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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO MARTINEZ,

Defendant and Appellant.

G044885

(Super. Ct. No. 08ZF0027)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed as modified.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Sergio Martinez was convicted of premeditated murder, attempted premeditated murder, unlawfully possessing a firearm and street terrorism. The jury also found true several enhancement allegations, including the special circumstance allegation appellant committed the murder to further the activities of a criminal street gang. On appeal, appellant contends his attorney was ineffective for failing to object to certain evidence, and there is insufficient evidence to support the jury's findings on the gang charges. We reject these contentions. Other than to correct two undisputed sentencing errors, we affirm the judgment in all respects.

FACTS

In June 2006, appellant lived in Stanton. His pregnant girlfriend lived in Anaheim, and he often went there to see her. After visiting her on June 24, appellant had a run-in with several neighborhood men, including Fausto Acevedo. During the encounter, tempers flared and appellant pulled a gun on the men. Although he squeezed the trigger, the gun malfunctioned and did not fire. Appellant then left the area without further incident.

Two days later, appellant returned to see his girlfriend. As he was leaving her apartment, he met up with Juan Castillo, aka "Poly." They walked to a stairwell, where Castillo retrieved a gun and handed it to appellant. Appellant then walked out to the street, where Acevedo was drinking beer with others, including Jorge Flores and Jose Espinoza. Appellant conversed briefly with Espinoza, and then the two walked off in different directions.

About 10 minutes later, Espinoza returned briefly before departing for a second time. Shortly after that, appellant returned, and Acevedo asked him what happened. Appellant didn't answer the question; instead, he asked Acevedo what barrio he was from. Acevedo replied "none" and told appellant he didn't want any trouble. Nonetheless, appellant pulled his gun and pointed it at Acevedo.

Flores threw a beer can at appellant and tried to take his gun. In the process, the gun discharged, but no one was hit, and appellant retained the weapon. Flores then moved toward appellant, as did Acevedo. While backing away from them, appellant fired several more shots. One struck Acevedo in the hand and one struck Flores in the chest, killing him.

In the wake of the shooting, 13 year-old Deisi Garcia told police she witnessed the events from her bedroom window. She said she saw appellant, whom she knew as “Clumsy,” go up to his girlfriend’s apartment before the shooting. Then he met up with “Poly” (i.e., Castillo), who handed appellant a gun. Garcia told police the gun transfer occurred in an area where “gang member types” hang out and said Poly was a gang member. However, she did not know what gang he was in. She saw appellant, with the gun, approach Acevedo and Flores in the street. She said the victims were not armed, and appellant shot them after they tried to swipe his gun away. Garcia also told the police she had seen the incident that occurred two days earlier involving appellant and Acevedo, and to her, it appeared as though appellant was looking to get revenge for that incident when he confronted the victims before the shooting.

Gang expert Brandt House testified that, at the time of the shooting, appellant was an active member of a gang called Hawaiian Gardens. House opined the shooting benefited and furthered the activities of Hawaiian Gardens by spreading fear in the community and sending a message the gang was not to be trifled with.

Testifying on his own behalf, appellant claimed he acted in self-defense. He said he shot Flores because he was coming at him with a machete, and he shot Acevedo because he had something shiny in his hand and was trying to trip him up. Appellant admitted he was a member of Hawaiian Gardens in the 1990’s and early 2000’s, but he claimed he was no longer in the gang at the time of the shooting. Describing the shooting as a “domestic” incident, he said it had nothing to do with gang activity.

The prosecution did not see it that way. In addition to charging appellant with premeditated murder, attempted premeditated murder and possessing a firearm as a felon, it also charged him with active participation in a criminal street gang, aka street terrorism. (Pen. Code, §§ 187, subd. (a), 664, subd. (a), 12021, subd. (a), 186.22, subd. (a).)¹ The prosecution also alleged that, in committing these crimes, appellant furthered the activities of his gang, benefited his gang, personally discharged a firearm and caused great bodily injury. (§§ 190.2, subd. (a)(22), 186.22, subd. (b), 12022.53, subds. (c), (d), 12022.7, subd. (a).) The jury convicted on all counts and found all of the allegations true. After finding appellant had also suffered a prior serious felony conviction, the trial court sentenced him to life in prison without the possibility of parole.

