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

THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN HACKETT, JR.,

Defendant and Appellant.

F067591

(Super. Ct. No. F12908266)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On January 23, 2013, a jury failed to reach a verdict that defendant Calvin Hackett, Jr., committed multiple counts of assault with a semiautomatic weapon (Pen. Code, § 245, subd. (b)),¹ two counts of shooting into an inhabited dwelling (§ 246), committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), inflicted great bodily injury on two victims (§ 12022.7, subd. (a)), and personally used a gun (§ 12022.53, subds. (c), (d)).

A second amended information was filed on March 26, 2013, alleging defendant committed two counts of assault with a semiautomatic weapon (counts 1 & 2) and two counts of shooting into an inhabited building (counts 3 & 4). All four counts alleged defendant committed his offenses for the benefit of a criminal street gang. Counts 1 and 2 alleged defendant committed great bodily injury and personally used a gun within the meaning of section 12022.5. Counts 3 and 4 further alleged defendant personally used a gun within the meaning of section 12022.53, subdivisions (c) and (d). At the conclusion of a jury trial on April 4, 2013, defendant was found guilty of all counts and the special allegations were all found true.

On July 8, 2013, the trial court sentenced defendant to an indeterminate prison term of 25 years to life and to a consecutive determinate term of 13 years. The trial court used count 3 as the principal term, imposing an indeterminate sentence of 25 years to life pursuant to section 12022.53, subdivision (d). The court's determinate sentence on count 3 was set at three years for violating section 246, plus a consecutive term of 10 years for the gang enhancement. Defendant's determinate sentence on all other counts and enhancements was stayed or imposed concurrently.

On appeal, defendant contends there was insufficient evidence he committed his offenses for the benefit of a criminal street gang. We affirm the judgment.

¹Unless otherwise designated, statutory references are to the Penal Code.

FACTS

Fight and Shooting

During the afternoon of November 16, 2011, family and friends were gathered to watch television and socialize in Tanea Robinson's upstairs apartment on East Alta in Fresno.² There were at least 10 people in Robinson's apartment. There were children present as well. In the apartment were Robinson's daughter Nicosha Rogers, Rogers' boyfriend DeAndre Westbrook, brothers Jason and Jaishawn Y., Robinson's other daughter, Imani M., and Robinson's uncle, Lee Washington; most were members or associates of the Modoc Street gang. Also present was Charisse Cole, a member of the Dog Pound gang.

Both the Modoc Street and Dog Pound gangs belong to a Fresno gang alliance known as MUG. The other major gang alliance is Twamp. The Grove Street Mob is affiliated with the Twamp alliance. Defendant is a member of the Grove Street Mob and his girlfriend, Ebony Stovall, is an associate of that gang. The Modoc Street and Grove Street Mob are rival gangs.

Earlier on November 16, Jason, Jaishawn, Imani, Cole, and Angela Bass walked to Ebony Stovall's apartment complex to confront her about a car that had been following Jason. According to Cole, there was also a dispute between Jaishawn and defendant over Jaishawn's backpack. Bass had a heated exchanged with Stovall and defendant at Stovall's apartment. During the incident, Jaishawn challenged defendant to a fight. Defendant initially refused the challenge, saying he thought Jaishawn was too young for defendant to fight. Defendant, however, said he would be back. Defendant and Stovall drove away.

At 11:30 a.m., 15 to 30 minutes after the initial confrontation, Jason came to the Robinson apartment and exclaimed, "They're here. They're here." Stovall and defendant were in the parking lot of Robinson's apartment complex with two other males.

²Unless otherwise designated, all references to dates are to 2011.

Nearly everyone in Robinson's apartment went outside. Rogers, Jaishawn, and Jason were standing in the middle of a staircase close to the ground floor. Other people were standing on the apartment balcony. Stovall was driving a green car and stopped in the parking lot. Defendant exited the car from the front passenger seat. The two males also exited the car.

Rogers and the Y. brothers were still walking down the stairs when they heard defendant say, "Who wants it?" Rogers thought defendant threw the first punch at Jason, but missed. Rogers began fighting with Stovall. They were still close to the staircase. Robinson thought Jason threw the first punch at defendant but did not land a blow. Robinson explained that after defendant hit Jason, Jason ran away. Jaishawn started fighting defendant. Both Y. brothers are short. At the time of the incident, Jason was 15 years old and Jaishawn was 16 years old. Robinson said neither brother was armed with a weapon.

