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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.

DAVID CHE,

Defendant and Appellant.

G045016

(Super. Ct. No. 09ZF0065)

O P I N I O N

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

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood, Bradley A. Weinreb, and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

David Che appeals from a judgment after a jury convicted him of conspiracy to commit robbery, attempted second degree robbery, assault with a semiautomatic firearm, and street terrorism, and found true street terrorism and firearm enhancements. Che argues insufficient evidence supports his convictions and the street terrorism enhancements and the gang expert offered improper opinion testimony. None of his contentions have merit, and we affirm the judgment.

FACTS

Detective Elijah Hayward arranged to buy Ecstasy from a person he believed was part of a group dealing drugs in Orange and Los Angeles counties. Hayward agreed to meet a man by the name of “Jay” and purchase 2,000 Ecstasy pills for \$5,200. After a series of text messages and telephone calls, the parties agreed to meet at a Pavilions Shopping Center in Newport Beach on an April 2008 evening at 8:45 p.m. Hayward carried a handgun and wore a wire to transmit conversations to officers nearby. If Hayward needed assistance, he would yell, ““Help”” and put his hands in the air.

Soon after Hayward arrived, a black Honda Civic drove into the parking lot and stopped to the left of Hayward’s car. Hayward saw three people inside the Honda: the driver, Hoang Nguyen, the front passenger, Khoa Vo, and the backseat passenger, Ricky Ly.

Vo, who identified himself as “Jay,” told Hayward to get inside the car but Hayward refused. The Honda’s occupants told Hayward they wanted to see the money. Hayward told Nguyen to pull the Honda closer and they could see the money in a backpack that was hanging on a headrest; the backpack was empty. Hayward said he wanted to see the Ecstasy before he would give them the money. Ricky Ly showed Hayward a black backpack but he could not see inside.

A blue Acura drove into the parking lot and stopped with the front end of the car next to Hayward. The Acura’s driver, who was revving the car’s engine, asked Hayward, ““Where you from?”” ““Where you from?”” Hayward asked the Acura’s

occupants the same question. The Honda's occupants also asked the same question. The Acura's driver asked, "Where the fuck are you from?"

Hayward started to feel uncomfortable and gave the prearranged signal. As Hayward backed away, he saw Vo get out of the Honda and point a black semiautomatic handgun at him. An officer approached Vo from behind and said, "Police." When Vo turned around, Hayward ran to his vehicle. As Vo got back into the Honda, Hayward shouted at him to drop his weapon. The Honda and the Acura drove away.

Officers stopped the Acura; there were four males and one female in the car. The driver, and the person with whom Hayward spoke, was Jimmy Luong. A female, Cassidy Ngo, was sitting in the front passenger seat. In the backseat were Brian Ly, who was sitting behind the driver, and Che, who was sitting in the rear passenger seat. Jonathan Louie was sitting in the backseat between Brian Ly and Che. Officers found a baseball bat but no other weapons. Officers also found three cellular telephones in the glovebox and one in the backseat; an officer recovered Che's cellular telephone. A citizen approached the police and asked the officer to follow him back up the street. The officer recovered a loaded semiautomatic handgun. Hayward identified the gun as the one Vo pointed at him.

Officers also stopped the Honda. Officers recovered cellular telephones from Nguyen, Vo, and Ricky Ly, and one from the car's center console. They recovered two .32 caliber rounds from the gutter next to where the Honda had stopped. Officers did not find any Ecstasy.

After Detective Matthew Graham interviewed Brian Ly, Graham interviewed Che and advised him of his *Miranda*¹ rights. Che said he received a telephone call from his friend Brian Ly who asked him if he wanted to go to

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

Newport Beach. Che stated Luong picked him up at his house in San Gabriel and drove to Newport Beach. Che claimed they got lost and pulled into the Pavilions parking lot for directions, and when they left the lot, police stopped them.

An indictment charged Che² with conspiracy to commit robbery (Pen. Code, §§182, subd. (a)(1), 211, 212.5, subd. (c))³ (count 1)⁴, attempted second degree robbery (§§ 664, subd. (a), 211, 212.5, subd. (c)) (count 2), assault with a semiautomatic firearm (§ 245, subd. (b)) (count 3), and street terrorism (§ 186.22, subd. (a)) (count 6). The indictment alleged Che committed counts 1, 2, and 3 for the benefit of a criminal street gang (§ 186.22, subd. (b)). As to count 2, the indictment also alleged Che was a gang member who vicariously discharged a firearm (§ 12022.53, subds. (b), (e)(1)).