I

At trial, the parties stipulated Hawaiian Gardens is a criminal street gang. However, they disputed whether appellant was a Hawaiian Gardens member at the time of the shooting and whether the shooting benefited and furthered the activities of that gang. In formulating his opinion on those issues, gang expert House relied on hearsay evidence from a variety of sources. Appellant contends his attorney was ineffective for failing to object to some of that evidence, failing to request a limiting instruction as to its permissible use, and failing to challenge various other aspects of House's testimony. We do not believe these failings deprived appellant of his right to effective assistance of counsel.

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability

¹ Unless noted otherwise, all further statutory references are to the Penal Code.

that, but for counsel's errors, the result of the proceeding would have been different.”
(*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

With this standard in mind, we now examine House's expert testimony in detail to determine whether defense counsel was ineffective for failing to challenge it more vigorously. House testified he is a detective in the gang unit of the Los Angeles Sheriff's Department. He said Hawaiian Gardens is a traditional Hispanic street gang that engages “in all manner of criminal activity from petty theft to murder.” Although the gang originated in the area of Hawaiian Gardens, its members commit crimes all over Orange County. They often sport tattoos to show their pride in, and allegiance to, the gang. House explained that once a person joins a gang, they are typically considered a member for life.

As the basis for his opinion that appellant was an active participant in Hawaiian Gardens at the time of the shooting, House relied on several sources of information. First, he considered gang records and field interview cards that are kept on file at the sheriff's department. Those sources establish that when contacted by law enforcement personnel over the years, appellant has consistently admitted he is a member of Hawaiian Gardens and his gang moniker is “Clumsy.” Although House did not specify when each of those police contacts occurred, he said they spanned from 1991, when appellant was 14 years old, to 2006.

House also considered the fact appellant has numerous tattoos displaying his allegiance to Hawaiian Gardens and the Mexican Mafia, including one on his face. House said if a person was trying to get out of a gang, they might very well get rid of their gang tattoos. And if they did not get rid of them, that would indicate to House that they were still proud of their gang.

In House's opinion, the nature of the charged offenses was another sign appellant was an active gang member. House explained, “Any violent crime that a gang member commits is going to elevate his status within the gang as well as the status of the

gang itself. . . . That's why the crime itself is an important indicator" of appellant's gang status.

House also considered the circumstances of the shooting, in that Castillo gave the gun to appellant right before he confronted the victims. House said it is common for gang affiliates to supply guns to gang members for the purpose of facilitating criminal activity. In fact, Castillo's role in this incident was enough to convince House that Castillo was affiliated with the Hawaiian Gardens gang quite apart from the testimony of Deisi Garcia. House said that while gang affiliates sometimes perpetrate crimes themselves, their role is usually limited to holding onto contraband, such as guns, for gang members. House explained, "Gang members will have an affiliate hold onto a firearm for them because they know they're less likely to be stopped with it than they are."

In opining on appellant's gang status, House also relied on the run-in he had with Acevedo and his companions two days before the shooting. Given that appellant was confronted on that occasion, House believed it would be important for him to retaliate in some manner in order to save face. By committing a violent offense, appellant would not only restore respect for himself, but also preserve and enhance the reputation of his gang.

In addition to the foregoing evidence, House considered the police reports that were generated in connection with this case. Those reports contain statements that were attributed to appellant by individuals who were not identified at trial. One of the statements attributed to appellant was, "I'm Clumsy from Hawaiian Gardens." According to the police reports, appellant was heard to have made this statement when he confronted the victims in this case, as well as on other occasions. Speaking to the significance of the statement, House testified that for appellant to "claim that in public only strengthens my opinion even more about his gang membership."

Defense counsel did not object to this testimony. However, House was then asked about a second statement that was attributed to appellant in the police reports. Allegedly, when he confronted the victims before the shooting, appellant told them, “This is my block now.” When the prosecutor asked House if he had read that statement in the police reports, defense counsel objected on the basis the prosecutor was “relying on facts that aren’t in evidence.” The court sustained the objection, ruling “[t]here is a lack of foundation, hearsay.”

