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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.

TAM TRONG NGUYEN,

Defendant and Appellant.

G045626

(Super. Ct. No. 06WF1235)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseño, Judge. Affirmed.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gary W. Brozio and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Shortly after midnight, defendant Tam Trong Nguyen and five other men participating in a criminal street gang named Asian Boyz, committed a home invasion robbery. Five of them, wearing ski masks and dark clothing, broke into a home, accosted and restrained the two occupants at gunpoint, demanding money and other valuables. Just as the break in began, one occupant called 911. The police responded, surrounding the home. During a three-hour stand off, the victims successfully escaped from the house and the police apprehended the five intruders, plus a sixth man in a nearby vehicle.

All six were charged with several crimes, including attempted robbery, conspiracy to commit robbery, and street terrorism. The information alleged the criminal street gang enhancement to all counts other than street terrorism and the criminal street gang firearm use enhancement. As to defendant, the information also alleged he had suffered five prior serious or violent felonies. Defendant successfully moved to sever his case from his confederates, but a jury found him guilty on all counts and returned true findings on the enhancements. In a bifurcated trial, the court found defendant suffered the prior convictions. It then sentenced him to 40 years to life in prison.

On appeal, defendant challenges the sufficiency of the evidence supporting his street terrorism conviction and the criminal street gang enhancement, the admissibility of the gang expert's opinion testimony and that of his girlfriend who testified under immunity, plus the court's jury instructions on the conspiracy and street terrorism charges. Finding no prejudicial error, we affirm the judgment.

DISCUSSION

1. Quynh Nguyen's Testimony

a. Background

When the home invasion occurred, defendant lived with his girlfriend, Quynh Nguyen, who was then pregnant with twins. During the stand off, Ms. Nguyen

arrived at the residence telling the police defendant was her husband, she brought him to the home for a party earlier in the evening and had returned to pick him up.

Several weeks later Ms. Nguyen was questioned by the police. By then, the police had learned a car parked near the victims' home was registered to defendant. Initially, she told the police defendant's car was located where she and defendant lived on the night of the home invasion robbery. The interrogating officers accused her of lying and one officer told her to think about her children. She then admitted the story she told the police the night of the crimes was untrue.

Before testifying at trial, Ms. Nguyen exercised her Fifth Amendment privilege not to incriminate herself. The prosecution obtained an order compelling her to testify "fully and truthfully, as to her knowledge of the facts out of which the charges arose" in return for a grant of use immunity. Claiming Ms. Nguyen was "given immunity . . . for the crime of lying," defense counsel objected to her testifying at trial and asked the court to "disavow the immunity grant." The court denied the request.

At trial, Ms. Nguyen testified that on the evening of the home invasion robbery she went to bed around 10:00 p.m. Defendant was in the living room speaking with some men. A few hours later, she received a telephone call from defendant. He said the police had surrounded the residence, gave her the address, told her to come to the home and, if the police confronted her, tell them she had brought him to the residence for a party earlier in the evening and had returned to pick him up.

b. Analysis

Defendant now contends his federal constitutional rights were violated by the admission of Ms. Nguyen's testimony because "as [she] understood her agreement with the state, 'the truth' – as the state theorized the truth to be – was a critical component of the deal," and she was thus under strong compulsion to testify in

conformity with the statement she gave to the police during the interrogation. He argues, “[a]ny contrary statement would have been viewed as false, and resulted in [her] arrest, prosecution, and the loss of her children.”

First, the Attorney General notes defendant forfeited this issue by not timely and properly raising it. (Evid. Code, § 353, subd. (a).) At trial, defense counsel challenged the admissibility of Ms. Nguyen’s testimony solely because he claimed nothing was “more abhorring than a witness who is being given immunity because she is purportedly lying.” This argument did not implicate the unduly coercive immunity claim raised on appeal. (*People v. Boyer* (2006) 38 Cal.4th 412, 454 [objection that immunized witness’s testimony “was the ‘tainted fruit’ of illegal police conduct” did not preserve claim witness was being strongly compelled to testify in a certain manner].) (*Ibid.*)

Even on the merits, defendant’s argument fails. “A prosecutor may grant immunity from prosecution to a witness on condition that he or she testify truthfully to the facts involved. [Citation.] But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted by the witness’s self-interest, and thus inadmissible.” (*People v. Boyer, supra*, 38 Cal.4th at p. 455; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1251-1252.)

The order compelling Ms. Nguyen to testify at defendant’s trial merely required her to testify “fully and truthfully, as to her knowledge of the facts out of which the charges arose.” “[U]nless the bargain is expressly contingent on the witness sticking to a particular version, the [foregoing] principles . . . are not violated.’ [Citations.] These principles are violated only when the agreement requires the witness to testify to prior statements ‘regardless of their truth,’ but not when the truthfulness of those statements is the mutually shared understanding of the witness and the prosecution as the basis for the plea bargain. [Citation.]” (*People v. Homick* (2012) 55 Cal.4th 816, 862-863.)

