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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID FLORES LOZANO III,

Defendant and Appellant.

F063996

(Super. Ct. No. BF133883A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On August 25, 2010, around 5:30 p.m., Anthony Rodriguez was shot five times in front of a friend's house in Bakersfield. Rodriguez survived the shooting but suffered serious injuries requiring hospitalization and surgery.

On January 11, 2011, the Kern County District Attorney filed an information charging defendant, David Flores Lozano III, with attempted first degree murder (Pen. Code,¹ §§ 664, 187, subd. (a), 189; count 1), assault with a semiautomatic handgun (§ 245, subd. (a)(2); count 2), active participation in a criminal street gang (§ 186.22, subd. (a); count 3), and being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 4).

As to counts 1 and 2, the information alleged the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(c)), and, in the commission of the offenses, defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). It was further alleged that, in the commission of count 1, defendant personally and intentionally discharged a firearm and proximately caused great bodily injury (§ 12022.53, subd. (d)(e)(1)), and, in the commission of count 2, defendant personally used a firearm (§ 12022.5, subd. (a)). The information also contained allegations that defendant had two prior convictions which qualified as strikes and serious felonies (§§ 667, subds. (a), (c)-(j), 1170.12, subds. (a)-(e)), and that he had served four prior prison terms (§ 667.5, subd. (b)).

On June 17, 2011, the judge in defendant's first trial granted defendant's motion to bifurcate trial of the gang allegations (i.e., the gang enhancements and gang participation offense) from the trial of the other substantive offenses. The jury trial commenced on June 23, and ended in a mistrial on July 1, after the jury was unable to reach a verdict.

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

On August 26, 2011, the judge in defendant's second trial denied his motion to bifurcate the gang allegations but imposed certain restrictions on the gang evidence that could be presented. The jury trial commenced on September 6, and on September 14, after deliberating for just under three hours, the jury found defendant guilty on all counts, and found the associated gang, firearm, and great bodily injury enhancement allegations to be true. The same day, the trial court found the prior strike, serious felony, and prison term allegations to be true. On November 30, 2011, the trial court denied defendant's motion for a new trial and sentenced him to a total prison term of 89 years to life.

On appeal, defendant contends: (1) a prosecution witness committed prejudicial misconduct while testifying; (2) insufficient evidence supports the gang allegations; (3) the trial court erred in denying defendant's motion for a new trial; and (4) the abstract of judgment contains clerical errors that must be corrected. Respondent concedes and we agree defendant's conviction of active participation in a criminal street gang must be reversed pursuant to *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*). We also agree with defendant that the abstract of judgment must be amended to correct clerical errors. Accordingly, we will reverse defendant's conviction on count 3 and order necessary corrections to the abstract of judgment. In all other respects, the judgment will be affirmed.

FACTS

Overview

The identity of the person who shot Anthony Rodriguez on August 25, 2010, was the principal issue at trial. Rodriguez identified defendant as the shooter in a photographic lineup and at trial. Defendant presented an alibi defense and expert testimony on the unreliability of eyewitness identifications.

The prosecution

According to Rodriguez's trial testimony and a statement he made to a sheriff's deputy who arrived on the scene after the shooting, Rodriguez was standing with his

bicycle outside the gate in front of his friend's house, when a black sedan pulled up with four Hispanic men inside. One of the men got out of the car and pointed a gun at him. When Rodriguez went to grab the gun, the man shot him once in the chest. As Rodriguez attempted to run away, the man shot him four more times in the lower body.

Rodriguez fell to the ground, rolled over, and pretended to be dead. While he was lying on the ground, he saw the shooter reload his gun. A woman came over to Rodriguez and he heard her say, "Can't you see he's had enough?" He then heard the driver of the black sedan say, "Let's go. Cops ... are coming." The sedan then drove away.

Another sheriff's deputy came to the hospital later that night to take Rodriguez's statement. Rodriguez told the deputy that before he was shot, the shooter said, "This is Delirious coming at you." Rodriguez testified that he had never heard the name Delirious before, but he was certain he heard the shooter say, "This is Delirious coming at you." Rodriguez did not hear the name "DeLorean" or "Delorene" during the incident.²

During the afternoon before the shooting, Rodriguez consumed four or five 24-ounce beers, which was approximately the equivalent of 10 regular beers. According to Rodriguez, consuming this amount of beer over the course of a day was something he had done in the past and it had never caused him any difficulty in going about his daily business.

