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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ALAN GRAY,

Defendant and Appellant.

E063277

(Super.Ct.No. FVI1400084)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Alana Butler, Meredith S. White, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

On December 19, 2014, a jury convicted defendant and appellant Raymond Alan Gray of assault with a firearm (Pen. Code,<sup>1</sup> § 245, subd. (a)(2); count 2) and being a felon in possession of a firearm (§ 29800, subd. (a); count 3). As to count 2, the jury found true the allegations that he personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d), and that he committed the assault for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)(1)(B)). As to count 3, the jury found true the allegation that defendant possessed a firearm for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)(1)(A)). In a bifurcated proceeding, the trial court found true a prison prior allegation. Defendant was sentenced to state prison for a total term of 23 years. He appeals, contending his constitutional rights were violated by the admission of the gang experts' testimony and the evidence was insufficient to support his gang enhancements. We disagree and affirm the judgment.

## I. FACTUAL BACKGROUND

On January 5, 2013, Mikia Walker witnessed a fight between her boyfriend, Peter Turner, and defendant, nicknamed "Knuckles." Walker heard defendant say that he was a "Blood" gang member and claim, "LA Lanes." After defendant pointed a gun at Walker, she ran to her apartment and later heard three or four gunshots. Turner was shot in his hand. During trial, Walker was reluctant to identify defendant. When she was interviewed by police, she expressed concern about talking to them because she was worried for her safety and that of her child.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

Turner testified and denied any involvement in the incident, claiming he did not know defendant. He admitted that he was a former gang member. He had been interviewed by San Bernardino County Sheriff's Department deputies on January 13, 2013. During that interview, Turner claimed that he did not go to the police after the incident because he feared retaliation. He admitted getting into a fight and being shot in the hand. Turner said the other guy was wearing a red beanie and claimed Denver Lanes, and that he (Turner) responded by saying he was a "Crip homie" and a Grape Street Watts member. Turner identified defendant from a photographic lineup.

Pasadena Police Detective Jordan Ling and San Bernardino County Deputy Sheriff Scott Hamilton, gang experts, opined that Pasadena Denver Lanes (PDL) is a criminal street gang, and they offered opinions regarding PDL's primary activities and its members carrying firearms.

Defendant's cousin testified that defendant was at his apartment in Pasadena on January 5, 2013; however, the cousin was gone between 7:30 p.m. and 12:00 a.m.

## II. DISCUSSION

### **A. The Trial Court Properly Admitted the Gang Experts' Testimony**

Defendant claims that the gang experts' opinions were based on inadmissible hearsay and their testimony violated the federal confrontation clause as construed in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

#### *1. Further Background Facts.*

Defense counsel filed a motion in limine to exclude all of the gang evidence pursuant to Evidence Code section 352. The motion itself conceded the evidence was

relevant, but asked that it be excluded as unduly prejudicial. The motion also objected to the admission of any out-of-court testimonial statements under *Crawford*, to the extent the experts testified to the contents of such statements. The trial court denied the motion.

Detective Ling offered his opinion on the PDL criminal street gang. His background, training and experience included police academy gang training, conversations with other police officers regarding Pasadena gangs, and consensual and detention-based contacts with gang members where he discussed the gang in general, initiation procedures, and why members chose to join gangs. The detective had contacted over 200 gang members, written over 20 search warrants related to gang activity, and executed over 50 search warrants regarding gang crimes. In addition, Detective Ling was assigned to the FBI federal task force and completed over 100 hours of formal training from the California Gang Investigator's Association, the Institute of California Investigations, and California Narcotics Officers Association. Specifically, he had contacted PDL members over 100 times.

Detective Ling identified PDL's territory and testified that there are over 350 documented PDL members, with over 100 currently active members. He described the signs and symbols associated with PDL. He explained that PDL is a Bloods gang and it is aligned with the Los Angeles Denver Lanes gang. Crips gangs are considered rivals to PDL. Grape Street Watts is a Los Angeles Crips gang and a rival of PDL.

According to the detective, being a member of a gang is a "lifestyle"; members participate in the gang 24 hours a day, and consider gang membership their identity. The gang code of conduct dictates that members should strive to be feared and respected.