After Jaishawn ran away from defendant, Westbrook began to fight defendant. By this time, Robinson had moved down the staircase. Another family friend who was at Robinson's apartment that day, Ray Ray, joined the fight with a baseball bat to help Westbrook. Ray Ray hit defendant once in the head with the bat. The hit was described by witnesses as a hard one. Defendant was rubbing his head afterward and stopped fighting. Defendant ran behind parked cars.

Rogers saw defendant with a gun. Cole, who was still fighting Stovall, heard gunshots. Cole remembered people scattering. Rogers said people were trying to get into Robinson's apartment. As Imani was running up the stairs toward the apartment, she heard bullets hitting the wall to Robinson's apartment. The only shooter was defendant, who was pointing his gun at the victims as they tried to get back into the apartment.

Cole said she was grazed by a bullet and hurt her foot hopping up into a tree. Cole was treated at the scene for her injuries and not hospitalized. When Rogers got into the apartment, she realized she had been shot in her left arm. She was transported to the

hospital where her wound was cleaned and stapled. Westbrook was shot in the leg and transported to the hospital. Westbrook received two staples in his leg. He had to use crutches to assist with walking after being released from the hospital.

Fresno Police Department investigators found 12 expended cartridge casings from .380-caliber ammunition. The casings were from two different manufacturers. This did not automatically mean two guns were fired, but it is possible two different guns were fired. A bullet strike was found above the door of a first floor apartment directly below Robinson's apartment. Multiple bullet holes were found around Robinson's apartment. Gunfire damage and a bullet hole on the exterior wall was found at Robinson's apartment. A bullet entry hole was found in the sofa. The strike marks to Robinson's apartment appeared to be recent.

Fresno police officer Sergio Briseno was on duty when he was dispatched to locate defendant shortly after the shooting. Briseno initiated a vehicle stop of a car matching the description of the car. Stovall was the driver, defendant was in the front passenger seat, and there was one other male in the car. The male in the back of the car was Kelly Reaves. No weapon was found in the car.

Gang Evidence

Rogers testified she, Jason, Jaishawn, Imani, Ray Ray, and Westbrook were all members of the Modoc Street gang. Rogers denied hearing the term "Fink White" before the shots were fired. Rogers described herself as being an active member of the Modoc Street gang, meaning she was involved in everything it does. Imani also claimed membership in the Modoc Street gang. Imani said both Y. brothers were also members of the Modoc Street gang.

Sheriff's Deputy William Nemoto worked as a population management and classification deputy in the Fresno County jail. As part of his duties, Nemoto has inmates fill out questionnaires to evaluate how to safely house them in the jail and also for staff safety. The questionnaires include questions concerning gang affiliation. On July 14, in

response to questioning from Nemoto, defendant indicated he affiliated with the Grove Street Twamp. Defendant signed the form.

On September 20, Nemoto again questioned defendant about his gang affiliation when defendant was about to be housed as a jail inmate. On this occasion, defendant indicated he was not affiliated with a gang. Defendant, however, said he associated with the Twamp because he lived on Grove Street. Nemoto wrote this information on a jail intake card. Nemoto believed defendant's claim to an affiliation with the Grove Street Mob meant he was likely active in the gang.

Deputy Cinthya Diaz also worked as a jail population management and classification correctional officer in the Fresno County jail. On November 20, after defendant was arrested for the instant offense, Diaz filled out an intake card based on questioning of defendant, admitted as exhibit 76. When Diaz asked defendant if he associated with any street or prison gang, defendant said yes. Defendant said he was a Grove Street associate.³ In 2011, he affiliated with the Grove Street gang and the Twamp, and he filled out two forms claiming these associations. Defendant filled out a third form later in 2011 admitting to jail authorities he was a Grove Street associate. On one occasion in September 2011, however, defendant denied to jail authorities he was a gang member.