Rodriguez testified that, during the incident, he was able to get a good look at the shooter's face and thought he could identify him if he saw him again. However, he was initially apprehensive about identifying anybody because of the tattoos he saw on the shooter's face, which Rodriguez also referred to as "physical markings."

² The parties stipulated that if called to testify, Shirley Harris would testify, *inter alia*, that she was the first person to get to the victim after the shooting and, when she asked the victim who shot him, he said, "DeLorean."

Approximately three weeks after the shooting, Rodriguez spoke with Bakersfield Police Detective James Newell on the phone. Rodriguez told Detective Newell the shooter had multiple facial tattoos, including a tattoo over his left eye, and that his tattoos had very little to no color in them. The shooter also had a fairly large tattoo covering the front of his neck. Rodriguez described the neck tattoo as consisting of big, bold letters in black ink. Detective Newell confirmed that the tattoos Rodriguez described to him on the phone were consistent with defendant's tattoos.

At the time Rodriguez told Detective Newell about the shooter's tattoos, Detective Newell had already identified defendant as a suspect in the shooting based on the sheriff deputy's report that the shooter identified himself as Delirious before shooting Rodriguez. Detective Newell explained he thought he recognized defendant's street name from a prior contact and conducted a records search, confirming that defendant's moniker was Delirious. Detective Newell did not share any of this information about defendant with Rodriguez before Rodriguez identified defendant as the shooter.

Rodriguez acknowledged that the phone conversation with Detective Newell was the first time he mentioned the shooter's facial tattoos to anyone in law enforcement. He did, however, describe the shooter, including the tattoos, to his family members when he was in the hospital after the shooting.

Rodriguez's wife, Rita Rodriguez, confirmed that Rodriguez described the shooter to her in the hospital and told her the shooter had facial tattoos. He also talked to her about being in fear for his life and that of his family.

According to Rodriguez's testimony, he was scared and nervous when, after their phone conversation, Detective Newell came over to his house to show him a photographic lineup. When Rodriguez first saw the lineup, defendant's photograph stood out to him and he immediately recognized defendant as the shooter. He was hesitant to point this out, however, because he was fearful of retaliation. Thus, while he circled and

initialed photograph number four, which depicted defendant, he told Detective Newell he was only 50 percent sure of his identification.

Later, after talking to his wife, Rodriguez called the detective to tell him he was 80 percent sure he had identified the shooter and eventually told the detective he was 100 percent sure. At trial, Rodriguez reiterated he was 100 percent sure defendant was the shooter when he initially viewed the photographic lineup.

Detective Newell testified he created the six-person lineup with a photograph of defendant and photographs of other individuals who had tattoos similar to those Rodriguez had described. When he handed the lineup to Rodriguez, Rodriguez's hand was shaking. One of the things Detective Newell looked for when a witness was viewing a photographic lineup was the tracking of the witness's eyes. The detective knew that defendant's photograph was in the number four position, which was in the lower row, on the left side of the lineup. When Rodriguez looked at the lineup, the detective was in a position to track his eye movements and it appeared Rodriguez's eyes were focusing on the lower left corner of the lineup.

According to Detective Newell, witnesses are sometimes reluctant to identify a suspect fully. Based on his observations while administering the lineup, he felt Rodriguez might be withholding. Thus, after Rodriguez circled number four, Detective Newell gave him his business card and told him to feel free to call if he had any questions or changed his mind. The same day, Rodriguez called Detective Newell and said, "he was not going to be scared" and "the person that he picked out originally in the lineup, number four, that he was 100 percent sure that was the suspect that shot him."

The parties stipulated that the Southside Bakers is a criminal street gang that engages in an ongoing pattern of criminal activity as defined in section 186.22, subdivisions (e) and (f).

The prosecution's gang expert, Bakersfield Police Officer Nicole Shihrer, testified that, in her opinion, defendant was an active member of the Southside Bakers on August

25, 2010. Officer Shihrer described a number of reports and records which supported her opinion, including a gang registration form dated August 19, 2010, bearing defendant's signature and acknowledging he was a member of the Southside Bakers and that his gang moniker was Delirious. Officer Shihrer also explained the significance of a number of defendant's tattoos. They spelled out letters, numbers, and words—such as “S,” “SS,” “SSBKS,” “Puro Sur 13,” and “Southside #1”—reflecting his affiliation with the Southside Bakers and Southerners or Sureños. Officer Shihrer observed that, over a period of recent years, defendant appeared to have acquired an increasing number of tattoos and they had become darker and more prominent in appearance.