“Respect equates to reputation,” creating fear of the gang by other gangs and the community. To achieve this, members commit crimes that will generate the fear. Fear in the community can prevent witnesses from being willing to testify against the gang. PDL is known for intimidating witnesses. A Crips gang member beating up a Bloods gang member would be a blow to the Bloods gang member’s reputation and status within the gang. The Bloods gang member would seek to retaliate to protect his reputation. In 2012, Detective Ling investigated a case where a PDL member had lost a fight to a rival gang member and then got a gun and shot at the rival gang member.

Detective Ling explained that PDL has a hierarchy that includes generals, lieutenants, and foot soldiers. The foot soldiers, as the lowest members, are expected to carry guns and commit crimes. PDL members support themselves through residential burglaries and armed robberies. The gang also sells drugs as a source of income, but burglaries and robberies have usurped drug sales as the main source of income for the PDL gang.

Prior to Deputy Hamilton’s testimony, defense counsel specifically objected on *Crawford* grounds. Deputy Hamilton was trained on gangs at the San Bernardino Sheriff’s Academy and became “SMASH certified.”<sup>2</sup> He is a member of several associations through which he completed additional training on gang activity and identifying gang members. He was assigned to the gang unit in Adelanto from 2011 to 2013, where he learned about the city’s gangs through more than 1,000 contacts with members and conversations with confidential informants. Defense counsel again

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<sup>2</sup> San Bernardino Movement Against Street Hoodlums (SMASH).

objected on *Crawford* grounds, and added objections based on foundation and confrontation clause. The court overruled the objections.

Deputy Hamilton testified there were 50 PDL members in the High Desert. He identified PDL's primary activities, including simple thefts, assaults with deadly weapons, assaults with firearms, robberies, burglaries, and scrapping metals. While the deputy stated that murder and attempted murder were also primary activities of PDL, he was unaware of any murders or attempted murders by PDL members in the High Desert. He stated that PDL, as a group, had established a pattern of criminal activity, and that "their business is crime."

Deputy Hamilton was familiar with defendant's tattoos, explaining that the red "D" followed by the word "evil" is consistent with a Bloods gang, and the word "devil" references PDL. Below the "D" are the words "Blood" and "West" for west side. Defendant also has tattoos that read "PDL" and "KMB." KMB stands for "Kings Manor Blood," the housing project in Pasadena where the PDL gang originated and is still prominent. Finally, defendant has a tattoo that reads "754," numbers on a telephone key pad that coincide with the letters "PJG," an abbreviation for "Project Gang," which is another reference to the housing project where KMB originated. Only members of a gang may have the tattoos representative of the gang.

Regarding his conversation with over 30 PDL members in Adelanto, the only specifics Deputy Hamilton offered were that he "personally contacted" Xavier Odom, a PDL member. Odom was convicted of assault with a deadly weapon for the benefit of a gang for an incident that occurred on April 7, 2009, and an assault with a deadly weapon

charge for an incident that occurred on May 8, 2009. Deputy Hamilton also testified that another PDL member, Marquise McCook, was convicted of robbery in 2007. The deputy opined that defendant is an active member of PDL based on his tattoos and his prior self-admissions of being a member of PDL with the moniker, “Knuckles.” Deputy Hamilton also testified that the victim, Peter Turner, is a member of Grape Street Crips.

In Deputy Hamilton’s opinion, defendant committed the charged crimes “for the benefit of, at the direction of, or in association with a criminal street gang.” The deputy explained that because both men identified themselves as members of rival gangs, the fight escalated as each was fighting for respect. He testified that gangs whose members are known to carry firearms are more respected and feared than those that do not have a reputation for being armed, and that using a weapon during the fight would have escalated defendant’s respect among his fellow gang members, and rival gangs, and benefited the gang in the community.

## *2. California Law.*

Under Evidence Code section 801, an expert witness may base an opinion on “matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.” (Evid. Code, § 801, subd. (b).) “Indeed, an expert’s background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such

background information has never been subject to exclusion as hearsay, even though offered for its truth.” (*People v. Sanchez* (2016) 63 Cal.4th 665, 685 (*Sanchez*).

“Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the content of testimonial hearsay statements.” (*Sanchez, supra*, 63 Cal.4th at p. 685.) “[C]ase-specific statements related by the prosecution expert concerning defendant’s gang membership constitute[] inadmissible hearsay under California law.” (*Id.* at p. 670.)

“The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. [Citations.]” (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) This broad discretion also applies when the issue is whether evidence is substantially more prejudicial than probative under Evidence Code section 352. (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 31.)