After that, however, without identifying which statement she was referring to, the prosecutor asked House how the “statements” in the police reports supported his opinion appellant was a gang member at the time of the shooting. House replied that when gang members “talk to citizens out in the street [they] will talk to them a certain way, in a challenging way. If they’re not active or they don’t want any part of the gang or [to put] in work for the gang, they’re not going to be doing that.”

The prosecutor then asked House whether, hypothetically speaking, the “underlying conduct” described in the police reports was such as to benefit, promote and further the activities of Hawaiian Gardens. House said it was because the commission of a violent crime would elevate the status of Hawaiian Gardens and spread fear in the community. He said that once word of the shooting got out, it would dissuade people from reporting the gang’s criminal activity in the future.

Appellant’s argument centers on the hearsay statements attributed to him in the police reports, i.e., “I’m Clumsy from Hawaiian Gardens” and “[t]his is my block now.”² Appellant recognizes that an expert may properly rely on hearsay evidence in forming the basis of his opinions. However, he claims the statements attributed to him in

² As we have explained, defense counsel did not object to the first statement. And although the court sustained defense counsel’s objection to the second statement, the prosecutor referenced it in a question right before asking House if the “statements” in the police reports supported his opinion appellant was an active gang member. Moreover, as we explain below, the prosecutor referenced the second statement again in her closing argument. Therefore, we will consider both statements in our analysis.

the police reports were so prejudicial, that had his attorney objected to them, the trial court would have been required to exclude them entirely. He also contends that, even if the statements were properly admitted as basis evidence for House's opinions, his attorney should have requested a limiting instruction as to their permissible use. Appellant argues that absent such an instruction the jury was improperly allowed to consider the statements for their substantive truth, in violation of his confrontation rights.

As appellant acknowledges, it is permissible for an expert witness to base his opinion on out-of-court statements that would otherwise be inadmissible under the hearsay rule. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) In that situation, the statements are not being admitted for their substantive truth, but rather as foundational evidence for the expert's opinions, and therefore their admission does not violate the confrontation clause. (*Williams v. Illinois* (2012) __ U.S. __, __ [132 S.Ct. 2221, 2228]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.)

"A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.]" (*People v. Gardeley, supra*, 14 Cal.4th at p. 619.) Under Evidence Code section 352, "the trial court may exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 919; see also *People v. Coleman* (1985) 38 Cal.3d 69, 92-93.)

But we must remember that the decision whether or not to invoke Evidence Code section 352 in this context rests in the sound discretion of the trial court. The decision to allow gang evidence as the basis for an expert's opinion should not be disturbed under that section "unless the trial court's decision exceeds the bounds of reason. [Citation.]" (*People v. Valdez* (1997) 58 Cal.App.4th 494, 511.)

Contrary to appellant's claim, the statements attributed to him in the police reports were not so prejudicial as to require their exclusion from the trial. In so arguing,

appellant fails to recognize his preshooting statements about being from Hawaiian Gardens and claiming the block where the shooting occurred where probative of his gang status and his motive for the shooting. As House explained, it is highly unlikely a person would mention a gang name and challenge the victims in such a fashion if he were not part of that gang. Thus, as foundational evidence for House's opinions, the challenged statements were relevant to his credibility and the weight to be afforded his opinions. (*People v. Valdez, supra*, 58 Cal.App.4th at p. 511.)

Yet, in and of themselves, the statements did not directly implicate appellant in any particular criminal activity, either in this case or any other situation. In fact, compared to the violent nature of the charges alleged against appellant in this case, the statements were relatively tame. This quite obviously lessened the danger they would unduly prejudice the jurors or cause them to be confused about the issues. (*People v. Valdez, supra*, 58 Cal.App.4th at p. 511.)

Appellant asserts the statements were too unreliable to be admitted into evidence, even as basis evidence, because the identity of the people who reported them to the police was never disclosed to the jury. However, that is an issue pertaining to weight rather than admissibility. House's opinions were subjected to full cross-examination, and the jurors were instructed that it was up to them to decide whether the information on which he relied was true and accurate. The jurors were also told they were free to disregard House's opinions if they found them to be unbelievable, unreasonable or unsupported by the evidence. The jurors were certainly capable of discounting the challenged statements if they found them to be an unconvincing basis for House's opinions. Therefore, even if the statements had been challenged as being unreliable or unduly prejudicial, it would not have been an abuse of discretion for the court to admit them as basis evidence.