In reviewing the facts and circumstances of the shooting in this case, Officer Shihrer agreed that the following factors were significant. The incident occurred within the traditional boundaries of the Okie Bakers gang, which was a rival of the Southside Bakers gang. There were reportedly three other subjects in the vehicle, which showed “there was a group of people there to witness this incident.” The shooting was also typical of crimes Officer Shihrer had investigated involving gang members, including Southside Bakers. It was also significant the shooter identified himself as Delirious before he shot his victim. Officer Shihrer explained: “Identifying himself by moniker instills fear not only in that person against that Delirious but Delirious is from the Southside, so it makes the Southside more violent, more apt to carry out random acts of violence against the community.”

Officer Shihrer opined that a shooting like the one in this case (i.e., “a shooting by a Southside Baker within Okie territory”) would benefit a gang by instilling fear in other gangs and in members of the community. It would also bolster the gang's status in the community “as being a notorious violent ... criminal street gang capable of doing bad things to people.” Instilling fear in community members and other gang members “would ... make them less likely to go to law enforcement if something bad did happen

to them.” This in turn would hinder criminal investigations and promote the gang’s goals of controlling its territory and leaving it free to commit further crimes.

The defense

Defendant’s sister, Naomi Lozano, testified that defendant was at home with her at the time of the shooting and that they left together later that evening to pick up defendant’s girlfriend and bring her back to the house. Defendant’s girlfriend at the time, Jacqueline Holliday, confirmed that defendant and his sister picked her up from her house that evening and that she stayed with defendant the rest of the night.

In addition to presenting an alibi defense, the defense challenged Rodriguez’s credibility and identification of defendant as the shooter. Through cross-examination, the defense highlighted inconsistencies in Rodriguez’s varying accounts of the shooter and the shootings, including discrepancies in his descriptions of the shooter’s appearance and defendant’s actual appearance. For example, Rodriguez reported that the shooter was between 18 to 23 years old, but defendant was 29 years old at the time of the incident. Rodriguez also reported to others and testified that the shooter was around 5 feet 11 inches tall, but Detective Newell acknowledged in court that defendant was visibly shorter than that.

The defense also elicited testimony to show Rodriguez added embellishing details when he testified about the shooting. Rodriguez acknowledged that, at a previous hearing, he started by testifying that he only saw the shooter’s face for two seconds. Later in the hearing, he added that he was also able to see the shooter when he was lying on the ground playing dead and that he saw the shooter reloading his gun. Rodriguez admitted that this hearing was the first time he ever mentioned seeing the shooter reload his gun.

Rodriguez confirmed that at the time of the shooting, he was not a gang member, wearing gang clothing, or “yelling gang signs or anything like that.” He was simply going to visit his friend.

Dr. Robert Shomer, a psychologist, testified as an expert on eyewitness identification. Dr. Shomer testified that, in general, eyewitness identifications of strangers are very unreliable. He explained a number of factors diminish an eyewitness's ability to remember accurately, such as stress, alcohol use, the presence of a weapon, and having only a short period of time to view a person.

Dr. Shomer explained there is no correlation between how confident somebody is of their eyewitness identification and its accuracy. Memories of a stranger's face tend to fade very quickly and are far less accurate after 24 hours. As time passes, witnesses often become more confident in their identifications, even as the actual contents of their memories are fading. This does not say anything about the initial accuracy but rather reflects a level of commitment or belief in the identification.

The amount of detail in the initial description provided by an eyewitness correlates with the accuracy of their later identification. If a witness later describes unique identifying details not initially disclosed, it is possible the new information was heard from other sources and incorporated into the witness's memory; there is no reliable way of knowing where the information came from.

According to Dr. Shomer, the best practice would be for a photographic lineup to be presented by a police officer who does not know who the suspect is or whether the suspect is included in the set of pictures to prevent the officer from inadvertently influencing the witness. The witness should only be able to see one picture at a time because anything else encourages a form of "comparison shopping" which is strongly correlated with mistaken identifications.

Police officers often believe they can accurately read people's eye movements, but this belief is completely unsubstantiated by research. Police officers have been specifically tested for their purported ability to track eye movements and the research shows they cannot reliably tell which photograph a witness is looking at. Officers who

believe they can track a witness's eye movement can unintentionally influence the witness's identification.

In Dr. Shomer's opinion, the photographic lineup administered in this case was unduly suggestive because, prior to the lineup, the eyewitness described the shooter as having a tattoo over his left eye, but only two of the six individuals in the lineup had a tattoo over their left eye.