The People called Fresno Police Department officer Donovan Pope as an expert on gangs. Pope had been assigned to the Multi-Agency Gang Enforcement Consortium known as MAGEC. Pope had contacts over nine years with no less than 500 different gang members. Over the course of his career, Pope was involved in approximately 800 gang-related investigations. Half of these were with the MAGEC team. In addition to

³Defense counsel objected to the admissibility of the jail intake cards on the ground they were hearsay and not subject to the business record exception. The trial court found only one of the three cards admissible. Also, at the conclusion of a pretrial hearing pursuant to Evidence Code section 402, defense counsel not only objected to the jail intake cards as being hearsay, but because they violated the defendant's Fifth Amendment right against self-incrimination. The trial court ruled the information in the jail intake cards was admissible.

receiving training, Pope made presentations on gangs to other officers. Pope received quarterly updates and training on trends within gangs. Pope also read literature and watched videos on gang-related themes.

Pope explained that in Fresno, gang affiliations and alliances are based on neighborhoods. As noted above, the two major alliances are MUG and Twamp. The alliances are composed of different gangs that associate together. One ultimate goal of every gang is to gain respect so it can operate without opposition. Respect is based on fear and intimidation. Gang members are identified by the crimes they commit, and field identification cards are prepared by officers to document gang-related incidents, the distinctive type of clothing worn by gang members, and the personal observations of the officers.

The Grove Street Mob in Fresno had 15 documented members at the time of trial. The gang uses the name Grove, the initials GSM, the number 25 or 2500 to designate the block of Grove Street it claims, and its members identify with the Green Bay Packers logo or the letter "G." The gang color is green. The Grove Street Mob affiliates with the Twamp alliance. A few of the other Twamp affiliated gangs are Lotus Street, Lee Street, Villa Posse, Strother Boys, Peach and Olive, Fink White, Mohammeds, and Walnut. The MUG alliance includes Modoc, U Boys, Garrett Street, Dog Pound, East Lane, and Goon Squad.

Primary activities of the Grove Street Mob include felony assaults, narcotic sales, murder, firearm possession, and auto theft. Firearm possession is usually illegal when it involves felons in possession of firearms and concealed possession of firearms.

Pope had several contacts with Kevin William Smith, a member of the Grove Street Mob, who on April 16 was convicted of possession of a concealed firearm. Smith's conviction is consistent with one of the primary activities of the Grove Street Mob. Pope had contact with another Grove Street Mob member, Monte Jordan. On

October 11, 2008, Jordan was convicted of possession for sale of narcotics, a crime consistent with one of the primary activities of the Grove Street Mob.

Pope knew Demetrius Brown, a member of the Grove Street Mob who was convicted on January 17, 2008, for grand theft of a person, activity consistent with one of the primary activities of this criminal street gang. Pope knew another Grove Street Mob member, Correy Thomas, who was convicted on August 15, 2008, of possession of a concealed firearm.

Pope explained gang members actively commit crimes and are involved in the gang's activities. Gang associates hang around with gang members, as well as go to parties and socialize with gang members. During his investigation of defendant, Pope read all the police reports indicating defendant's involvement. Pope also views social media sites like Facebook to learn about a potential gang member's background.

The Fresno Police Department uses a 10-point criteria system to identify a defendant with a particular gang. Defendant's Facebook page had multiple photographs of him, along with his profile and birthdate. In a photograph admitted as exhibit 67, defendant is displaying a hand sign, using his fingers to display a two and a zero. The number 20 stands for Twamp, the Grove Street Mob gang's alliance. In a photograph admitted as exhibit 74, also from Facebook, defendant is depicted with his hand-printed moniker "40 Cal" and "2500 Cuddieluv." This is a direct reference to the 2500 block of Grove Street claimed as territory by defendant's gang. Defendant also has the street moniker "40 Cal."

The Facebook page of defendant's girlfriend, Stovall, had a photograph admitted as exhibit 69 depicting defendant displaying two "W's" on his hands, which stands for west side. The Grove Street Mob gang is located on the west side of Fresno. Another photograph taken from the Facebook page belonging to Michael Daniels of the Weller Boys gang was admitted as exhibit 70. Defendant is also in the photograph with Stovall, who was wearing a graduation gown, and Jovan Rosemond of the Grove Street Mob, and

Kelly Reaves of the Weller Boys gang. All of these gangs are part of the Twamp alliance.