The *Allen* case presents an analogous situation. There the defendant’s adult son Kenneth made several different statements to the police. One statement implicated

himself, the defendant, and others in a murder for hire scheme to eliminate potential witnesses. A few months later, the prosecution entered into a plea agreement with Kenneth, allowing him to plead guilty to lesser crimes in return for “testify[ing] truthfully and completely in all proceedings” (*People v. Allen, supra*, 42 Cal.3d at p. 1249.) Kenneth then testified against the defendant and others at their preliminary hearings and against the defendant at his trial. On appeal, the defendant argued the testimony “was immutably tied to [Kenneth’s incriminating] pretrial statement” (*Id.* at p. 1252.)

The Supreme Court disagreed. “The plea agreement between Kenneth and the . . . [d]istrict [a]ttorney’s office . . . was conditioned only on Kenneth’s truthful and complete testimony in all proceedings against [the] defendant The fact that he . . . may have felt some compulsion to testify in accord with his earlier statement to the police does not, in itself, render the agreement invalid. There is nothing in the record to suggest Kenneth was ever told or led to believe he would receive the benefit of the plea bargain only if his testimony conformed with his October 7 statement. Furthermore, contrary to defendant’s contention, Kenneth was not placed ‘under a strong compulsion to testify in a particular fashion’ merely because he was offered the plea agreement only *after* his October 7 statement. Surely, law enforcement officials cannot be expected to offer plea agreements only to those individuals who have made no prior statements and expressed no views concerning the events in question. Such a rule would have the practical effect of prohibiting all plea agreements” (*People v. Allen, supra*, 42 Cal.3d at p. 1253; see also *People v. Fields* (1983) 35 Cal.3d 329, 361 [“an agreement which requires only that the witness testify fully and truthfully is valid”].)

Defendant also appears to challenge Ms. Nguyen’s credibility. The opening brief’s summary of the facts notes she acknowledged further changes in her story while testifying at trial. She admitted her prior statement that she had never been to the victims’ home was false, and she gave conflicting testimony on whether during the

telephone call defendant said something was wrong. But Ms. Nguyen’s credibility was a matter for the jury to decide. (*People v. Lee* (2011) 51 Cal.4th 620, 635; *People v. Ennis* (2010) 190 Cal.App.4th 721, 728-729.) “‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.’ [Citation.]” (*People v. Lee, supra*, 51 Cal.4th at p. 632.)

Thus, defendant’s attacks on the admissibility of Ms. Nguyen’s testimony lack merit.

2. *The Criminal Street Gang Charge and Enhancements*

a. Background

The prosecution called Joe Pirooz, an investigator with the Long Beach Police Department, to testify as a gang expert in support of the street terrorism charge and criminal street gang enhancements. During his first stint on the witness stand, Pirooz explained the street gang subculture in general and that of Asian gangs in particular. In part, he noted Asian gangs employ crews to commit particular types of criminal activity, and focus on theft crimes on members of the Asian community because Asians tend to distrust financial institutions and thus keep money and valuables in their homes.

He described Asian Boyz, summarizing its history and describing its size, symbols, hand signs, favored colors, graffiti, allies and rivals, plus its primary activities. Through Pirooz, the prosecution introduced conviction records of two persons Pirooz identified as Asian Boyz gang members to establish the predicate crimes requirement. Pirooz expressed the opinion that, on the date of the crimes charged, Asian Boyz qualified as a criminal street gang.

Pirooz also opined that all six men charged with the underlying crimes were active participants of Asian Boyz. As to four of them (Hung Bui, Huan Nguyen, Tuan La, and Sam Min), Pirooz based his opinion on the facts of this case, his prior training and experience concerning gangs, plus each person's gang-related tattoos and previous admissions of gang membership. Three of them also had a known moniker, i.e., gang nickname. In addition, three of these individuals had a tattoo of the word "Vietnam." Pirooz stated this tattoo, "[i]n and of itself," was not significant, "but it is significant if he is with others that have the same or similar tattoo."

A fifth man, Long Nguyen, had no tattoos or a moniker. Pirooz concluded Long Nguyen was also an active participant in Asian Boyz based on the facts of this case and his prior admission to belonging to another street gang named Viet Danger Boys.