DISCUSSION

I. Volunteered Testimony of Detective Newell

Defendant contends his conviction must be reversed because of misconduct committed by Detective Newell while testifying about Rodriguez's viewing of the photographic lineup. Defendant's contention arises from the following line of questioning:

“[THE PROSECUTOR]: Q. You mentioned shaking. Did you notice anything about Mr. Rodriguez?”

“Did he appear to be shaking at all?”

“[DETECTIVE NEWELL]: A. Yes.

“Q. When you say shaking, can you kind of describe what you saw?”

“A. I noticed when I handed him the line-up, and he took it from me, that his hand was shaking. I can watch the paper kind of flutter. He did have some body shaking.

“And I noticed that his eyes, when he looked at the photographic line-up, scanned and then went right to number four, which is where [defendant] is depicted.”

“[DEFENSE COUNSEL]: Your Honor, I will object as to the—

“THE COURT: I'm going to sustain the objection to the phraseology of that portion of the answer and ... strike the last portion of it as to what he looked at.” (Italics added.)

Defendant asserts that Detective Newell's volunteered testimony, italicized above, was “in bad faith” and constituted a “flagrant” violation of the trial court's in limine

ruling that, in defendant's words, "the detective could describe what he observed but could not provide his opinion as to the interpretation of the victim's body language ... or his opinion of what the victim was thinking or looking at in particular." While the court ordered the testimony stricken and later admonished the jury not to consider stricken testimony, defendant claims the detective's volunteered statement was incurably prejudicial.

"Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice." (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that 'the improper subject matter is of such a character that its effect ... cannot be removed by the court's admonitions.' [Citation.]" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935 (*Allen*).)

A careful examination of the record in this case reveals that, contrary to defendant's suggestion, Detective Newell's volunteered statement does not appear to violate any of the trial court's specific in limine rulings and therefore did not impart improper information to the jury. During a pretrial hearing, the court considered and *found admissible* a statement substantially similar to Detective Newell's volunteered statement at trial. Specifically, the court found admissible the detective's statement that "[Rodriguez] put the photographic line-up in front of his face, and his eyes immediately went down to the left hand corner of the photographic line-up, comma, which had [defendant's] picture." That court explained: "That is not speculation. That is his description of the direction in which he was looking."

A little later in the pretrial hearing, the court indicated it would also be proper for Detective Newell to testify that Rodriguez "never took his eyes off the bottom left corner where [defendant's] picture was" because this "expresses directionality," but it would be

improper for him to testify to his opinion that Rodriguez “never took his eyes off [defendant’s] picture.” Thus, it appears the trial court’s in limine rulings generally permitted Detective Newell to describe the direction in which he saw Rodriguez’s eyes move and did not preclude the detective from specifically mentioning that defendant’s picture was located in the area where Rodriguez’s eyes focused.

Detective Newell’s volunteered statement that in scanning the photographic lineup, Rodriguez’s eyes went right to number four where defendant was depicted conveyed essentially the same information as the statement, found admissible by the trial court, that Rodriguez’s eyes went immediately down to the left hand corner of the photographic lineup, which had defendant’s picture. The detective was permitted to testify, and it is evident from the photographic lineup itself, that the number four position was in the left hand corner of the photographic lineup. In light of the strong similarities between the two statements, we see no basis for finding any bad faith on Detective Newell’s part or improper prejudice resting from his volunteered statement.

Defendant’s reliance on *Allen*, *supra*, 77 Cal.App.3d 924 is misplaced. There, a rebuttal witness in a robbery trial testified the defendant’s sister had told the witness the defendant was on parole. (*Id.* at p. 929.) The trial court struck the testimony and instructed the jury to “disregard it completely.” (*Id.* at p. 934.) The appellate court concluded the admonition was insufficient under the circumstances of the case to cure the harm caused by the improper prejudicial comment. “An examination of the record reveals an extremely close case in which the jury had to make its fact determination based upon the credibility of the [defendant] and his witnesses and on the credibility of the prosecution’s witnesses. In light of these facts, it is reasonably probable that a result more favorable to [defendant] would have been reached had the prejudicial information of [defendant’s] parole status not been divulged to the jury. [Citation.]” (*Id.* at p. 935.) In *Allen*, the defendant testified (*id.* at p. 929); although the problematic testimony came

in through a prosecution rebuttal witness, the defendant's parole status was due to a juvenile adjudication, and could not be used to attack his credibility (*id.* at p . 934).