Defendant was arrested on September 19 with Anthony Perry and Mandel Jones of the Lee Street gang, another Twamp-allied gang, and Kelly Reaves and Ben Edwards of the Weller Boys gang for a gang-related offense. Pope also based his opinion defendant was a member of the Grove Street Mob on the jail identification cards he filled out when he was arrested.

Pope never experienced a situation where someone claimed an association with a criminal street gang when he or she was not a member or associate. When defendant was arrested for the current offense, he was in the company of known gang member Kelly Reaves. Based on defendant's claimed associations, Facebook profile, and arrest, Pope opined defendant was a member of the criminal street gang Grove Street Mob. Furthermore, defendant was not a mere associate of the gang, but an active participant in the gang's primary activities.

Pope was asked hypothetically what would happen to a Grove Street Mob member who was challenged by a rival Modoc Street gang member to a fight and then backed down and refused to fight the rival gang member. Pope explained a gang member who backed down and ran away from a fight would not be tolerated by fellow gang members because he would be no good to the gang. It would reflect badly not only on the reputation of the gang member who backed down, but for the reputation of the entire gang. Gang members do not back down from confrontations because it makes that member and his gang look weak.

Pope continued with the hypothetical situation similar to the facts of this case by noting that although a gang member could initially decide not to engage in a fight, he usually will not let it go. So the gang member could get some friends to go with him and confront his antagonists a little later to protect his own reputation and the reputation of his gang. If the gang member fights three rivals at once and starts to lose the fight, he

will want to take the fight to the next level by escalating the level of violence. If the gang member losing the fight is, say, hit with a baseball bat, it is a continuation of the scenario to pull out a gun and shoot several times at his rivals.

The court instructed the jury that Pope was giving opinions based on his expertise on gangs using hypotheticals. The court told the jury the hypotheticals were based on the facts of the case and Pope had assumed the facts were true, but the jury still had to determine the assumed fact was true beyond a reasonable doubt.

Pope explained that a violent act—like shooting at a group of people—enhances the gang’s reputation, especially when it occurs in broad daylight and two people are actually shot. It would also further the defendant’s reputation. Pope opined a gang member acts for the benefit of the gang when he or she shoots a gun at a group of people.

Defendant called Officer Keith Kobashi who testified that when he was dispatched to the crime scene after the shooting, he questioned Cole. Cole only identified the shooter as a Black male adult. Officer Phia Vang testified he questioned Rogers in the hospital after the shooting. Rogers described the shooter as a Black male with long dreadlock hair, 18 or 19 years old, between five feet seven and five feet eight inches tall, and weighing between 170 and 180 pounds. Rogers also identified the two males with defendant as being members of the Fink White gang. Detective Leonard Cabrera testified Cole was shown a photographic lineup and identified defendant as the shooter.

DISCUSSION

I. Sufficiency of the Gang Evidence

A. Introduction

Defendant contends there was insufficient evidence produced by the People that he committed the felony at the direction of or in association with criminal street gang members. Defendant also contends there was insufficient evidence to demonstrate he was himself an active member of the Grove Street Mob gang when he committed the shooting even considering the expert’s opinion. Finally, defendant contends there was

insufficient evidence he committed the felony for the benefit of a criminal street gang or he had the specific intent to promote, further, or assist any gang members. Defendant argues the evidence adduced at trial showed the crime was a personal act by him and not committed for the purpose of a gang. We reject these contentions.

B. Substantial Evidence Standard

In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. It is the jury, not the appellate court, which must be convinced of a defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320; see also *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In reviewing a challenge to the sufficiency of the evidence, appellate courts do not determine the facts. We examine the record as a whole in the light most favorable to the judgment and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient for a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

An appellate court must accept logical inferences that the jury might have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Before setting aside the judgment of the trial court for insufficiency of the evidence, it must

clearly appear there was no hypothesis whatever upon which there was substantial evidence to support the verdict. (*People v. Connors* (2008) 168 Cal.App.4th 443, 453; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

C. Criminal Gang Enhancement

Section 186.22, subdivision (b)(1) applies when the charged felony is committed “for the benefit of, at the direction of, or in association with” a criminal street gang. An offense can only be enhanced if the crime is gang related. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Not all crimes committed by gang members are related to a gang. (*Albillar, supra*, at p. 60.) If, however, the crime was committed in association with the gang, it is gang related. (*Ibid.*) The People must present evidence the defendant committed the offenses “in association with any criminal street gang” as required by section 186.22, subdivision (b)(1). The enhancement requires the defendant's specific intent to benefit the gang. (*Albillar*, at pp. 69-60.)