Che and Brian Ly were tried together.⁵ At trial, Officer David White testified he examined the cellular telephones. He testified Che's cellular telephone had address entries for Brian Ly, Luong, and Vo. White testified that minutes after Hayward texted Luong directions to Pavilions, Luong (who was driving the Acura), texted Vo (who was a passenger in the Honda), with directions to their destination.

² The indictment also charged Louie (Wah Ching), Ricky Ly (V Boys), Nguyen (V Boys), Brian Ly (Cool Boys), Che (Cool Boys), Luong (Cool Boys), and Vo (V Boys).

³ All further statutory references are to the Penal Code.

⁴ The indictment listed six overt acts, including Luong sent Vo a text message with directions and the Honda arrived at Pavilions and its occupants told Hayward to get into the car, and the Acura arrived at Pavilions, and pulled next to Hayward and engaged in a gang "hit up."

⁵ In a nonpublished opinion filed concurrently, we affirm Brian Ly's convictions. (*People v. Ly* (June 19, 2012, G045177).)

The prosecutor offered the testimony of gang expert, Detective Thomas Yu. After detailing his background, training, and experience, Yu testified concerning the culture and habits of Asian gangs. He stated Asian gangs, unlike African-American and Hispanic gangs, are not territorial; they are economically driven and will travel to commit primarily economic crimes. Yu explained how to join a gang, what it means to claim a gang, and the concepts of “hitting up” rival gang members, and backing up your own and allied gang members. Yu stated that in Asian gangs, allied gang members will work together to commit economic crimes. He also explained the importance of tattoos and cigarette burns, respect and disrespect, weapons, and violence within the gang culture. He said a gang gun is a firearm that belongs to the gang, not a particular individual, and can be used by a gang member and returned to a safe house for later use by another gang member. Based on conversations with gang members, Yu learned that “when Asian gang members commit a crime with a gang gun, members of that gang would know about the gun or who has the gun.” Yu stated gang members commit crimes with other gang members to intimidate the victims and so they can boast about the crimes to gain respect in the gang. Yu stated it is common for Asian gang members to use two or more cars to commit a crime. He stated there is a primary car and a backup car, which provides security. Yu explained the distinction between being a gang member (a person who is jumped into a gang) and being a gang associate (a person who “hangs out with the gang”).

Based on his experience investigating Asian street gangs, Yu opined “V Boys” was a criminal street gang at the time of the offenses. He detailed its formation and history and described its membership and common signs and symbols. Yu stated its allies are “Asian Boys” and “Cool Boys” and its rival is “Wah Ching.” Yu said V Boys’ primary activities are attempted murder, extortion, possession of controlled substance for sale, transportation of controlled substance, drive-by shootings, and assault with and

without firearms. Yu opined Nguyen, Ricky Ly, and Vo were active participants of V Boys at the time of the offenses.

Based on his experience investigating Asian street gangs, Yu opined Cool Boys was a criminal street gang at the time of the offenses. He detailed its formation and history and described its membership and common signs and symbols. Yu stated its allies are “Hell Side,” “Red Door,” and “Four Seas.” Yu stated its primary activities are possession of controlled substance for sale, transportation of controlled substance, and assault with and without firearms. Yu testified concerning the statutorily required predicate offenses. He opined Luong and Brian Ly were active participants in Cool Boys at the time of the offenses. He also opined Wah Ching was a criminal street gang at the time of the offenses and Louie was an active participant in Wah Ching at the time of the offenses.

Based on his prior contacts with Che, Che’s tattoos, and his review of police records and the charged offenses, Yu opined Che was an active participant in Cool Boys at the time of the offenses. Yu stated that on one occasion, officers contacted Che, who was with other Cool Boys gang members, and he admitted he was a Cool Boys gang member. Yu said Che had a tattoo on his right forearm of Chinese characters that could be translated to read, ““If one play, we all play.”” When Yu asked Che what that meant, he stated, ““If you fuck with one, you fuck with everybody.””