In this case, the trial court did not abuse its discretion in admitting Detective Ling’s and Deputy Hamilton’s opinions on the general history of the PDL gang. Both experts had been in law enforcement since 2007 and had spent at least two years in a gang enforcement division. The experts kept up to date on gang activities in their divisions by gathering intelligence on gangs in the area, identifying and tracking gang

members and their activities, working with other officers and gang detectives, conducting searches on gang members, and investigating gang-related crimes. They both had training on gang awareness, and they had contact with gang members on a daily basis. They relied on the same types of sources other courts have found appropriate for gang expert testimony, that is, conversations with gang members, confidential informants and officers, as well as written materials. And while individual sources such as gang members might be reasonably questioned, the experts did not rely on these sources alone or simply recite statements by others; they fit the information into all the other sources and their own experiences to render their opinions. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1124-1125.) The trial court therefore properly admitted Detective Ling's and Deputy Hamilton's expert testimony under California law.

### 3. *Confrontation Clause.*

To be subject to the confrontation clause, an out-of-court statement must be "testimonial." (*Crawford, supra*, 541 U.S. at p. 59; see *People v. Lopez* (2012) 55 Cal.4th 569, 580-581 (*Lopez*)). "Throughout its evolution of the *Crawford* doctrine, the high court has offered various formulations of what makes a statement testimonial but has yet to provide a definition of that term of art upon which a majority of justices agree." (*Sanchez, supra*, 63 Cal.4th at p. 687.) "[A]lthough the high court has not agreed on a definition of "testimonial," testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose

pertains in some fashion to a criminal prosecution.’ [Citation.]” (*People v. Edwards* (2013) 57 Cal.4th 658, 705.) Not all statements made to a police officer are necessarily testimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 828.) ““On appeal, we independently review whether a statement was testimonial so as to implicate the constitutional right of confrontation.’ [Citation.]” (*People v. Ford* (2015) 235 Cal.App.4th 987, 994-995.)

With little exception, Detective Ling’s and Deputy Hamilton’s testimony did not implicate the confrontation clause. They were the prosecution’s gang experts. As is appropriate, the experts were led through their foundation, their opinions, and the matters upon which they relied. In so doing, they did not testify as to the details of conversations with third persons or the contents of documents. The examination was constructed such that the experts testified that they had talked to other gang experts and confidential informants, read materials, attended classes on gangs and how to identify members, talked to members during contacts, arrests and detentions, and then they were asked their opinions based on those conversations and documents. This was accomplished without them testifying as to the substance of the third party conversations or the contents of the documents reviewed.<sup>3</sup> That these witnesses used this general information to testify as

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<sup>3</sup> Deputy Hamilton at one point did indicate that he had personally contacted PDL gang member Xavier Odom and was familiar with defendant, whom he opined was an active participant of the PDL gang based on his tattoos and his previous self-admissions. Odom’s conviction records were admitted into evidence. At another point, the deputy testified that defendant goes by the moniker Knuckles. These two points were of minimal import and based on Deputy Hamilton’s personal knowledge. As such, they do not rise to the level of “case-specific statements” contemplated in *Sanchez*. (*Sanchez, supra*, 63 Cal.4th at p. 670.)

gang experts at trial does not mean their primary purpose in obtaining this information was to use it against defendant in a later criminal prosecution. Rather, this information is useful to law enforcement as “part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution. . . . [N]othing in the consensual encounters with gang members or officers suggests they might have reasonably understood [the] primary purpose [of these witnesses] was to use their statements in a later prosecution.” (*People v. Valadez* (2013) 220 Cal.App. 4th 16, 36.) Thus, the experts’ testimony did not give rise to a violation of defendant’s confrontation rights or run counter to state hearsay rules.

#### **B. Substantial Evidence Supports Defendant’s Gang Enhancements.**

Defendant contends the gang enhancements must be reversed for lack of sufficient evidence of the gang’s “primary activities.” He asserts that “the evidence here consisted of vague and conclusory testimony which cannot be sufficient to sustain the enhancement.” He faults the experts for failing to provide “specifics as to the circumstances of the crimes, or where, when, or how [they] had obtained the information.” Alternatively, defendant argues that the gang enhancement on the possession of a firearm charge must be reversed for lack of sufficient evidence of the requisite intent.