“[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, italics omitted.) To prove the elements of the gang enhancement, the People may present expert testimony on criminal street gangs, as they did in the instant action. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048; *People v. Gardeley, supra*, 14 Cal.4th at pp. 617-620.)

“Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the ... gang enhancement. [Citation.]”

(*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *People v. Albillar, supra*, 51 Cal.4th at p. 63.) The expert's opinion may be based on facts given in hypothetical questions, so long as such questions are rooted in the facts shown by the evidence at trial and any material forming the basis of an expert's opinion testimony is reliable, although it need not ordinarily be admissible. (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.)

D. Defendant's Association with a Criminal Street Gang

The day defendant shot the semiautomatic weapon at several victims, he had earlier been confronted by three members or associates of the rival Modoc Street gang, including Jason and Jaishawn, while defendant was at Stovall's apartment. Defendant was essentially being challenged to a fight by rival gang members. Rather than accepting the challenge to fight then and there, defendant left with Stovall. Sometime later, defendant arrived at Robinson's apartment complex with Stovall and two males who were later identified by Rogers to police as members of the Fink White gang, a member of the Twamp alliance. Although defendant seemed to handily fight both Jason and Jaishawn when the fight erupted at Robinson's apartment complex, there was evidence at trial from which the jury could reasonably infer defendant waited to fight them and others until he collected members of an affiliate gang.

Defendant discounts the evidence showing his affiliation with a gang as being either baseless or unreliable. Defendant claims, for instance, he had no known gang tattoos. The evidence of his gang affiliation, however, was based on eyewitness accounts of the events on November 16 and did not rest on mere speculation. Although defendant attempts to minimize his conduct before and during the assault, in doing so defendant does the opposite of how this court scrutinizes the sufficiency of the evidence: he examines the evidence in the light most favorable to his theory of the case. We cannot do so. There was substantial evidence before the jury demonstrating defendant's association with a criminal street gang.

E. Defendant's Active Involvement with Grove Street Mob

There was also substantial evidence defendant was personally involved with the Grove Street Mob as well as with other gangs affiliated with the Twamp alliance. Defendant argues on one occasion in jail he denied being a member of a gang and the photographs from social media pages were inconclusive of his gang membership.

Defendant told Deputy Nemoto in the jail in 2011 that he affiliated with the Grove Street Mob gang and the Grove Street Twamp, and filled out two forms claiming these associations. Defendant filled out a third form later in 2011 admitting to jail authorities he was a Grove Street associate. On one occasion in September 2011, however, defendant denied to jail authorities he was a gang member. Nemoto believed defendant's claim to an affiliation with the Grove Street Mob meant he was likely active in the gang.

Defendant's Facebook page had multiple photographs of him along with his profile and birthdate. In a photograph admitted as exhibit 67, defendant is displaying a hand sign, using his fingers to display a two and a zero. The number 20 stands for Twamp. In a photograph admitted as exhibit 74, "2500 Cuddieluv" and "40 Cal" is handwritten. This was a direct reference to the 2500 block of Grove Street claimed as territory by defendant's gang. Defendant also has the street moniker "40 Cal."

The Facebook page of defendant's girlfriend, Stovall, had a photograph admitted as exhibit 69 depicting defendant displaying two "W's" on his hands, which stands for west side. The Grove Street Mob gang is located on the west side of Fresno. Another photograph taken from Facebook admitted as exhibit 70 depicted defendant in a group with other known members of gangs in the Twamp alliance, including members of the Weller Boys gang. Further gang documentation showed defendant's association with members of the Grove Street Mob, the Lee Street gang, the Lotus Street gang, and the Hoover Crips gang.

