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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL AVILA GARZA,

Defendant and Appellant.

F067310

(Super. Ct. No. BF144482A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Charles A. Brehmer, Judge.

Susan K. Shaler, 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, Stephen G. Herndon and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant Raul Avila Garza was convicted by a jury of vehicle theft (Veh. Code, § 10851), active participation in a criminal street gang (Pen. Code,<sup>1</sup> § 186.22, subd. (a)), and resisting an officer in the performance of duties (§ 148, subd. (a)(1)). A section 186.22, subdivision (b), gang enhancement was found true as to the vehicle-theft offense. Additionally, the trial court found true that Garza previously had been convicted of a serious felony and had served a prior prison term.

Garza contends the People's gang expert was not qualified to testify as an expert, and the trial court erred in allowing the testimony. He also contends the trial court abused its discretion under Evidence Code section 352 and allowed the admission of cumulative and prejudicial gang evidence, which violated due process. Finally, Garza contends the trial court violated the ex post facto clauses of the state and federal Constitutions when it imposed restitution and parole revocation fines in amounts that exceeded the minimum statutory amounts in effect at the time the offenses were committed.

We reject each of Garza's contentions and affirm.

## **FACTS AND PROCEDURAL HISTORY**

In October 2012, Frederick Twyman was the co-owner and manager of the Rankin Hotel on Baker Street in Bakersfield. On the evening of October 8, 2012, Twyman's pick-up truck was parked in the hotel's parking lot. Late that night, Thomas Fitzpatrick, a resident of the hotel, saw two men in the parking lot standing next to Twyman's truck and talking.

About 10 to 15 minutes after Fitzpatrick first noticed the two men, he heard a noise from the parking lot and looked out his window; he saw people trying to get into Twyman's truck. Fitzpatrick also saw someone inside the cab of the truck and another

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<sup>1</sup>References to code sections are to the Penal Code unless otherwise specified.

man outside the truck trying to gain entry. The man in the cab opened the door for the man outside the truck and that man climbed inside the cab. Fitzpatrick watched as the men backed the truck out of the parking space and drove out of the parking lot.

Fitzpatrick called Twyman to tell him someone was stealing his truck. Twyman called 911 at 12:08 a.m. on October 9, 2012. Bakersfield Police Officer Juan Orozco and his partner, Senior Officer William Coleman, were dispatched to investigate the report of the stolen vehicle.

About 13 minutes after being dispatched, the two officers spotted a pick-up on Brown Street that matched the description of the stolen vehicle. The vehicle was occupied by three people; the lights of the vehicle were on; the engine was running; and the truck was facing in the opposite direction of oncoming traffic. Garza was seated in the driver's seat.

As the officers approached, Garza climbed out of the truck and ran. Coleman used the patrol vehicle to pursue Garza while Orozco stayed with the truck and its remaining two occupants, James Raymond Huerta and Eddie Don Calistro. Coleman called for back-up and Officer Thomas Hernandez and his canine partner, Kane, responded to the call and saw Garza running. Hernandez pursued Garza, yelling, "Police, stop. I'll release my dog."

Garza continued running and Hernandez warned him again to stop or the dog would be released. When Garza failed to stop, Hernandez released Kane who was able to engage Garza. Other officers arrived on the scene and placed Garza in handcuffs. Huerta and Calistro were taken into custody without incident.

Huerta and Calistro waived their rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and agreed to talk with officers. Both Huerta and Calistro admitted they were from the Varrio Bakers street gang. They both claimed, however, they were no longer active in the gang.

Officer Ryan Miller transported Fitzpatrick to where the defendants were taken into custody. Fitzpatrick identified Garza as the man he saw get into Twyman's truck in the hotel parking lot. At trial, Fitzpatrick identified Garza and Huerta as the two men he had seen by Twyman's truck in the hotel parking lot. Twyman did not give any of the defendants permission to use his truck.

