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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.

ABEL ARMENTA,

Defendant and Appellant.

G044940

(Super. Ct. No. 10NF2258)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W.  
Michael Hayes, Judge. Affirmed.

Mark Yanis for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Susan E. Miller and  
Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury convicted defendant Abel Armenta of three counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)),<sup>1</sup> as well as one count each of probationer in possession of a firearm (§ 12021, subd. (d)(1)),<sup>2</sup> active participation in a gang (§ 186.22, subd. (a)) and brandishing a firearm in the presence of occupants of a motor vehicle (§ 417.3), and found true the associated gang and firearm enhancement allegations. The court sentenced defendant to a total term of seven years in prison, consisting of the three-year midterm for one assault with a firearm conviction and a consecutive four-year midterm for the associated personal use of a firearm enhancement (§ 12022.5, subd. (a)); the court sentenced him to concurrent or stayed terms on the other convictions and enhancements.

## FACTS

On the afternoon of July 24, 2010, Chris Woody drove his car into an alley near an apartment complex and stopped. Also in the car were Woody's cousin, Gregory Hill, and friends, Luis Santiago and Frank Velasquez (as well as possibly a fifth person). Hill wanted to visit a friend there, so he got out of the car and walked by some garages toward a gate that led to the apartments.

Within seconds, Hill saw a lone man (who was standing by a garage) pull a revolver from his waistband. The gunman was Hispanic and bald. Hill jumped back in the car and yelled, "He got a gun. Let's go. Let's go." Woody, looking in the car's rearview mirror, saw a man walking quickly toward the car holding a handgun. The

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

<sup>2</sup> Effective January 1, 2012, the statute defining the firearm offense charged against defendant has been repealed and reenacted without substantive change, but with different statutory designation, as follows: former section 12021, subdivision (d) is now section 29815, subdivision (a).

gunman called out, whereupon many other people entered the alley, including a girl who whistled, called other people to come out, and yelled, ““Get the F out of our hood.””

Woody drove forward, but came to a gate blocking the alley. Woody and his passengers got out of the car and ran to a nearby street. Woody and Hill left their cell phones in the car; Hill also left his iPod there. The gunman chased them for a few blocks.

Less than 30 minutes later, Woody and Hill returned to the area and saw that the car doors were open and people were around and inside the car. Woody and Hill then walked to a friend’s home where the friend’s mother phoned the police. The police drove Woody and Hill to the alley, but the car was gone. The officers then drove Woody and Hill to a tow company yard, where they found the car’s back window was smashed out, its front windshield was cracked, and the cell phones and iPod were gone.

At the police station, Hill positively identified defendant as the gunman from a photographic lineup of six photos. Woody separately viewed the photographic lineup and identified defendant as the gunman.

Around 2:30 a.m. on July 25, 2010, an officer drove into the area near the alley and saw defendant. Defendant ran into an apartment complex and locked the pedestrian gate. Officers then conducted a door-to-door search and located defendant hiding in a bedroom of an apartment and pretending to be asleep on the floor.

## DISCUSSION

### *The Court Did Not Abuse Its Discretion by Admitting Hill’s Out-of-Court Statement*

At trial, over defense counsel’s hearsay objection, Officer Mike Brown testified that Hill, after identifying defendant in the photo lineup at the police station, stated that he (Hill) had visited a friend in the neighborhood a few days earlier, had seen the person in the photo at that time, and had been challenged to a fight by the person in

the photo. Defendant argues Hill's out-of-court statement was hearsay and inadmissible under any exception.

The Attorney General counters that Hill's statement was not hearsay. She argues the statement was offered, not for the truth of the matter, but rather "as an added reason why Hill recognized the man depicted in the selected picture as the gunman and not to establish that the man challenged Hill to fight." The Attorney General further argues that the statement, even if hearsay, was admissible under Evidence Code section 1238's prior identification exception to the hearsay rule.

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) A "trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

The court did not abuse its discretion by admitting Hill's out-of-court statement. Contrary to the Attorney General's position, the statement was hearsay because it was offered to show Hill saw defendant a few days before the incident (thereby bolstering the accuracy of Hill's identification). Nonetheless, the statement was admissible as a prior identification.