The problem is, the jury was not instructed to consider the statements solely for that purpose. It is well "recognized that most often hearsay problems will be cured by

an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth.” (*People v. Valdez, supra*, 58 Cal.App.4th at p. 511.) However, in this case, defense counsel did not ask the court for such an instruction. Therefore, there was nothing stopping the jury from considering the challenged statements for their substantive truth. And to make matters worse, the prosecutor alluded to one of the statements in arguing appellant was guilty of the charged offenses. Referring to appellant in closing argument, the prosecutor stated, “This is a gang member who arms himself, gets his gun, walks over, is going to confront these guys because *it’s his block now*. It’s his hood now. He’s the one in charge. He’s the thug of the streets. He doesn’t want these people on that street to view him as anything other than ‘I’m in charge now.’” (Italics added.)

As we have explained, the trial court actually sustained defense counsel’s objection when he challenged the admission of appellant’s alleged statement, “This is my block now.” While that statement would have been admissible as basis evidence for House’s expert opinions, it was not admissible as substantive evidence of appellant’s guilt. Therefore, defense counsel should have requested an instruction alerting the jury to this fact. Even though the jury was told it was free to disregard House’s opinions if it found they were unsupported by the evidence, it was never informed of the distinction between considering this in evaluating the expert’s opinion and considering this in evaluating the evidence of guilt. (See generally *Williams v. Illinois, supra*, ___ U.S. at p. ___ [132 S.Ct. at p. 2236] [emphasizing the need for “careful jury instructions” when evidence is admitted solely as the basis for an expert’s opinion and not for its substantive truth].)

Still, we do not think it is reasonably probable appellant would have obtained a more favorable result had the jury been properly instructed to consider the challenged statements only as basis evidence and not for their substantive truth. Appellant argues the prosecutor improperly incorporated the statements into her

hypothetical questions to House about whether the shooting benefited and furthered the activities of Hawaiian Gardens. However, in posing those questions, the prosecutor referred to the *underlying conduct* reflected in the police reports, not appellant's statements. And of course that conduct was shown by direct evidence at the trial. The hypothetical questions were not improper.

What's more, even without the challenged statements, there was still a plethora of evidence to support House's opinions. Indeed, House testified appellant's numerous tattoos and prior police contacts, as well as the nature and circumstances of the shooting, all supported his conclusion appellant was an active member of Hawaiian Gardens and that the shooting was gang related. One of the circumstances House found significant is that appellant obtained the murder weapon from Castillo – identified as a gang member by Deisi Garcia – shortly before the shooting. House opined that Castillo's conduct in supplying the gun to appellant showed that Castillo was an affiliate of Hawaiian Gardens who was helping appellant commit a gang crime.

Appellant argues his attorney should have objected to House's opinion in that regard because it lacked foundation. But House testified it is common for gangs to enlist the aid of affiliates for the purpose of holding contraband such as guns and drugs. House explained this is a commonly used counterintelligence practice designed to throw off law enforcement and allow gang members to perpetrate criminal activity without detection. Since Castillo's conduct in handing the gun to appellant before the shooting fit the description of gang affiliate activity, there was an adequate basis for House's opinion about Castillo's affiliate status and the significance of his behavior to this case. (See generally *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-949 [experts may properly rely on a variety of sources in formulating their opinions about whether the defendant's conduct is consistent with the culture and habits of criminal street gangs].)

House's opinion about Castillo's affiliate status was consistent with information that was supplied to the police by percipient witness Deisi Garcia, who

recognized Castillo as a gang member.³ Garcia lived in the area where the shooting occurred and had seen Castillo and appellant on prior occasions. Not only did she identify Castillo as a gang member, she also knew appellant by his gang moniker, Clumsy. The information she provided in this regard firmly corroborated the foundational aspect of House's expert opinions.