### ***Gang evidence***

City of Bakersfield Police Officer Michael Ko testified as a gang expert for the People. In addition to Ko's testimony, nine other law enforcement officers testified regarding the gang activities of Garza and his codefendants. These officers provided testimony regarding the basis evidence upon which Ko relied in forming his expert opinion.

Prior to allowing Ko to testify as an expert, the trial court held a hearing to determine whether Ko had the requisite experience and expertise to qualify as a gang expert. At the hearing, Ko testified that he had been a member of the police department for a little over five years, 14 months of that in the gang unit. As a member of that unit, his main duties involved analyzing gang crimes and patterns in an effort to suppress gang violence. Ko contacted gang members "pretty much on a daily basis" to talk with them about their gang membership, the gang itself, gang colors, gang tattoos, gang territories, and the offenses committed by the gang. Ko further stated that, during his time as a patrol officer, he worked a high-crime area that involved a lot of gang activity and was in contact with gang members on a regular basis.

Ko also testified at the hearing to having received 12 to 14 hours of gang training in the academy; an eight-hour course on gangs after attending the academy; a 40-hour course with the Bakersfield Police Department that focused on Bakersfield-area gangs; and a 40-hour conference on gangs held in Anaheim. In addition, Ko belonged to the Kern County Gang Investigators Association and attended the regular meetings where information on gangs, gang activity, and gang trends in the area was shared.

Over the objection of Garza, the trial court permitted Ko to testify as a gang expert. Ko then testified that the Varrio Bakers are a Hispanic gang associated with the Mexican Mafia prison gang. It was Ko's estimate that the Varrio Bakers had more than 50 active members. Varrio Bakers identified with the color blue, the number 13, a "V" hand sign, and the initials "VB" and "VBKS." This gang's primary criminal activities consisted of auto theft, burglaries, narcotic sales, robberies, shootings, firearms possession, and witness intimidation.

Ko opined that Garza, Huerta, and Calistro were active members of the Varrio Bakers gang. Ko based his opinion on the current charges, prior offense reports, street contacts, booking reports, and gang-related tattoos. Specifically as to Garza, Ko relied upon the current offense, nine prior offenses, a street check, and numerous booking reports in forming his opinion that Garza was an active Varrio Bakers gang member.

Ko testified to nine predicate offenses. The first was a vehicle theft committed by two admitted Varrio Bakers gang members in November 2010. The second was a grand theft auto offense involving four admitted Varrio Bakers gang members in December 2011.

The third predicate offense Ko testified to was the assault with a deadly weapon and active participation in a criminal street gang offenses to which Garza pled in September 2008. The fourth predicate offense also was Garza's; he was convicted of grand theft in March 2009 as a result of an incident where he and an unknown suspect stole a bicycle. The fifth predicate offense involved codefendant Huerta and another gang member; Huerta pled to a second degree burglary charge in June 2011.

The sixth predicate offense to which Ko testified occurred in April 2009, when two members of the Varrio Bakers gang assaulted a man with a baseball bat and a knife; the man died from his injuries. Both gang members were convicted of murder. The seventh predicate offense occurred in October 2009, when Huerta pled guilty to assault with a deadly weapon.

The eighth predicate offense to which Ko testified was an incident in February 2010 where three Varrio Bakers gang members were in a stolen vehicle; one of the men fired shots at the pursuing officers and was convicted of attempted murder. The ninth and final predicate offense occurred in November 2010 when Calistro failed to stop in response to California Highway Patrol Officers. Calistro was found in possession of a stolen rifle and pled guilty to firearms possession.

### ***Verdict***

On March 22, 2013, a jury found Garza guilty of felony vehicle theft, active participation in a criminal street gang, and resisting or obstructing a peace officer in the performance of his or her duties. In addition, the jury found true the allegation that Garza had committed the vehicle theft for the benefit of a criminal street gang. In a bifurcated proceeding, the trial court found true the prior conviction and prior prison term allegations.