Detective Newell's volunteered statement was not akin to the revelation of the defendant's parole status in *Allen*. Nor was it improperly prejudicial because, contrary to defendant's assertion, it stated information that would have been presented to the jury—and was presented to the jury—in any event. Detective Newell was permitted to testify, albeit in a more roundabout fashion, that when he showed Rodriguez the photographic lineup, it appeared Rodriguez's eyes focused on the area where defendant's picture was located. On the record before us, we are not convinced there is a reasonable probability that the outcome would have been more favorable to defendant in the absence of the volunteered statement, which was essentially duplicative of evidence properly before the jury.

II. Sufficiency of the Evidence of the Gang Allegations

Defendant challenges the sufficiency of the evidence supporting the gang participation offense in count 3 and the gang enhancements associated with count 1 (attempted murder) and count 2 (assault with a semiautomatic firearm). For reasons discussed below, we accept respondent's concession that the evidence was insufficient to support the gang participation offense. However, we find there was sufficient evidence to support the jury's findings on the gang enhancements.

A. The Gang Participation Offense

Defendant contends the evidence presented was insufficient to support his conviction for active participation in a street gang pursuant to section 186.22, subdivision (a) based on the recent California Supreme Court case of *Rodriguez, supra*, 55 Cal.4th 1125. Respondent concedes that the conviction must be reversed.

“The substantive offense defined in section 186.22[, subdivision] (a) has three elements. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element of the substantive offense defined in

section 186.22[, subdivision] (a). The second element is ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and the third element is that the person ‘willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.’ [Citation.]” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

The California Supreme Court has held that the third element of the offense is not satisfied when a gang member commits a felony while acting alone. The word “members,” as the Supreme Court explained, “is a plural noun.” (*Rodriguez, supra*, 55 Cal.4th at p. 1132.) “Therefore, to satisfy the third element, a defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct. The plain meaning of section 186.22[, subdivision] (a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member.” (*Ibid.*) The felonious criminal conduct referred to in the statute must be committed “‘by members of that gang.’” (*Id.* at p. 1131.)

The parties here agree the evidence failed to establish the crimes were committed by at least two gang members. The prosecution did not present evidence to show any of the individuals who were with defendant at the time of the shooting were members of the Southside Bakers gang. As such, we agree that defendant’s conviction in count 3 for violating section 186.22, subdivision (a) must be reversed. Since the trial court stayed the sentence on this count, there is no impact on the resulting sentence in this case.

B. The Gang Enhancements

Defendant contends there was insufficient evidence to support the gang enhancements because, other than evidence of his gang membership and speculation by the gang expert, there was no evidence the shooting was committed to benefit his gang or was otherwise gang related. According to defendant, theory suggested by the gang expert’s testimony—i.e., that the shooting was committed to benefit defendant’s gang by

instilling fear in the community and rival gangs—was unsupported by substantial evidence because there was no evidence “the victim, any member of the community, any member of Okie Bakers, or any member of any gang, knew that the shooting was committed by a Southside Bakers gang member.”

The substantial evidence standard of review applies to the section 186.22 gang enhancement. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) “Our review of the sufficiency of the evidence is deferential. We review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] We focus on the whole record, not isolated bits of evidence. [Citation.] We presume the existence of every fact the trier of fact could reasonably deduce from the evidence that supports the verdict. [Citation.] If the verdict is supported by substantial evidence, we accord due deference to the verdict and will not substitute our evaluations of the witnesses’ credibility for that of the trier of fact. [Citation.]” (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 660; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196 (*Frank S.*) We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 (*Ferraez*)). Thus, substantial evidence includes circumstantial evidence and the reasonable inferences this evidence allows. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

To establish the gang enhancement, the prosecution had to prove that the crime was (1) “for the benefit of, at the direction of, or in association with” a criminal street gang, and (2) that the defendant had “the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) These elements essentially require that both the crime and the defendant’s specific intent be “gang related.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 619, 621-622, 625, fn. 12

(*Gardeley*).) *People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*); *People v. Castenada* (2000) 23 Cal.4th 743, 745 [gang enhancement statute “increases the punishment for some gang-related crimes”]; *People v. Mendez* (2010) 188 Cal.App.4th 47, 56 [gang enhancement statute “applies when a crime is gang related”].) “Not every crime committed by gang members is related to a gang.” (*Albillar, supra*, at p. 60.) A defendant’s mere membership in the gang does not suffice to establish the gang enhancement. (*Gardeley, supra*, at pp. 623-624; *Frank S., supra*, 141 Cal.App.4th at p. 1199.) Rather, “[t]he crime itself must have some connection with the activities of a gang.” (*Frank S.*, at p. 1199.)