As for defendant, while he had tattoos, Pirooz acknowledged none of them were specifically gang related. However, defendant did have the "Vietnam," tattoo that Pirooz found "significant" because "other defendants had a similar tattoo" and all of the intruders and the victims were of Vietnamese heritage. To support his opinion, Pirooz also relied on the following information contained in police reports: (1) During a search of defendant's residence, other occupants claimed membership in an Asian gang; (2) when admitted to the jail after his arrest, defendant stated he affiliated with all Asian gangs; and (3) Ms. Nguyen's statements to the police that Sam Min was a roommate, Long Nguyen had visited the residence several times, and she knew Huan Nguyen by his moniker.

After defense counsel cross-examined Pirooz, the court interrupted his testimony to have Ms. Nguyen take the stand and testify. Upon being recalled, the prosecutor again asked Pirooz if he had an opinion on whether defendant was an active participant in Asian Boyz on the date of the crimes. Pirooz answered yes, and when asked for "the basis of [his] opinion," gave the following response: "Very simple. The basis of

my opinion is the fact that the defendant himself unlawfully was in the house were the scene occurred We know that the bedroom door was kicked in and the victims were inside. And we know, I know that the defendant had to have done one of three things.” At this point, defense counsel objected on the ground of speculation. The trial court struck the reference to defendant doing one of three things, but otherwise allowed Pirooz to complete his answer. Pirooz then stated: “We know his participation was either tying up the victims, holding a gun to the victims, or ransacking the house. [¶] . . . [¶] Coupled with the fact that the defendant is a roommate of one of the other persons arrested within the crime, and the roommate’s girlfriend testified that she knew Long Nguyen . . . as coming to the house between four and five times, and identified one of the Asian Boy members as being Bad Boy.” Upon further questioning, Pirooz noted he also relied on defendant’s statement to a jail official that he associated with all Asian gangs.

The prosecutor addressed a hypothetical question to Pirooz based on the facts of this case that had been previously approved by the court. Pirooz opined the crimes were committed in association with and for the benefit of Asian Boyz.

Concerned about the expert’s latter testimony, the trial judge drafted and, with the concurrence of trial counsel, gave the following special instruction to the jury: “The expert witness’s opinion as to the facts or the defendant’s role assumes certain circumstances existed and have been proved beyond a reasonable doubt or certain witness’s testimony is credible. If you find that these facts have not been proved beyond a reasonable doubt, you are to determine the effect of that failure of proof as to the opinion given. [¶] You are cautioned that no witness can testify as to the guilt or innocence or the credibility of any witness. In permitting the expert to assume certain facts for the purpose of rendering an opinion, the court has only found that these assumed facts are within the range of the evidence presented. It is the duty of the jury to decide the credibility of a witness and the existence or nonexistence of any facts in dispute.”

b. Sufficiency of the Evidence

Defendant attacks his conviction for street terrorism and the true finding on the criminal street gang enhancement alleged as to each of the other substantive charges, arguing the evidence fails to support the verdict and findings. As for the street terrorism charge, defendant claims the prosecution failed to present substantial evidence he actively participated in Asian Boyz or that he willfully promoted, furthered, or assisted a gang-related felony. We disagree.

“In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses 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.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.’ [Citation.]” (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

First, we note defendant’s discussion of the issue misstates some of the evidence. For example, he asserts Pirooz had never qualified to testify as an expert on Asian Boyz. He is wrong. Pirooz testified that, while he had not previously testified as an expert on Asian Boyz in Orange County Superior Court, he had done so on at least 10 prior occasions in Los Angeles County Superior Court. He also suggests Pirooz testified that, for a crime to be gang related, the perpetrators must either identify themselves as members of the gang during the commission of the crime or leave behind gang graffiti.

Rather, Pirooz stated these actions are some of the factors he takes into account when determining whether a crime is gang related, but he reviews each incident on a case-by-case basis.

Second, defendant's argument is premised on viewing the evidence in the light most favorable to him. "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Consequently, to prevail on an insufficiency-of-the-evidence claim, an appellant "must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*) An appellant "does not show the evidence is insufficient by citing only his own evidence, or by arguing about what evidence is *not* in the record, or by portraying the evidence that is in the record in the light most favorable to himself." (*Ibid.*)

Third, the evidence supports the jury's street terrorism verdict. "[T]he elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 56.)