Based on a hypothetical question mirroring the facts of this case, Yu opined the offenses were committed in association with and for the benefit of a criminal street gang. He added that the offenses were done to promote, further, and assist criminal conduct by the criminal street gang. Yu explained the offenses promoted and furthered criminal conduct because the gang members were “putting in work” for the gang. He added the crimes would make it easier for other gang members to commit the same crime on a later date. Finally, he stated the proceeds of the offense would be distributed among the other gang members.

On cross-examination, Yu testified he was assigned to the gang unit about one month after the offenses here. Yu admitted Che's tattoo could be interpreted to mean something different.

The jury convicted Che of all counts and found true the enhancements. The trial court sentenced Che to the middle term of two years on count 2, and a consecutive 10-year term on the firearm enhancement (§ 12022.53, subds. (b), (e)(1)). The court stayed the sentences on the other counts.

DISCUSSION

Sufficiency of the Evidence

“In considering a challenge to the sufficiency of the evidence . . . , [the appellate court] review[s] the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] [It] presume[s] every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] 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. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.’ [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).

Conspiracy to Commit Robbery and Attempted Robbery

Che argues insufficient evidence supports his convictions for counts 1 and 2 because there was no evidence he intended to aid and abet the commission of those offenses. We disagree.

Robbery is the felonious taking of another's property against his will by the use of force or fear. (§ 211.) An attempted robbery requires that the defendant both harbor a specific intent to rob the victim and take a direct but ineffectual step to commit

the robbery. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) Conspiracy to commit robbery requires that two or more people conspire to commit robbery and at least one person performs an overt act in furtherance of the conspiracy. (*People v. Swain* (1996) 12 Cal.4th 593, 600.) As with robbery and attempted robbery, conspiracy to commit robbery is a specific intent crime that requires the intent to conspire and the intent to commit the robbery. (*Ibid.*)

“To be guilty of a crime as an aider and abettor, a person must ‘aid[] the [direct] perpetrator by acts or encourage[] him [or her] by words or gestures.’ [Citations.] In addition, . . . the person must give such aid or encouragement ‘with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,’ the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person ‘must share the specific intent of the [direct] perpetrator,’ that is to say, the person must ‘know[] the full extent of the [direct] perpetrator’s criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator’s commission of the crime.’ [Citation.]” (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

Here, there was sufficient evidence for the jury to reasonably conclude Che was aware of and intended to aid in the conspiracy to commit robbery and attempted robbery. After Hayward texted Luong the directions to the meeting place, Luong, who was driving the Acura, texted those directions to Vo, who was a passenger in the Honda.⁶ After Nguyen stopped the Honda near Hayward’s car, Vo told Hayward to get inside. Vo claimed to be “Jay,” the person Hayward had spoken with and texted. A few minutes

⁶ This refutes Che’s contention that when they arrived at Pavilions they were asking the occupants of the Honda where they were from. Although the record is vague, the more reasonable interpretation is that after the Honda occupants asked Hayward where he was from and Hayward asked them where they were from, the Acura occupants’ question was directed at Hayward.

later, Luong stopped the Acura, in which Che was a passenger, near Hayward, and he “hit up” Hayward. After Hayward asked them where they were from, the Honda’s occupants “hit up” Hayward. When Hayward started to back away, Vo pointed a gun at him.

Che was a known Cool Boys gang member, and he was in the Acura with two other Cool Boys gang members. Although there was a Wah Ching gang member in the Acura, there was testimony it is not unusual for rival Asian gangs to act in concert to commit economic crimes. And all the occupants in the Honda were members of the V Boys criminal street gang, an ally of Cool Boys. The jury heard testimony that Che had a tattoo that stands for the proposition, “If you fuck with one [gang member], you fuck with every[] [gang member].”

Yu testified that Asian gangs often work together to commit economic crimes. He also explained that it is common to have two or more cars to be used to commit such a crime, with one car acting as backup. Yu testified that when one gang member has a gun, the other gang members know their confederate is armed. Moreover, the occupants of the Acura were not unarmed, they had a baseball bat. And officers did not find any Ecstasy, which the jury could rely on to conclude Luong orchestrated the meeting so he and his confederates could rob Hayward.

Although Che was not in the Honda with the gun and he was not a member of the same gang, based on the entire record there was sufficient evidence for the jury to reasonably conclude the V Boys and the Cool Boys, including Che, conspired with each other and attempted to rob Hayward. This evidence refutes Che’s contention he was merely an innocent bystander who happened to be in the wrong place at the wrong time.