“[T]o prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048 (*Hernandez*); *Ferraez, supra*, 112 Cal.App.4th at p. 930 [“It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a ... finding on a gang allegation”].) “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.]’ [Citation.]” (*People v. Ward* (2005) 36 Cal.4th 186, 209.) But “[a] gang expert’s testimony alone is insufficient to find an offense gang related.” (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) Rather, the expert testimony must be accompanied by some substantive factual evidentiary basis from which the jury could reasonably infer the crime was gang related. (*Id.* at p. 660 [“something more than an expert witness’s unsubstantiated opinion that a crime was committed for the benefit of, at the direction of, or in association with any criminal street gang is required to justify a true finding on a gang enhancement”]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 852 (*Ramon*); *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198; *Ferraez, supra*, at p. 931.)

We find the circumstances surrounding the shooting in this case, combined with the gang expert's testimony, provided substantial evidence of a gang motive for defendant's crimes and sufficient support for the conclusion they were committed for the benefit of and with the specific intent to promote his gang. Defendant, an acknowledged Southside Bakers gang member, committed the crimes in a neighborhood claimed by a rival gang. Defendant identified himself by his gang moniker immediately before shooting the victim once in the chest and then four more times in the lower body as the victim tried to run away. An audience for the shooting was provided by the men who accompanied defendant in the car that drove him to the location of the shooting and helped facilitate his escape afterwards. Defendant exhibited conspicuous gang tattoos on his face and neck, and the victim specifically attributed his initial reluctance to provide police with identifying information to fear generated by the tattoos he saw on the shooter. A reasonable jury could infer from all these circumstances that the purpose of defendant's crimes was to demonstrate his willingness to commit a violent shooting to enhance the status of his gang and promote its reputation for ruthlessness. Thus, there was a sufficient factual basis accompanying the gang expert's testimony.

Contrary to what defendant suggests, there is no requirement that the prosecution produce specific testimony from either crime victims or community members that they were aware the perpetrator of a crime was a gang member or member of a specific gang in order to prove a crime was intended to enhance the reputation of the perpetrator's gang by instilling fear in the community. We have examined the many authorities cited by defendant and none of them is factually analogous to this matter.

For example, in *People v. Albarran* (2007) 149 Cal.App.4th 214, a shooting occurred at a birthday party held for the cousin of a Pierce Boys Gang member, but the gang officer testified that the Pierce Boys Gang had no known or relevant gang rivalries, and he knew of no reason for the shooting. Additionally, there was nothing inherent in the facts of the shooting to suggest any specific gang motive. (*Id.* at p. 227.) The court

found “insufficient evidence to support the contention that [the] shooting was done with the intent to gain respect.” (*Ibid.*)

Here, in contrast, there was evidence defendant went into territory claimed by a rival gang and specifically identified himself by his gang moniker before brazenly shooting the victim five times on a residential street in the presence of multiple witnesses. While we agree with defendant that the inference of gang relatedness would have been even stronger had he called out the name of his gang rather than simply his gang moniker, or witnesses had testified they were aware defendant was a Southside Bakers gang member, the absence of such evidence does not demonstrate defendant did not intend the shooting to benefit his gang. Defendant’s argument in this regard goes to the weight rather than the sufficiency of the evidence, and the question of weight was solely for the jury to decide.

For these reasons, we conclude the gang expert’s opinion was not speculative and the record contains ample evidence from which a reasonable jury could find that defendant shot Rodriguez for the benefit of the Southside Bakers Gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.

III. Denial of Defendant’s Motion for a New Trial

Defendant contends the trial court erred in denying his motion for a new trial, which included claims that defendant was entitled to a new trial because (1) the prosecution failed to present any evidence of a particular theory of motive it presented in opposition to defendant’s pretrial motion to bifurcate the gang allegations, and (2) the gang expert’s testimony violated the trial court’s in limine rulings placing restrictions on the gang evidence that could be presented. We conclude defendant has failed to show the trial court abused its discretion in denying his motion for a new trial.

It has long been settled that the trial court has broad discretion in ruling on a new trial motion, and there is a strong presumption that it properly exercised that discretion. “The determination of a motion for a new trial rests so completely within the court’s

discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” (*People v. Williams* (1988) 45 Cal.3d 1268, 1318; *People v. Andrade* (2000) 79 Cal.App.4th, 651, 659.)