### **DISCUSSION**

Garza raises three issues. First, he contends the trial court erred in permitting Ko to testify as an expert on gangs. Second, Garza contends the trial court abused its discretion by admitting extensive and cumulative gang evidence. Lastly, he contends the imposition of restitution and parole revocation fines in the amounts of \$280 pursuant to sections 1202.4 and 1202.45 violated ex post facto laws. We address, and reject, each contention.

#### ***I. Gang expert***

Garza contends the trial court erred in permitting Ko to testify as a gang expert because Ko did not have the requisite experience, knowledge, education, and training to qualify as an expert. We disagree.

A witness is qualified to testify as an expert if the witness has specific knowledge, skill, experience, or education pertaining to the matter on which the testimony is offered. (Evid. Code, § 720.) Expert opinion may be admitted whenever it would assist the jury

and is to be excluded only when “the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.)

An appellate court reviews the trial court’s determination that a witness is qualified as an expert for abuse of discretion; reversal is warranted only when a witness clearly lacks qualifications as an expert. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1062-1063; *People v. Chavez* (1985) 39 Cal.3d 823, 828.)

In light of Ko’s training, education and experience, Garza’s argument that Ko was not qualified to testify as a gang expert borders on specious. Ko had knowledge of gangs, and specifically gangs in Bakersfield, far beyond that of the average person. (Evid. Code, § 801, subd. (a).) A gang expert’s opinion may be based upon experience with “street gangs in general.” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) Here, Ko had much more than generalized knowledge of gangs. He had spent four years as a uniformed officer on patrol in areas of Bakersfield with a high gang population; had been part of the gang unit for 14 months; and had attended numerous trainings and seminars on gangs, including specifically on Bakersfield area gangs.

Although Garza challenges the depth of Ko’s experience, where a witness has demonstrated sufficient knowledge to testify as an expert, the question of the degree of an expert’s knowledge and experience goes to the weight of the expert opinion, not its admissibility. (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322.) As for Garza’s claim that a gang expert must have specific training in the sociology and psychology of gangs, he has failed to cite any authority for this proposition and we are aware of none.

The trial court did not abuse its discretion in permitting Ko to testify as an expert. We cannot say that Ko “clearly lacked” qualification as a gang expert. (*People v. Wallace, supra*, 44 Cal.4th at pp. 1062-1063.) As there is no abuse of discretion in permitting Ko to testify as an expert, we summarily reject any claim of a violation of due process. (*People v. Lewis* (2006) 39 Cal.4th 970, 990, fn. 5.)

## ***II. Gang evidence***

Ko and nine other law enforcement officers testified regarding gang activities of Garza, his codefendants, and the Varrio Bakers gang, over Garza's objection. Garza contends the admission of cumulative and prejudicial gang evidence was an abuse of the trial court's discretion under Evidence Code section 352 and constituted a violation of due process. Again, he is incorrect.

Admittedly, there was considerable gang evidence admitted at trial. However, Garza and his two codefendants each were charged with both the substantive gang offense and the gang enhancement. Garza contends, however, that the gang evidence should not have been admitted because "there was no dispute that the Varrio Baker gang was a criminal street gang." This contention lacks merit. Garza entered a plea of not guilty to the gang offense and denied the gang-enhancement allegation. Consequently, all elements of the gang offense and gang enhancement were at issue. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

There are differences between the gang offense and the gang enhancement. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.) The gang enhancement punishes gang-related conduct, i.e., felonies specifically committed with the intent to promote the gang; the gang offense punishes gang members who act in concert with other gang members in committing a felony, regardless of whether the felony was gang related. (*Id.* at p. 1138.)

The People were entitled to introduce evidence to prove beyond a reasonable doubt the elements of the gang enhancement and the gang offense. All relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court enjoys broad discretion in determining the relevancy of evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 727.)

We review a trial court's rulings on the admissibility of evidence for abuse of discretion. (*People v. Aguilar* (2010) 181 Cal.App.4th 966, 973.)