Assault with a Deadly Weapon

Che contends there was insufficient evidence he committed count 3. Not so.

The elements of assault with a deadly weapon are: (1) the defendant did an act with a semiautomatic firearm that by its nature would directly and probably result in

the application of force to a person; (2) the defendant did the act willfully; (3) when he or she did so, the defendant was aware of facts that would lead a reasonable person to realize his or her act would result in the application of force to someone; and (4) the defendant had the present ability to apply force with the semiautomatic firearm. (§§ 240, 245, subd. (b); *People v. Golde* (2008) 163 Cal.App.4th 101, 120-123.)

“[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the ‘natural and probable consequence’ of the target crime.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) A jury “must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; . . . (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the defendant’s confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.” (*Id.* at p. 262, fn. omitted.)

Here, there was sufficient evidence Che aided and abetted the assault with a deadly weapon and the assault with a deadly weapon was the natural and probable consequence of the conspiracy to commit robbery.⁷ As we explain above more fully, there was evidence from which the jury could reasonably conclude the Cool Boys planned to rob Hayward under the pretense they were going to sell him Ecstasy and they called the V Boys for backup. Che was with the gang member who arranged to meet Hayward and who texted the location to Vo, the man who later pointed the gun at Hayward. And the gang expert testified that based on his conversations with Asian gang members, “when Asian gang members commit a crime with a gang gun, members of that

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The trial court instructed the jury on both general aiding and abetting principles and the natural and probable consequences doctrine.

gang would know about the gun or who has the gun.” Based on this evidence the jury could conclude Che knew Vo was armed and planned to assault Hayward and assisted him in committing that offense. Additionally, the jury could also conclude that not only did Che know of Vo’s purpose but he assisted in the commission of the target offense (conspiracy to commit robbery), and the nontarget offense (assault with a deadly weapon) was a natural and probable consequence of the target offense. It was certainly reasonable to conclude that when a gang member takes a gun to rob someone, it is foreseeable he will use that gun to assault the victim. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [assault with a deadly weapon is natural and probable consequence of armed robbery].)

Che relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), in arguing Yu’s testimony was improper. In *Killebrew*, a jury convicted defendant of conspiring to possess a handgun after police found handguns in and around three vehicles occupied by gang members. Defendant was seen in the area of one of the vehicles. (*Id.* at pp. 648-649.) On appeal, defendant challenged the admissibility of a gang expert’s testimony “that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun,” arguing “that these opinions on the subjective knowledge and intent of each occupant in the car were improperly admitted.” (*Id.* at p. 652, fn. omitted.) The Fifth District Court of Appeal held that a police gang expert’s testimony regarding the defendant’s subjective knowledge and intent was inadmissible. (*Id.* at pp. 647, 652, 658.) And, because the gang expert’s testimony was the only evidence offered by the prosecution to establish the elements of the crime, reversal was required. (*Id.* at pp. 658-659.)

Our Supreme Court, however, has expressly limited *Killebrew* and made clear that an expert is not prohibited from answering hypothetical questions regarding the intent of hypothetical persons, but is merely prohibited from opining on the knowledge or

intent of a specific defendant on trial. (*People v. Vang* (2011) 52 Cal.4th 1038, 1047-1048 (*Vang*).

In *Vang, supra*, 52 Cal.4th at page 1041, defendants were convicted of assault by force likely to produce great bodily injury. The jury also found the assault was committed for the benefit of the criminal street gang. (*Ibid.*) On appeal, defendants complained the prosecution's gang expert was permitted to respond, over defense objection, to two hypothetical questions, tracking the facts of the case, regarding whether the assault was gang related. (*Id.* at pp. 1042-1044.)

The *Vang* court held the expert's responses to hypothetical questions, premised on the facts of the case, were properly admitted. (*Vang, supra*, 52 Cal.4th at p. 1052.) The court rejected the argument the hypothetical questions were impermissible because they too closely tracked the facts of the alleged crime. The court observed: "Use of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence' [Citations.]" (*Id.* at p. 1045.) The court also stated: "We disapprove of any interpretation of *Killebrew, supra*, 103 Cal.App.4th 644, as barring, or even limiting, the use of hypothetical questions. Even if expert testimony regarding the defendants themselves is improper, the use of hypothetical questions is proper." (*Vang, supra*, 52 Cal.4th at pp. 1047-1048, fn. 3.)