All things considered, we do not believe defense counsel was ineffective for failing to challenge House's expert opinions more vigorously. While defense counsel was remiss in one regard, in that he should have requested a limiting instruction to help ensure the jury did not consider appellant's out-of-court statements for their substantive truth, that failing could not have been material in light of all of the other evidence that was presented in the case. No prejudice has been shown.

II

Appellant also raises two arguments regarding the sufficiency of the evidence. Based on the assumption House's opinions were improperly admitted, appellant first contends there is insufficient evidence to support the jury's findings he was a member of Hawaiian Gardens at the time of the shooting and he intended to benefit the gang in committing the alleged offenses. (§§ 186.22, subds. (a), (b), 190.2, subd. (a)(22).) However, as we have explained, House was properly allowed to rely on hearsay in forming his opinions, and his testimony provided substantial evidence from which the jury could find the elements of the gang charges had been proven beyond a reasonable doubt.

Moreover, in addition to the expert opinion testimony, the evidence also established appellant was a self-admitted member of Hawaiian Gardens who had several Hawaiian Gardens tattoos, he had a confrontation with the victims two days before the

³ At oral argument, appellant's counsel mistakenly described Ms. Garcia as a seven-year-old child who said she thought Castillo was a gang member "because he was Mexican." In fact, Ms. Garcia was 13 years old and her identification of Castillo as a gang member was not just an assumption based upon perceived ethnicity.

shooting, and he obtained the murder weapon from a gang cohort shortly before the shooting occurred. Considering all of the evidence in the light most favorable to the prosecution, there is substantial evidence to support the jury's findings appellant was a member of Hawaiian Gardens at the time of the shooting and intended to benefit his gang in carrying out the charged offenses.

Focusing more precisely on his conviction for street terrorism, appellant also argues there is insufficient evidence he “willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of [his] gang[.]” (§ 186.22, subd. (a).) Appellant interprets the quoted language as requiring proof he associated with other gang members in carrying out the charged offenses. However, the statute has been found applicable even when the defendant acts alone. (See, e.g., *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1305-1308 and cases cited therein.)⁴

In any event, the record shows appellant obtained the murder weapon from Castillo, whom witness Deisi Garcia recognized as a gang member. This indicates appellant was acting in concert with other gang members in carrying out the alleged offenses. Therefore, even if we accepted appellant's restrictive interpretation of the gang statute, we would reject his challenge to the sufficiency of the evidence to support his conviction for street terrorism.

III

During her interview with the police, witness Garcia was asked how she knew appellant's nickname was Clumsy. She said she learned it from a seventh-grade boy in the neighborhood. The boy also told her he had once seen appellant trying to throw his girlfriend from the stairs. Appellant claims this statement should have been excluded because it amounted to irrelevant and inflammatory character evidence. But

⁴ The issue of whether section 186.22, subdivision (a) can apply to a gang member acting alone is currently before our Supreme Court. (*People v. Rodriguez*, review granted Jan. 12, 2011, S187680; *People v. Gonzales*, review granted Dec. 14, 2011, S197036; and *People v. Cabrera*, review granted March 23, 2011, S189414.)

because he did not object to the statement at trial, he has waived his right to challenge it on appeal. (Evid. Code, § 353; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1052.)

Alternatively, appellant argues his attorney was ineffective for failing to object to the statement. However, the statement was not offered or used to show appellant's propensity for violence. Rather, it came in inadvertently while Garcia was explaining how she knew appellant's nickname. The fleeting reference to a single bad act that occurred under unknown circumstances at some unknown time is insufficient to undermine our confidence in the verdict. Thus, defense counsel's failure to object to the reference is not grounds for reversal. (*People v. Gamache* (2010) 48 Cal.4th 347, 391 [a defendant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice].) Accordingly, we discern no basis for disturbing appellant's convictions. Although appellant argues the cumulative effect of the trial court's errors deprived him of a fair trial, we do not believe the alleged errors, whether considered individually or combined, rendered his trial unfair.