Regarding his first ground for seeking a new trial, defendant claims the trial court denied his pretrial motion to bifurcate trial of the gang allegations “based on a misrepresentation by the prosecutor that it was necessary to introduce the gang evidence to prove identity, motive and intent for the shooting.” Defendant asserts the trial court should have granted his new trial motion because it became apparent during the trial “the prosecutor had no admissible evidence to prove a gang motive and intent for the alleged crimes” and “the gang expert’s opinions, without support in the evidence, were used to bolster the weak identification of [defendant] as the shooter.”

Defendant’s claims are without merit. First, there is no support in the record for his claim that the prosecutor *misled* the trial court into denying his bifurcation motion. At the hearing on the motion, the prosecutor correctly argued that the gang evidence was relevant to prove defendant’s motive and intent for the otherwise senseless shooting, and posited a theory similar to the one developed at trial.³ It is true the prosecutor also posited another theory of relevancy that he did not pursue at trial, but this does not demonstrate the prosecutor misled the court.

³ Thus, the prosecutor argued: “We will be able to show through the testimony that they went into Okie Baker territory and Okie Bakers are a rival of the Southside Bakers. Several individuals were in the car and they shoot, randomly, an individual inside rival gang territory. [¶] In addition, you have somebody announcing a moniker that that person has admitted he associates with the Southside Bakers as he is opening fire on the victim. [¶] I think you have some articulable facts in the case, perhaps circumstantial as a whole, some direct, but something that a jury, I believe, can reasonably infer from those facts—his intent, his motive, his motive to further the gang, further himself in status in the gang.” “That type of shooting is motivated by a number of things the expert will testify to. Again, one of them is the more violent the crime, the more status you get within the gang. The more violent the crime, the more intimidation, the more fear you instill within the immediate community. The more fear and intimidation you instill, the better you are as far as operating within those communities, because people won’t report the crimes, and if they do, they won’t come to court to testify.”

When denying the bifurcation motion, the court expressly recognized that one of the prosecutor's theories of motive was that defendant had been absent from the Southside Bakers gang for a period of time due to incarceration and that he committed the shooting in order to reestablish himself within the gang. The court also noted this might "not be the *only* theory of the offense that is presented in the trial." (Italics added.) The court then went on to limit the gang evidence the prosecution could present, in part, by precluding "any reference to the fact that [defendant] had been incarcerated, was just released, was paroled, or anything of that nature." The court acknowledged that evidence of defendant's incarceration was relevant to the prosecutor's theory but found "the prejudicial effect of that outweighs whatever probative value it has."

In light of the trial court's evidentiary ruling, which foreclosed the prosecution from presenting evidence of the reason for defendant's absence from the gang (i.e., his incarceration), it is not surprising the prosecutor abandoned the theory that defendant committed the crimes to reestablish himself in the gang following an absence and pursued another theory of motive instead; this does not in any way show the prosecutor misled the court during the hearing on defendant's bifurcation motion. In any event, the court's express acknowledgment that its evidentiary restrictions would limit the prosecutor's ability to pursue such a theory and that the prosecutor might present other theories of motive directly contradicts defendant's claim that the court denied his bifurcation motion *based* on the prosecutor's representation that he needed gang evidence to support the theory defendant committed the offenses to reestablish himself in the gang.

Second, we have already considered and rejected defendant's claim that, apart from the gang expert's opinion, there was no substantial evidence the crimes in this case were gang related. For the same reasons, we reject defendant's similar claim in arguing the court erred in denying his new trial motion. Nothing that occurred during defendant's trial showed the court's initial denial of his motion to bifurcate the gang allegations was erroneous. Rather, the gang evidence was used in a permissible manner: to establish

motive and intent. (*Hernandez, supra*, 33 Cal.4th at p. 1049 [even in cases where no gang enhancement is charged, “[e]vidence of the defendant’s gang affiliation ... can help prove ... motive ... specific intent ... or other issues pertinent to guilt of the charged crime”].) The court thus acted well within its discretion not only in denying the new trial motion at issue on appeal, but also in refusing to bifurcate trial of the gang enhancements and gang participation offense from the trial of the other substantive offenses.

As to defendant’s second ground for seeking a new trial, he claims the prosecutor elicited testimony from the gang expert which violated the restrictions placed on gang evidence by the trial court’s in limine rulings, which appear to have been designed to address the court’s concern about the close relationship between the issues of motive and identity. In relevant part, the court ruled that “in this particular case, although it is normally admissible and I normally do, I am not going to permit the expert to render any opinion that the crime in this particular case was committed for the benefit of, at the direction of, or in association with a criminal street gang.” The court explained, “in my view, opining on that issue in this case is tantamount to opining on the identity of the individuals who committed the crime, which clearly is not permissible of opinion testimony, no matter how qualified an expert is.” Thus, the court ruled that “the expert may testify as to gang culture, issues related to gang affiliation and so forth, and the People can connect up circumstantially their argument that shows why the crime was committed in this particular case....”