To qualify as a criminal street gang there must be proof: “(1) [of] an “ongoing” association involving three or more participants, having a “common name or common identifying sign or symbol”; (2) that the group has one of its “primary activities” the commission of one or more specified crimes; and (3) the group’s members either

separately or as a group “have engaged in a pattern of criminal gang activity.” [Citation.]’ [Citation.]” (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611 (*Alexander L.*); see § 186.22, subd. (f).) The first and third elements are not at issue here. Relying upon the decision in *Alexander L.*, defendant contends the gang experts’ testimony regarding the primary activities of PLD—the second element—lacked sufficient foundation, rendering the evidence insufficient.

““Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.]’ [Citation.] The standard of review is the same where the prosecution relies primarily on circumstantial evidence. [Citation.] Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ [Citation.] The same standard of review applies to section 186.22 gang [allegations]. [Citation.]” (*Alexander L., supra*, 149 Cal.App.4th at p. 610.)

Gang evidence, including expert testimony, is relevant and admissible to prove the elements of the gang enhancements. (*People v. Williams* (2009) 170 Cal.App.4th 587, 609; *People v. Vang* (2011) 52 Cal.4th 1038, 1044.) The trier of fact may rely upon expert testimony about gang culture and habits to reach a finding on a gang allegation. (*Vang, supra*, at p. 1048.)

*1. Primary Activities.*

In *Alexander L.*, the only evidence in support of the primary activities element consisted of the gang expert's testimony that: "I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotics violations." (*Alexander L., supra*, 149 Cal.App.4th at p. 611.) This testimony was found to be insufficient, not only because the expert failed to directly testify that those crimes constituted the gang's primary activities (*id.* at p. 612), but also because, based upon that record, the appellate court did not know whether the basis of the expert's "testimony on this point was reliable, because information establishing reliability was never elicited from him at trial." (*Ibid.*) As a result, the appellate court concluded that it was "impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay. [Citation.]" (*Ibid.*, fn. omitted.)

Defendant contends *Alexander L.* requires the same finding in this case. While the expert in *Alexander L.* did not directly testify that the crimes he mentioned were the primary activities of the gang in that case (*Alexander L., supra*, 149 Cal.App.4th at p. 612), here, when the experts were asked whether the gang has primary activities, Detective Ling testified that PDL members support themselves through residential burglaries, armed robberies, and drug sales. He testified about a 2012 case where a PDL member was charged with an assault with a firearm based on his action of retrieving a gun from his car to shoot a rival gang member. Deputy Hamilton identified simple theft,

assault with a deadly weapon, assault with a firearm, robberies, burglaries, and scrapping metal. He also identified murder and attempted murder, noting that those activities appeared to be limited to the gang's home territory because he was unaware of any murders or attempted murders in the High Desert. Deputy Hamilton testified about three predicate offenses—two assaults with a firearm and one robbery. These three crimes were further proved through the admission of conviction records.

While the evidence in *Alexander L.* was lacking because the source of the expert's opinion was unknown (*Alexander L.*, *supra*, 149 Cal.App.4th at pp. 611-612.), here the experts testified regarding their extensive training on gangs and gang culture, their personal contacts and interviews with many members of PDL, and their conversations with other law enforcement officials. This distinction makes a difference; however, there was no lack of substantial evidence regarding the other primary activities of PDL.

## 2. *Possession of a Firearm.*

Regarding the gang enhancement on the possession of a firearm charge, it is unclear whether defendant is claiming the evidence fails to show that he possessed the firearm for the benefit of a gang, or that he possessed it with the specific intent to promote the gang. Either way, we reject his contention.

Defendant was charged with assault with a firearm based on his fight with a rival gang member where both participants identified their gangs. In addition to the above-referenced testimony, the experts testified that possession or use of a weapon is beneficial to the gang because it creates fear and respect for the member, and by extension, the member's gang. The experts also testified that PDL is known for intimidating witnesses.

Defendant's use of the gun intimidated Walker, causing her to run back to her apartment, and later be reluctant to come forward as a witness and testify at defendant's trial.

According to expert testimony, the young PDL members were expected to carry weapons because they were expected to commit crimes for the gang.

Given the experts' opinions and the supporting evidence, the jury could reasonably conclude that defendant possessed the firearm both "for the benefit of . . . or in association with" PDL (§ 186.22, subd. (d)), and that he possessed the firearm "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (d).)

### III. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

CODRINGTON

J.