Defendant told authorities at the jail he affiliated with the Grove Street Mob and the Twamp, and filled out a form claiming these associations. Officer Pope never experienced a situation where someone claimed an association with a criminal street gang

and it was not true. When defendant was arrested for the current offense, he was in the company of known gang member Kelly Reaves, a member of the affiliated Weller Boys gang.

As he did in discounting the evidence he was associated with a criminal street gang, defendant views the direct evidence of his personal involvement with the Grove Street Mob and the Twamp alliance in the light most favorable to his theory of the case. At best, defendant has found some conflicting evidence showing he may not have been a gang member. It was for the jury, however, and not this court to weigh the conflicting evidence and accord it the weight it deserved. We reject defendant's characterization of the evidence adduced at trial.

F. Committing Offense for Benefit of a Criminal Street Gang

Defendant further argues there was insufficient evidence he committed his offense for the benefit of a criminal street gang. In a point directly related to this argument, defendant contends the only evidence at trial was he committed the crime personally, only for himself, and not for the benefit of a criminal street gang. Defendant asserts, for instance, that he did not "throw" gang signs prior to the shooting or announce the name of a gang. Defendant argues there was no evidence the name of a gang was called out during or after the shooting. Defendant analyzes Robinson's family tree to establish his conduct was the result of a personal disagreement, and not for the benefit of a criminal street gang. Again, we reject defendant's one-sided depiction of the evidence presented at trial.

In support of his argument, defendant relies on *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230. In *Albarran* two Hispanic males shot guns at a house. Though there was substantial evidence the sole defendant was a gang member, there was no evidence as to the identity of the other individual. (*Id.* at pp. 217-219.) Prior to trial, the court ruled that the proffered gang evidence was relevant not only to the gang enhancement but also to the issues of motive and intent for the underlying charges. (*Id.*

at p. 220.) The jury found the defendant guilty of the charged offenses and found the gang enhancement allegations true. (*Id.* at p. 222.) However, the trial court later found there was insufficient evidence to support the gang findings and they were dismissed without prejudice. (*Ibid.*)

Albarran held that, even if some of the gang evidence was relevant to the issues of motive and intent, other inflammatory gang evidence not relevant to the charged offenses was admitted. (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 227-228.) *Albarran* found much of the gang evidence had no legitimate purpose in the underlying trial and could have led the jury to conclude the defendant posed a danger to society. (*Id.* at p. 230.) *Albarran* determined the case was “one of those *rare and unusual* occasions where the admission of evidence ... violated federal due process and rendered the defendant’s trial fundamentally unfair.” (*Id.* at p. 232, italics added.)

We agree with the People, however, that this is not one of those *rare and unusual* cases. After citing to *Albarran*, defendant effectively asserts the prosecution presented little or no evidence the offenses were gang related. We disagree with defendant’s assertion. As already noted, the evidence supporting the gang allegations in this case was substantial.

Officer Pope testified at length about the nature of gang culture, how violence, especially toward rival gang members and their associates, enhances the reputation of both the individual gang member who commits the violence and that member’s particular gang. Defendant challenges nearly every fact and reasonable inference that could be drawn from those facts and repackages the evidence in a light positive to himself. As noted above, however, defendant could have fought Jason and Jaishawn by himself at Stovall’s apartment but found two associates to be with him in his fight. The associates were members of the Fink White gang affiliated with defendant’s gang. While Rogers at one point in the investigation could not identify the two males with defendant, she later identified them as members of the Fink White gang.

It was for the jury to resolve any conflict in the evidence. Unlike *People v. Albarran*, defendant was with identified gang members when he committed the shooting, there was unrefuted evidence before the jury of the gang rivalry between the MUG and Twamp alliances, and the Y. brothers and most of their other family members were members or associates of the MUG alliance and Modoc Street gang.

After fighting his rivals by more conventional means, defendant pulled out a semiautomatic weapon and fired it at a group of people, showing no regard for his victims while doing so. Officer Pope explained how this conduct directly benefited defendant's status with his gang and the status of the gang itself.