The *Vang* court also rejected the argument the expert's opinions were inadmissible as opinions on guilt or innocence. The court said: "'[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.'" [Citations.] [¶] . . . The jury was as competent as the expert to weigh the evidence and determine what the facts were, including whether the defendants committed the assault. So he could not testify directly whether they committed the assault for gang purposes. But he properly could, and did, express an

opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose.” (*Vang, supra*, 52 Cal.4th at p. 1048.)

The *Vang* Court explained: “To the extent *Killebrew, supra*, 103 Cal.App.4th 644, purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert’s expressing an opinion in response to a hypothetical question and the expert’s expressing an opinion about the defendants themselves. *Killebrew* stated that the expert in that case ‘simply informed the jury of his belief of the suspects’ knowledge and intent on the night in question, issues properly reserved to the trier of fact.’ [Citation.] But, to the extent the testimony responds to hypothetical questions, as in this case . . . such testimony does no such thing. Here, the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related. The expert did *not* give an opinion on whether defendants did commit an assault in that way, and thus did *not* give an opinion on how the jury should decide the case. [¶] . . . [¶] . . . 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.” (*Vang, supra*, 52 Cal.4th at pp. 1049-1050.)

Here, Yu did not offer an opinion on whether Che knew Vo possessed a gun. Yu responded to the prosecutor’s question about the role guns play in the culture and habits of Asian criminal street gangs. Yu explained that based on his discussion with Asian gang members, they typically know when another Asian gang member has a gun. Yu did not offer an opinion on whether Che knew Vo had a gun. Thus, with respect to Che’s argument Yu expressed an opinion on his guilt, we are not persuaded. As to Che’s argument the use of hypothetical questions tracking the facts of the case at issue is

improper, the *Vang* court clearly rejected that claim. (*Vang, supra*, 52 Cal.4th at p. 1052.)

Che also relies on *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, where another panel of this court concluded insufficient evidence supported defendant's conviction for being a felon in possession of a firearm based on the theory defendant, a gang member, constructively possessed a weapon found under a mattress in a motel room that he occupied with another gang member and two women. Officers found the gun near the codefendant gang member. The court opined, "Even assuming the firearm [codefendant] possessed fell into the gang gun category, no evidence showed [defendant] had the right to control the weapon." (*Id.* at p. 1417.) *Sifuentes* is inapposite as in that case, defendant was charged as a direct perpetrator. Here, the prosecutor proceeded against Che based on vicarious liability. There was no requirement Che constructively possess the gun for the jury to convict him as an aider and abettor.

Street Terrorism

Che asserts insufficient evidence supports his conviction for count 6 and the jury's finding he committed counts 1, 2, and 3 for the benefit of a criminal street gang. Although Che's arguments are somewhat confused and superficial, we do our best to discern their meaning.

The street terrorism substantive offense, section 186.22, subdivision (a), states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years." There are three elements to the substantive street terrorism offense: (1) active participation in a criminal street gang; (2) knowledge the gang's members have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting

in any felonious criminal conduct by members of the gang. (*Albillar, supra*, 51 Cal.4th at p. 56.)

The street terrorism enhancement, section 186.22, subdivision (b)(1), provides: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished”

We discern Che’s arguments to be as follows: (1) there was insufficient evidence he was an active participant in Cool Boys; (2) there was insufficient evidence of Cool Boys’ primary activities; (3) there was insufficient evidence members of Cool Boys engaged in the statutorily required predicate offenses; and (4) there was insufficient evidence Che committed counts 1, 2, and 3 for the benefit of a criminal street gang. We will address each claim in turn.