IV

Lastly, the parties agree that two sentencing errors appear in the record. First, because the trial court imposed an enhancement of 25 years to life on the attempted murder count based on appellant's personal discharge of a firearm causing great bodily injury under section 12022.53, subdivision (d), the court should not have imposed an additional three-year enhancement for inflicting great bodily injury under section 12022.7, subdivision (a). (§ 12022.53, subd. (f).) Second, the abstract of judgment identifies appellant's conviction for street terrorism as constituting a violent offense, but street terrorism is not defined as such an offense. (§ 667.5, subd. (c).) We will modify the judgment to correct these errors.

DISPOSITION

The judgment is modified to stay the three-year enhancement on count 2 for great bodily injury under section 12022.7, subdivision (a) and to reflect appellant's

conviction for street terrorism in count 5 was not for a violent offense. The clerk of the trial court is directed to prepare a new abstract of judgment reflecting these modifications and send a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

I CONCUR:

O'LEARY, P. J.

ARONSON, J., Concurring:

I concur, but write separately because I do not agree with the majority's analysis of Martinez's evidentiary challenge on the active participation count (Pen. Code, § 186.22, subd. (a)) and the allegation Martinez committed the crimes for the benefit of his gang (§ 186.22, subd. (b)(1)(C)).

In rejecting Martinez's claim there was no substantial evidence showing he was an active gang participant at the time of the shooting, the majority relies on gang expert Brandt House's testimony that (1) Martinez admitted in the past he belonged to the Hawaiian Gardens gang; (2) he had several Hawaiian Garden tattoos; (3) the crime was violent; (4) Martinez had confronted the victims two days before the shooting; and (5) had obtained the murder weapon from a gang affiliate just before the shooting took place. I do not agree with the majority's conclusion these factors constitute substantial evidence of Martinez's current active membership in his former gang.

Martinez's past admissions he belonged to Hawaiian Gardens sheds no light on whether he was nominally or actively involved with his gang when the shooting occurred. Martinez's gang tattoos certainly support the inference he once belonged to a gang, but do not show he was a current or active member because House conceded he had no "idea when these tattoos were put on [Martinez's] body." Also, the fact that violent crimes enhance a gang's and gang member's reputation does not mean, of course, that every perpetrator of every violent crime is a gang member; other evidence must establish that fact.

The majority cites House's conclusion that Martinez's confrontation with the victims two days earlier prompted Martinez to respond violently. As the majority explained House's testimony, "[I]t would be important for [Martinez] to retaliate in some manner in order to save face." (Maj. opn. *ante*, at p. 6.) Of course a gang-related basis

for this motive exists only if House *assumed* Martinez was an active gang member, but the motive to retaliate was offered to prove that very assumption.

Finally, House referred to Castillo's delivery of the gun to Martinez, and "based on that act alone" *and the assumption* that Martinez was an active member of Hawaiian Gardens, concluded Castillo must have been Martinez's gang affiliate because Castillo handed the gun to him. Next, House justified his premise that Martinez *must* have been an active member of Hawaiian Gardens and his crimes were gang related because Martinez received the gun from a gang affiliate, namely Castillo. Put another way, House deduced Castillo was Martinez's gang affiliate based on the assumption Martinez was an active gang participant intent on committing a gang-related offense. House then completes the circle and reaches his ultimate conclusion that Martinez was an active gang participant and his crimes were gang related because Castillo was an affiliate of Martinez's gang. This circular reasoning will not do.

Delivery of the gun to Martinez tells us nothing about Castillo's gang status unless it is assumed that either Castillo or Martinez are active gang participants. But House apparently knew nothing about Castillo, conceding he had never heard of him, and his assumptions about Martinez were based on the insubstantial factors discussed above that fail to show Martinez was an active participant in his gang's affairs when the crimes occurred.¹ All this falls short of establishing substantial evidence, a showing necessary

¹ The pertinent portion of House's testimony follows:

"[Q:] All right. And, again, just so we're clear, prior to this case you'd never heard of Juan Castillo, Poli?"

"[A:] No, I did not.

"[Q:] You're saying he is an affiliate, an associate because you've heard the facts that he handed the gun to Mr. Martinez?"

"[A:] Correct.