Evidence Code section 1238 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and: (a) The statement is an identification of a party . . . as a person who participated in a crime . . . ; (b) The statement was made at a time when the crime . . . was fresh in the witness' memory; and (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

As to the requirements set forth in subdivisions (b) and (c) of Evidence Code section 1238: (1) Hill's statement was made on the day of the incident (when the crime was fresh in his memory), and (2) evidence of the statement (through Brown's testimony) was offered *after* Hill testified at trial that he made the identification as a true reflection of his opinion at the time.<sup>3</sup> As to the requirement set forth in subdivision (a) of Evidence Code section 1238, the court did not abuse its discretion by impliedly finding that Hill's out-of-court statement constituted an identification of defendant. Hill's statement identified defendant by explaining that Hill had seen the person in the photo just a few days earlier in the same area and under memorable circumstances.

But defendant argues Hill's prior identification of him occurred only when Hill selected him from the photographic lineup, not when Hill made the subsequent statement in question. For this proposition defendant cites *People v. Gould* (1960) 54 Cal.2d 621, 626, without discussing or analyzing *Gould* at all. *People v. Cuevas* (1995) 12 Cal.4th 252, 257 "overrule[d] *Gould's* holding that an out-of-court identification is in all cases insufficient by itself to sustain a conviction." Based on defendant's citation of page 626 of *Gould* and his lack of explanation, it is unclear in what respect he relies on the case for support.

The trial court did not abuse its discretion by admitting Hill's statement.

#### *The Court Did Not Err by Allowing the Prosecutor to Ask the Gang Expert a Detailed Hypothetical Question*

The prosecutor posed a detailed list of hypothetical assumptions to the gang expert (based on the evidence in this case, but without mentioning defendant's or any other person's name), then asked whether the expert could form "an opinion as to

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<sup>3</sup> At trial, Hill testified that Brown showed him six pictures at the police department and that Hill was able to recognize the gunman in one of the photos. Although Hill was unable to identify defendant at trial, he confirmed that his memory was "fresher" on the evening he saw defendant's face than it was on the day of trial.

whether or not the crimes of assault with a firearm, brandishing a firearm at occupants of a motor vehicle, [and] possession of firearm, were done for the benefit or in association with the Boys from the Hood criminal street gang.” Defense counsel objected that the question called for a legal conclusion. The court overruled the objection. The expert then opined “that the actions of the active participant would be in association or for the benefit of Boys from the Hood criminal street gang.” The court later instructed the jury with CALCRIM Nos. 332 (jury need not accept expert opinions as true or correct), 302 (jury must decide what evidence to believe when evidence conflicts), and 252 (person is guilty of crime only if act or omission was done with wrongful intent).

On appeal, defendant argues “a gang expert may not give an opinion about a defendant’s subjective knowledge or intentions,” relying on *People v. Killebrew* (2002) 103 Cal.App.4th 644. Defendant further contends that the prosecution, “by creating a hypothetical where the facts were identical to the facts of [his] case, . . . elicited improper opinion on the ultimate issue and directed the jury to decide a certain way.” (Fn. omitted.)

“[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence . . . .” (*People v. Waidla, supra*, 22 Cal.4th at p. 725.)

Subsequent to defendant’s filing of his appellate brief, our Supreme Court issued its opinion in *People v. Vang* (2011) 52 Cal.4th 1038. *Vang* held the trial court properly permitted an expert witness to testify that a crime was gang related based on hypothetical questions “closely track[ing] the evidence in a manner that was only thinly disguised.” (*Id.* at p. 1041.) *Vang* stated: “It is required, not prohibited, that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence.” (*Ibid.*) In *Vang*, as in the case before us, the gang expert opined that based on the facts of a hypothetical question, a crime was committed for the benefit of and in association with a particular gang. (*Id.* at

p. 1043.) *Vang* held this hypothetical question was proper, citing, inter alia, “(*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1505, 1513–1514 . . . [prosecutor properly stated hypothetical facts, then asked the expert, “[D]o you have an opinion as to whether this particular offense was committed for the benefit of, or in association with the criminal street gang?”].)” (*Vang*, at p. 1045.) *Vang* explained: “Obviously, there is a difference between testifying about specific persons and about hypothetical persons. *It would be incorrect to read Killebrew as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons.*” (*Id.* at p. 1047.) *Vang* disapproved “of any interpretation of *Killebrew, supra*, 103 Cal.App.4th 644, as barring, or even limiting, the use of hypothetical questions.” (*Id.* at pp. 1047-1048, fn. 3.) “[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided. [Citation.] The jury still plays a critical role in two respects. First, it must decide whether to credit the expert’s opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions. The trial court instructed the jury on both of these roles.” (*Id.* at pp. 1049-1050.)

*Vang* is controlling here. The trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.