An expert's opinion that particular criminal conduct benefits a gang is permissible and can be sufficient to support the gang enhancement allegation. (*People v. Vang*, *supra*, 52 Cal.4th at p. 1048; see *People v. Albillar*, *supra*, 51 Cal.4th at p. 63.) The expert's opinion may be based on facts given in hypothetical questions, so long as such questions are rooted in the facts shown by the evidence at trial and any material forming the basis of an expert's opinion testimony is reliable, although it need not ordinarily be admissible. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) Even if the gang expert's testimony alone would be insufficient to find an offense gang related (see, e.g., *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657), our analysis takes into account the expert testimony presented at defendant's trial in conjunction with the other evidence adduced at trial.

Section 186.22, subdivision (b)(1) requires the charged felony "to be enhanced be committed for the benefit of, at the direction of, or in association with" a criminal street gang in order for the criminal offense to be subject to increased punishment under that statute. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 60.) A jury is permitted to infer a defendant's specific intent to commit a crime from all the facts and circumstances shown by the evidence. Evidence of a defendant's state of mind is almost inevitably circumstantial. Circumstantial evidence is as sufficient as direct evidence to support a

conviction. (*People v. Lindberg, supra*, 45 Cal.4th at p. 27, citing *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

Although there was evidence defendant's conduct involved a personal conflict with Jason and Jaishawn, there was additional substantial evidence defendant acted to enhance his status in the Grove Street Mob gang, as well as the status of his gang. Defendant's specific intent to benefit his gang and his status within it can reasonably be inferred from the direct and circumstantial evidence presented at trial.

II. Jail Gang Identification Cards

We granted defendant's request to file a supplemental brief raising the issue the statements made by defendant to deputies when he was being admitted to the jail and recorded on the jail information cards were inadmissible because there was no showing defendant had been given his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). In June 2015, our Supreme Court unanimously ruled in *People v. Elizalde* (2015) 61 Cal.4th 523, 527, 533-540, that certain admonitions must be given before a suspect's statement made during a custodial interrogation can be admitted in the prosecution's case-in-chief. Defendant contends the facts of this case fall squarely within the holding of *Elizalde* and, further, unlike that case, the evidence demonstrating his gang affiliation outside the jail intake cards was too weak for us to find the error was not prejudicial.

Elizalde specifically held the unadmonished answers of a defendant in jail to questions involving gang affiliation are inadmissible. Furthermore, *Elizalde* found the narrow public safety exception to *Miranda* did not apply to the jail intake process. (*People v. Elizalde, supra*, 61 Cal.4th at pp. 533-540.) The court in *Elizalde*, however, ultimately found any error in the admission of un-*Mirandized* jail intake information regarding gang affiliation was harmless beyond a reasonable doubt under the standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18. The court in *Elizalde* held

the other evidence of the defendant's gang affiliation was convincingly established by other witnesses and evidence, and the error was not prejudicial. (*Elizalde*, at p. 542.)

Following *Elizalde*, this court recently held the failure to give a *Miranda* warning to a jail inmate during intake made his statements regarding gang affiliation inadmissible. (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1015-1016.) As in *People v. Elizalde*, this court found in *Leon* there was no prejudice beyond a reasonable doubt because there was other evidence establishing the defendant's gang connections. (*Leon, supra*, at pp. 1020-1022.)

We initially note the issue of un-*Mirandized* jail intake information from a defendant concerning his gang affiliations was raised by defendant's counsel in a pretrial Evidence Code section 402 hearing. Thus, there is no issue concerning whether defendant has forfeited this point by not raising it to the trial court. Defense counsel lodged the appropriate objection. We further note there is no direct evidence in the current record concerning whether defendant was given his *Miranda* rights after he was arrested for the current offenses. There was no testimony regarding this point by the arresting officer or the jail intake deputy. Even if we were to reverse the findings regarding the gang enhancements, defendant could be retried on those allegations because there was substantial evidence supporting the allegations.

For the purposes of our analysis, we assume defendant did not receive *Miranda* warnings after his arrest for the current charges or while being admitted to the county jail. We find no prejudice to defendant because there was other credible evidence showing defendant's association or membership with the Grove Street Mob gang and the Twamp alliance of gangs.