"[Q:] Based on that act alone, given the fact it was a gun, you'd consider him an affiliate?"

on appeal to affirm a conviction and defined as “““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.” . . .” (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) As Martinez’s appellate counsel observes, “This circular reasoning amounts to no more than speculation without evidence.” In literary terms, House’s explanation resembled the Cheshire Cat’s circular reasoning in *Alice in Wonderland*. When the cat opined, “We’re all mad here. I’m mad. You’re mad,” Alice objected, “How do you know I’m mad?” “You must be,” rejoined the cat with a mad grin, “or you wouldn’t have come here.” The narrator informs the reader, “Alice didn’t think that proved it at all,” and the same is true here. The simple fact that Castillo was at the scene to hand a gun to Martinez did not prove he or Martinez were gang members. That, however, was the essence of House’s testimony.

True, House also considered the police reports in this case, including statements from witnesses that Martinez had announced on previous occasions and at the time of the shooting, “I’m Clumsy from Hawaiian Gardens” and “[t]his is my block now.” (Maj. opn. *ante*, p. 7.) These reports include witness Deisi Garcia’s pretrial identification of Castillo as a gang member and the person who gave Martinez the gun. As the majority points out, Martinez’s trial attorney could have asked the court to instruct the jury not to consider these statements for their truth. But his failure to do so does not compel reversal on grounds he received constitutionally inadequate assistance from his trial attorney.

In *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), the California Supreme Court found nothing improper in allowing a gang expert to opine the defendant

“[A:] I do.

“[Q:] In your — in that are you assuming that Poli, Mr. Castillo, is aware of Mr. Martinez’s status as a Hawaiian Gardens gang member?

“[A:] Yes.”

committed a gang-related crime based on reliable but inadmissible hearsay presented to the jury as the basis for the expert's opinion and not for the truth of the matter asserted. (*Id.* at pp. 618-619.) This rule was recently questioned in *People v. Hill* (2011) 191 Cal.App.4th 1104 (*Hill*), based on the groundbreaking decision in *Crawford v. Washington* (2004) 541 U.S. 36, which prohibited testimonial hearsay without a prior opportunity to cross-examine the declarant. (*Id.* at p. 68.) *Hill* found it implausible that a jury could disregard the truth asserted in a hearsay statement but somehow independently weigh the value of the expert opinion based on the hearsay statement. *Hill* cited with approval *People v. Goldstein* (2005) 6 N.Y.3d 119, which aptly illustrates the point. "We do not see how the jury could use the statements . . . to evaluate [the expert's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true. . . . The distinction between a statement offered for truth and a statement offered to shed light on an expert's opinion is not meaningful in this context. [Citation.]" (*Id.* at pp. 127-128.)

I agree with *Hill* that we often ask the jury to perform the metaphysically impossible task of disregarding the truth of testimonial hearsay, but to evaluate it as support for an expert's opinion, when the only way to do so is to consider whether the statement was true. I also agree with *Hill* that appellate courts are bound by *Gardeley* and other California Supreme Court authority holding that the use of hearsay statements as the basis of an expert's opinion does not violate the confrontation clause or the hearsay rule. The jury, however, could not have considered the expert's basis evidence for the truth of matter asserted if Martinez had received a limiting instruction. Consequently, the expert's basis evidence upon which the majority relies cannot support Martinez's conviction on the gang participation count or the gang enhancement. As *Gardeley* observes, "the law does not accord to the expert's opinion the same degree of credence

or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" (*Gardeley, supra*, 14 Cal.4th at p. 618.)

Other evidence supports the jury's verdict, however. Because the pretrial police interview of Deisi Garcia was admitted into evidence, the jury was entitled to consider her statements for their truth. Garcia knew Martinez as "Clumsy" and that he and Castillo were gang members who acted in concert when Castillo handed a gun to Martinez just before the shooting. The jury reasonably could conclude Martinez was an active participant in his gang because he continued to use his gang moniker, acted in tandem with another gang member, and committed crimes the expert testified were the primary activities of Martinez's gang. The jury therefore could reason that only an active participant would act in this fashion, and did so to benefit his gang. Coupled with the expert's opinion on the gang subculture, this constitutes substantial evidence to support the jury's verdicts on the gang charges. I therefore agree with the majority to affirm the judgment.

ARONSON, J.