Contrary to defendant’s suggestion, it appears the prosecutor and gang expert attempted to stay within the confines of the trial court’s somewhat perplexing restriction on the expert’s testimony. “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.]” (*Gardeley, supra*, 14 Cal.4th at p. 618.) “It is required, not prohibited, that hypothetical questions [to an expert witness] be based on the evidence.

The questioner is not required to disguise the fact the questions are based on that evidence.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1041). A prosecutor’s hypothetical question to an expert must be based “on what the evidence showed” the defendant in the case did, “not what someone else might have done.” (*Id.* at p. 1046.) “A hypothetical question not based on the evidence is irrelevant and of no help to the jury.” (*Ibid.*)

Consistent with these authorities, the prosecutor asked the gang expert a hypothetical question based on what the evidence showed defendant did in this case. Thus, the prosecutor asked: “Based on the facts of the case . . . we have got a shooting by a Southside Baker within Okie Territory. [¶] What, if you can tell us, might a gang benefit from an act like that? [¶] What would be the benefit based on your training and experience?” Consistent with the trial court’s in limine ruling, the prosecutor did not directly ask the expert’s opinion as to whether the particular shooting in this case, or even a hypothetical shooting based on the evidence presented, was committed for the benefit of a criminal street gang, even though the latter question would have been legally permissible. By framing his questions in terms of how a gang *might* benefit from a shooting like the one in this case, the prosecutor elicited opinions which left to the jury the question of whether the crimes here were, in fact, committed for the benefit of a criminal street gang. The conclusion the prosecutor did not violate the court’s in limine rulings is bolstered by the fact the court denied defendant’s objections to the expert’s responses to this line of questioning, suggesting the court did not find it violated the restrictions it imposed on the gang evidence.⁴

⁴ The closest the gang expert came to improperly expressing an opinion that defendant committed the crimes in this case was when she testified she agreed it was significant the “shooter” called out the name “Delirious” before firing. While she did not specifically identify defendant as the Delirious who committed the shooting, her explanation appeared to assume it was him. In explaining why it was significant that the shooter called out the moniker Delirious, she was not asked to assume this was the shooter’s moniker as a member of the Southside Bakers; rather, she volunteered that fact, testifying that calling out a moniker would instill fear in the victim not only “against that Delirious but Delirious is from the Southside” and thus it would also instill fear against the gang. Although the format of the expert’s response left something to

IV. Correction of Abstract of Judgment

Defendant contends the abstract of judgment must be amended to correct clerical errors appearing in items 1 and 5 of the abstract of judgment. Respondent does not dispute the errors defendant notes but suggests they are inconsequential because item 11 of the abstract of judgment correctly reflects defendant's sentence. We find this suggestion unpersuasive and will order the trial court to amend the abstract of judgment to correct the clerical errors identified by defendant.

The trial court here sentenced defendant to a total prison term of 89 years to life as follows: 52 years to life on count 1, plus 25 years to life for the firearm enhancement, 10 years for the two prior serious felony enhancements, and two years for the prior prison term enhancements. Punishment for the remaining counts and enhancements was stayed pursuant to section 654.

The abstract of judgment must be corrected to check the "654 stay" boxes for counts 2 and 4 in item 1, and to delete the reference to "77 years to life" and replace it with "52 years to life" in item 5. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court has the authority to order trial court to correct clerical errors in abstract of judgment].) In light of our conclusion that insufficient evidence supported the gang participation offense, the abstract of judgment must be further amended to reflect the reversal of count 3.

DISPOSITION

Defendant's conviction on count 3 for active participation in a criminal street gang (§ 186.22, subd. (a)) is reversed. The trial court is ordered to amend the abstract of judgment to: (1) reflect the reversal of count 3; (2) check the "654 stay" boxes for counts 2 and 4 in item 1; and (3) delete the reference to "77 years to life" and replace it with "52

be desired, she still avoided directly expressing opinion that defendant was the individual who committed the crimes in this case. We do not believe any of the expert's testimony was so improper or exceeded the scope of the trial court's in limine rulings, that it was an abuse of discretion for the court to deny defendant's new trial motion on this ground.

years to life” in item 5. The trial court shall forward the corrected abstract of judgment to the appropriate correctional authorities. In all other respects, the judgment is affirmed.

HILL, P. J.

WE CONCUR:

GOMES, J.

FRANSON, J.