“In the context of the Street Terrorism enforcement and Prevention Act [(STEP)] Act , active participation is ‘involvement with a criminal street gang that is more than nominal or passive.’ (*People v. Castenada* (2000) 23 Cal.4th 743, 747) It is not enough that a defendant have actively participated in a criminal street gang at any point in time, however. A defendant’s active participation must be shown at or reasonably near the time of the crime. Section 186.22, subdivision (a)[,] uses the present tense—‘actively *participates*’ [citation]—as did the Supreme Court in . . . *Castenada*—‘involvement . . . that *is* more than nominal or passive.’ [Citations.]” (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

Here, the evidence at trial demonstrated Che had previously admitted he was a Cool Boys gang member. Officers had previously contacted Che with other known Cool Boys gang members, and at the time of the offenses, Che was with two other

Cool Boys gang members. Based on his investigation of Che and the circumstances of this offense, Yu testified that at the time of the offense Che was an active participant in the Cool Boys criminal street gang. “[T]he testimony of a single witness is sufficient for the proof of any fact. [Citation.]” (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.) This was sufficient evidence for the jury to conclude Che was an active participant in Cool Boys at the time of the offenses.

Section 186.22, subdivision (f), defines a “‘criminal street gang’” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a *pattern of criminal gang activity*.” (Italics added.)

Section 186.22, subdivision (e), states: “As used in this chapter, ‘*pattern of criminal gang activity*’ means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons” (Italics added.) Conspiracy to commit robbery, attempted second degree robbery, and assault with a deadly weapon are all qualifying offenses. (§ 186.22, subd. (e)(1)(2).)

“[E]vidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the alleged criminal street gang. . . . The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes

is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324 [gang expert based opinion on conversations with defendant and gang members, personal investigations of hundreds of gang crimes, and information from other law enforcement officers].) A police officer's gang expert testimony can be sufficient evidence establishing section 186.22's required elements. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620.)

Here, Yu provided detailed testimony about the formation, history, and structure of Cool Boys. He had spoken with the gang's founders, arrested its members, and conducted parole and probation searches of its members. He testified concerning its membership, its symbols, and its allies and rivals. Yu opined Cool Boys' primary activities are transportation of narcotics, possession of narcotics for sale, and assault with a deadly weapon. Again, the testimony of one witness is sufficient, and Yu's testimony was sufficient evidence to establish Cool Boys' primary activities.

There was also sufficient evidence of the statutorily required predicate offenses establishing Cool Boys gang members engaged in a pattern of criminal gang activity. Yu testified Sidney Young Hwa Kang, a known Cool Boys gang member was convicted of assault with a deadly weapon in July 2008. The second statutorily required predicate offense is the charged offense, count 3, assault with a deadly weapon, which the jury was instructed it could consider as one of the predicate offenses and that we have concluded is supported by substantial evidence. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 [charged offense counts as one predicate offense].) Contrary to Che's contention otherwise, there was sufficient evidence of the two statutorily required predicate offenses.

With respect to the street terrorism enhancement, section 186.22, subdivision (b)(1), does not criminalize mere gang membership. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) As clarified by *Albillar, supra*, 51 Cal.4th at page 60, although “[n]ot every crime committed by gang members is related to a gang[]” for purposes of the first prong, a crime can satisfy the first prong when it is committed in association with the gang, or when it is committed for the benefit of the gang. The *Albillar* court also explained the second prong, which required the defendant commit the gang-related felony “with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1)), need not encompass proof the defendant committed the crime with the specific intent to promote, further, or assist other criminal conduct by gang members. Instead, that subdivision “encompasses the specific intent to promote, further, or assist in *any* criminal conduct by gang members—including the current offenses—and not merely *other* criminal conduct by gang members.” (*Albillar, supra*, 51 Cal.4th at pp. 64–65.) The *Albillar* court stated a gang expert’s opinion is admissible *as part of* the evidentiary showing on how the crimes can benefit the gang. (*Id.* at pp. 63–64.)

However, “[a] gang expert’s testimony alone is insufficient to find an offense gang related. [Citation.] ‘[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.’ [Citation.]” (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.)

Che’s primary complaint is that because insufficient evidence supports the convictions to which the street terrorism enhancements attach, insufficient evidence supports the jury’s true findings on the street terrorism enhancements. As we explain above more fully, sufficient evidence supports Che’s convictions on counts 1, 2, and 3. Further, the jury heard testimony that at the time of the offenses, Che was with other

known Cool Boys gang members and allied gang members. Yu testified the offenses were done for the benefit of and to promote criminal conduct by gang members because the gang members were “putting in work” for the gang and the gang members would share any ill gotten gains with other gang members. Yu opined that the offenses would make it easier for other gang members to commit additional criminal activity. Therefore, sufficient evidence supports the jury’s findings Che committed counts 1, 2, and 3 for the benefit of a criminal street gang.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.