Here, the gang evidence was properly admitted to establish elements of the gang offense and the gang enhancement, not to show a criminal propensity. To prove the allegations under section 186.22, subdivisions (a) and (b), the People were required to prove that the gang's primary activities were the commission of one or more crimes enumerated in section 186.22, subdivision (e), and that the gang's members engaged in a pattern of criminal activity. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) Proof of a gang's primary activities is established by evidence the gang "members consistently and repeatedly have committed criminal activity listed in the gang statute." (*Id.* at p. 324.)

While proof of only two predicate offenses is necessary to establish a *pattern* of criminal activity, proof of consistent and repeated criminal activity is necessary to establish the *primary* activities of the gang. (*People v. Loewen* (1997) 17 Cal.4th 1, 4; *People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.) The admission of evidence of multiple instances of criminal activity by members of the Varrio Bakers gang was relevant to prove that the primary activities of the gang fell within section 186.22, subdivision (e), and were not unnecessarily cumulative.

Additionally, there was nothing unduly prejudicial about the evidence. The prejudice Evidence Code section 352 seeks to avoid is not the damage that flows from highly probative and relevant evidence; it is prejudice that flows from extraneous factors. (*People v. Farmer* (1989) 47 Cal.3d 888, 912, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *People v. Karis* (1988) 46 Cal.3d 612, 638.) All of the predicate offenses were relevant to prove elements at issue in the case; all of the predicate offenses were the result of guilty pleas or convictions. The prior convictions minimize any risk that the jury would be tempted to punish a defendant based simply upon prior bad acts. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

Garza also has failed to demonstrate that the admission of evidence of nine predicate offenses, in a case involving three defendants and both the gang offense and gang enhancement, was an abuse of the trial court's discretion. The statute allows the People to introduce evidence of two *or more* predicate offenses. (§ 186.22, subds. (e) & (j); *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.) In *People v. Hill* (2011) 191 Cal.App.4th 1104, the introduction of eight predicate offenses into evidence was approved. (*Id.* at pp. 1137-1139.) Here, the introduction of nine predicate offenses was not an abuse of discretion.

Because the introduction of evidence of nine predicate offenses was not erroneous or an abuse of discretion, there is no issue presented of a violation of due process. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230.)

### ***III. No ex post facto violation***

At the time Garza committed the offenses in 2012, the minimum fine that could be imposed pursuant to the section 1202.4 restitution fine was \$240; the minimum that could be imposed for the section 1202.45 parole revocation fine also was \$240. When Garza was sentenced on April 13, 2013, the minimum had increased to \$280 under each code section. Garza contends that imposing the \$280 amount for offenses committed in 2012 violates ex post facto. We reject his contention for two reasons.

First, Garza acknowledges that he failed to object to the imposition of the \$280 amount at sentencing, but asserts that imposition of the \$280 amount constitutes an unauthorized sentence and is cognizable on appeal. He is mistaken. An error in imposing a fine or fee at sentencing is waived absent a timely objection. (*People v. McCullough* (2013) 56 Cal.4th 589, 597 [booking fee]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [victim restitution fine]; *People v. Walker* (1991) 54 Cal.3d 1013, 1023 [restitution fine]; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 [probation fee].) Therefore, Garza has forfeited this issue.

Second, even if not forfeited, the *minimum* fine that could be imposed under sections 1202.4 and 1202.45 was \$240 at the time of the offenses; the maximum was \$10,000, a point Garza concedes. (§§ 1202.4, subd. (b)(1); 1202.45.) Consequently, neither the amount of the restitution fine nor the amount of the parole revocation fine was in excess of the amount that legally could be imposed at the time the offenses were committed. The primary purpose of the ex post facto clause is to “prevent unforeseeable punishment.” (*People v. Snook* (1997) 16 Cal.4th 1210, 1221.) A fine within the limits of the trial court’s discretion at the time the offenses were committed is foreseeable and is not unauthorized. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1369.)

**DISPOSITION**

The judgment is affirmed.

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Smith, J.

WE CONCUR:

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Hill, P.J.

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Kane, J.