"

(Ibid.) Thus, "the elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be

satisfied *without proof the felonious criminal conduct promoted, furthered, or assisted was gang related.*" (*People v. Albillar* (2010) 51 Cal.4th 47, 56, italics added (*Albillar*)). Thus, a defendant can be found guilty of violating section 186.22, subdivision (a), as long as the defendant willfully promoted, furthered or assisted in *any* felonious criminal conduct by fellow members of his gang. (*Albillar*, at p. 55 ["there is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related"].)

The gang enhancement under section 186.22, subdivision (b)(1), provides for increased punishment for a felony "related" to a criminal street gang. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) The enhancement applies when the prosecution proves that the crimes of which the defendant was convicted were 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)). The first element of the gang enhancement is thus whether the crime was committed (1) "for the benefit of" any criminal street gang, or (2) "at the direction of" any criminal street gang, or (3) "in association with" any criminal street gang. (§ 186.22, subd. (b)(1).) The second element is whether the defendant committed the crime with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*Ibid.*)

Admission of Gang Evidence

"[A]s [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is

not more prejudicial than probative[,] and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) Where, as here, "a gang enhancement is alleged or a substantive gang crime is charged, expert testimony regarding the 'culture, habits, and psychology of gangs' is generally permissible because these subjects are ' "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." ' " (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620 [prosecution may meet its burden of establishing the statutory gang elements set forth in § 186.22 by presenting expert testimony about criminal street gangs].) A trier of fact may rely on expert testimony about gang culture and habits to reach a finding on gang allegations. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) Expert testimony about gang culture and habits may include, but is not limited to, testimony about the existence of a gang; gang turf or territory; an individual defendant's membership in, or association with, a gang; motivation for a particular crime, generally retaliation or intimidation; and whether and how a crime was committed to benefit or promote a gang. (*Id.* at p. 1197; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657, disapproved on other grounds in *People v. Vang* (2011) 52 Cal.4th 1038, 1047-1048, fn. 3.)

Application

Peinado argues there was no foundational evidence that the motivation for the attack on Juarez was gang-related, or was the result of anything other than a personal

dispute between Juarez and Gremlin that escalated into a fight, and therefore all of the expert's testimony on the gang was improperly admitted. We are not persuaded by Peinado's claim.

First, Peinado was charged with the substantive offense (§ 186.22, subd. (a)), which placed on the prosecution the burden of proving he was a member of a criminal street gang and willfully promoted, furthered or assisted *other members* of that gang in *any* felonious criminal conduct. (*Albillar, supra*, 51 Cal.4th at p. 56.) Although the parties stipulated to the first element of the offense (e.g. Peinado's membership in a criminal street gang), the prosecution was still required to prove other members in the gang (here Gremlin and Cruz) engaged in felonious criminal conduct (the assault on Juarez) that Peinado willfully promoted, furthered or assisted. The expert's testimony was relevant to establish Gremlin and Cruz were fellow members of Peinado's gang. Moreover, because Peinado's defense was that he did *not* participate in the assault, but instead saw the fight and stepped between the combatants to stop it, the expert's testimony was probative on at least two distinct issues: first, that Peinado was a fellow gang member with Cruz and Gremlin served to impeach Peinado's claim (made both to police and again at trial) that he did not know who was attacking Juarez; second, that gang culture requires its members to "back up" or assist other members when fights occur served to impeach Peinado's claim (made to police and again at trial) that there was blood on his pants because he acted contrary to gang mores by intervening to stop fellow gang members from inflicting harm on an outsider.

Second, Peinado was charged with the gang enhancement (§ 186.22, subd. (b)(1)) in connection with the battery charge. This placed on the prosecution the burden of proving Peinado committed the crime either (1) for the benefit of any criminal street gang, or (2) at the direction of any criminal street gang, or (3) in association with any criminal street gang. (§ 186.22, subd. (b)(1).) It also placed on the prosecution the burden of proving Peinado committed the battery with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*Ibid.*) Although not every crime committed by gang members is automatically "gang-related" for purposes of the enhancement, the court in *Albillar* clarified that crimes can be gang-related for purposes of the enhancement when they are committed "in association with the gang." (*Albillar, supra*, 51 Cal.4th at p. 60.) Addressing the "in association with the gang" component of the enhancement, *Albillar* explained that expert testimony showed gang members choose to commit crimes together for many gang-related reasons, including (1) increasing their chances of successfully completing the crime, (2) bolstering their reputation within the gang because co-participants can relay to other members the fact that a participant engaged in a status-enhancing crime, (3) committing a crime with fellow gang members enables the participants to rely on intimidation of third parties to deter them from turning to police, and (4) relying on gang loyalties to deter the participants from informing to police about the crimes they assisted in committing. (*Id.* at pp. 60-62.) Here, the expert testimony was admissible on the enhancement because, if the jury found Peinado *did* commit the crime "in association with" Gremlin and Cruz, the expert's testimony became probative on many issues.

First, as discussed above, whether Gremlin and Cruz *were* fellow gang members, with whom Peinado "acted in association with" to commit the crime, was part of the expert's testimony. Second, on the subject of whether the crime was sufficiently "gang-related," the expert testified (1) gang members assist each other in assaults to ensure success in the confrontation, (2) members who participate in an attack earn enhanced reputation among fellow gang members, (3) victims of attacks are unwilling to cooperate for fear of being attacked again, and (4) gang loyalties and fear of internal disciplinary retribution deter gang members from cooperating with police. Because the expert testimony was probative under *Albillar* on numerous factual questions pertaining to whether a group attack by gang members was sufficiently "gang-related" for purposes of the enhancement, it was not error to admit the evidence.

Peinado's reliance on *People v. Memory* (2010) 182 Cal.App.4th 835 is misplaced. The *Memory* court concluded it was error to admit evidence concerning the defendant's membership in an alleged motorcycle gang (the Jus Brothers) and the mores of that gang, and that under *People v. Watson* (1956) 46 Cal.2d 818 such error was reversible. (*Memory*, at pp. 858-863.) However, *Memory* involved no gang allegation as either a substantive offense or as an enhancement. (*Id.* at p. 851.) *Memory* specifically observed the evidence about the Jus Brothers:

"did not meet the foundation requirements for admission of criminal gang evidence. The requirements of . . . section 186.22, subdivision (f) were not met as there was no evidence the primary activities of the Jus Brothers were the commission of criminal acts enumerated in . . . section 186.22, subdivision (e). Nor did the Jus Brothers meet the definition of an outlaw motorcycle gang, as testified to by the prosecution expert Bertocchini. There was no evidence the Jus

Brothers utilized its motorcycle affiliation as a conduit for criminal enterprises. Tellingly, no gang enhancements were alleged. 'In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]' [Quoting *People v. Hernandez, supra*, 33 Cal.4th at p. 1049.]" (*People v. Memory, supra*, 182 Cal.App.4th at p. 860.)

Memory has no application to the present case because here section 186.22 allegations *were* present, the Diablos were *stipulated* to be a gang within the meaning of section 186.22, and there was some evidence gang affiliation *did* play a role in the attack.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.