Although Officer Pope relied on the jail intake forms to reach his conclusion defendant was a member of a gang, this was only one factor he relied upon in forming his opinion of defendant's gang membership. Pope's opinion was based on pictures of defendant on Facebook not only posing with known members of his gang and of the

Twamp alliance, but throwing gang signs, identifying with the Grove Street Mob gang and the Twamp alliance, and using the “2500 Cuddieluv” designation for the gang, which was also a reference to the 2500 block of Grove Street claimed by the Grove Street Mob gang; the rivalry between Twamp and MUG, and the fact everyone defendant shot at was a member of the Modoc Street gang or its MUG affiliate; defendant being arrested with known gang members for a gang-related crime prior to the current offense; the identification of two members of the Fink White gang with defendant during the shooting; and defendant’s arrest for this offense in the company of Kelly Reaves of the Weller Boys gang, an affiliate of the Twamp alliance. Combined, this was strong evidence of defendant’s affiliation with the Grove Street Mob gang.

The failure to give defendant *Miranda* warnings prior to having him answer questions concerning his gang affiliation while being admitted to the jail violated defendant’s Fifth Amendment rights as held by the Supreme Court in *Elizalde* and by this court in *Leon*. As with those cases, however, we are persuaded beyond a reasonable doubt the error was not prejudicial here because of the other evidence establishing defendant’s membership in, or association with, the Grove Street Mob gang and the Twamp alliance.

III. Gang Subsets

Another issue decided by the California Supreme Court after briefing was completed in this case was whether the prosecution had to prove connections between gang subsets and their affiliate gangs. In *People v. Prunty* (2015) 62 Cal.4th 59, 71-76 (*Prunty*), our high court held that proof of a common criminal activity within the subsets must be demonstrated. (*Id.* at p. 75.)

Out of an abundance of caution, we address this potential issue and conclude there is substantial evidence linking the gang subsets as required by *Prunty*. Proof of the interconnection of groups can be in the form of evidence demonstrating the organizational structure of subset gangs in relation to the larger affiliate. Evidence could

include that subset gangs have a loose approximation of hierarchy or being controlled by the same locus or hub. The gang subsets may be treated as the same organization with a chain of command. The gang subsets may be linked together as a single criminal street gang with proof coming in the form of groups having the same bylaws. (*Id.* at p. 77.)

In situations where formal structure or hierarchy is not present, the facts of the case may suggest the existence of behavior reflecting “such a degree of collaboration, unity of purpose, and shared activity to support a fact finder’s reasonable conclusion that a single organization, association, or group is present.” (*Prunty, supra*, 62 Cal.4th at p. 78.) Proof of shared goals can be in the form of committing crimes in concert. This evidence need not be direct and need not show frequent communication or hierarchical relationships between two or more groups. Evidence of more informal relationships such as members of two groups “hanging out” together, and backing up each other, can demonstrate the “subsets’ members have exchanged strategic information or otherwise taken part in the kinds of common activities that imply the existence of a genuinely shared venture.” (*Ibid.*) Furthermore, the gang subsets may acknowledge one another as part of the same organization. The evidence may establish the organization in question tends to operate in a decentralized fashion and in a relevant geographical area. (*Id.* at p. 79.)

In *Prunty*, the prosecution failed to provide evidence the gang subsets were in any way connected to each other. There was no evidence demonstrating collaboration, association, direct contact, or any other relationship among any of the subsets the gang expert described. (*Prunty, supra*, 62 Cal.4th at p. 82.) Here, in contrast to *Prunty*, Officer Pope, the gang expert, explained the relationship of several of the gang subsets comprising the Twamp alliance, including the relationship of the Grove Street Mob gang within the Twamp alliance. Defendant was arrested with Twamp alliance affiliated gang members for a gang-related offense on a prior occasion. Defendant was arrested for the instant offense with a known member of the affiliated Weller Boys gang and at least one

witness described defendant's two companions during the shooting as being members of the Fink White gang.

These interconnected relationships inferentially demonstrate "subsets' members have exchanged strategic information or otherwise taken part in the kinds of common activities that imply the existence of a genuinely shared venture." (*Prunty, supra*, 62 Cal.4th at p. 78.) Furthermore, there was evidence here the gang subsets acknowledged one another as part of the same organization. The evidence also established the organization in question tended to operate in a decentralized fashion and in a relevant geographical area.

DISPOSITION

The judgment is affirmed.

PEÑA, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

FRANSON, J.