On the element of a defendant's active participation, a gang expert's testimony is relevant. (*People v. Castenada* (2000) 23 Cal.4th 743, 753; *People v. Hunt* (2011) 196 Cal.App.4th 811, 818.) In part, Pirooz relied on the facts of this case to support his opinion defendant was an active participant of Asian Boyz during the home invasion robbery. He testified home invasion robberies are one of Asian Boyz's primary activities. Pirooz noted four of defendant's confederates in committing the other charged crimes were self-admitted Asian Boyz members and he explained "gang members . . . don't take people to crimes they don't trust"

While defendant did not have any tattoos expressly related to the gang, Pirooz concluded the “Vietnam” tattoo had some significance because he was with others, including self-admitted gang members with the same tattoo and the home invasion robbery was perpetrated against persons of Vietnamese heritage. In this respect, we note Pirooz previously explained to the jury Asian gangs primarily commit crimes against Asians, in part, because “residents within the Asian communities” tend to keep money and valuables in their homes because they “are less trustful of banks” and other institutions. Pirooz also cited the fact that, after his arrest, defendant told jail personnel he affiliates with all Asian gangs.

Evidence supporting the active participation element also came from Ms. Nguyen. She testified she and defendant lived in the same residence as Sam Min, one of the self-admitted Asian Boyz members who participated in the home invasion robbery. She had seen Min’s gang-related tattoos. She also acknowledged Long Nguyen, another participant in home invasion robbery, visited the residence on several occasions. From Pirooz’s testimony and the other evidence the jury could infer defendant was an active participant in Asian Boyz in committing the other charged crimes in this case.

Defendant’s attack on the evidentiary sufficiency for the third element is based on a misstatement of the law. He contends it requires proof of “‘gang-related conduct.’” In *People v. Albillar, supra*, 51 Cal.4th 47, the Supreme Court held Penal Code section 186.22, subdivision (a) “criminalizes active participation in a criminal street gang by a person who has the requisite knowledge and who ‘willfully promotes, furthers, or assists in *any* felonious criminal conduct by members of that gang[,]’ . . . not felonious gang-related conduct” (*People v. Albillar, supra*, 51 Cal.4th at p. 55), and thus a violation of the statute “is established when a defendant actively participates in a criminal street gang with knowledge that the gang’s members engage or have engaged in a pattern of criminal activity, and willfully promotes, furthers, or assists in *any* felonious criminal

conduct by gang members.” (*Id.* at p. 54.) Here, the evidence supports the existence of this element of the crime.

Concerning the enhancement, defendant contends “there was no evidence that [he] was an Asian Boyz gang member,” “associated with . . . Asian Boyz,” “knew that the other participants . . . were Asian Boyz gang members,” and “nothing about the crimes . . . indicate[d] . . . the crime[s] w[ere] at all gang related, or [were] being done to benefit Asian Boyz” An attack on the evidentiary sufficiency for a criminal street gang enhancement is also governed by the foregoing substantial evidence rule. (*People v. Albillar, supra*, 51 Cal.4th at pp. 59-60.)

First, we note the evidence previously discussed belies defendant’s claims he did not associate with Asian Boyz and did not know his confederates associated with the gang. Second, as for gang membership, we have already found there is sufficient evidence defendant was an active participant in Asian Boyz when the home invasion robbery occurred. But even if it did not, membership is not required for the enhancement. It applies to “any 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” (Pen. Code, § 186.22, subd. (b)(1).) Thus defendant “is wrong in asserting that the prosecution was required to prove that he was a . . . member of th[e Asian Boyz] gang.” (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 206; see also *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402 [the enhancement “does not require that the defendant be an active or current member of the criminal street gang that benefits from his crime”].)

Finally, the requirement that a crime be gang related for purposes of the enhancement can be established where “they were committed in association with the gang, [or] they were committed for the benefit of the gang.” (*People v. Albillar, supra*,

51 Cal.4th at p. 60.) Here, there was evidence the home invasion robbery “was committed ‘in association with’ the gang with the intent to assist criminal conduct. [Citation.]” (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [“[T]he jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members”].) In addition, Pirooz explained to the jury how the home invasion robbery benefitted Asian Boyz. “[C]ourts . . . have repeatedly recognized that expert testimony is admissible on the issue of “whether and how a crime was committed to benefit or promote a gang.” [Citations.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 621.)

Thus, we conclude substantial evidence supports the jury’s true findings on the criminal street gang enhancement. In a footnote, defendant also challenges the sufficiency of the evidence supporting the jury’s finding on the criminal street gang firearm use allegation. Defendant has waived the issue by raising the “in such perfunctory fashion” and without “set[ting it] out . . . under a separate heading.” (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793.) In any event, the evidence supporting the street terrorism charge and street gang enhancement justify rejecting this claim as well.

c. Admissibility of Gang Expert’s Opinion

Defendant contends Pirooz’s answer the second time the prosecutor asked him to explain the basis for his opinion that defendant was an active participant in Asian Boyz violated his constitutional rights because “the testimony was *not* permissible expert opinion on gang culture and habit,” but “tantamount to expressing an opinion as to defendant’s guilt.” The Attorney General concedes Pirooz’s response was improper, but argues any error in admitting it did not prejudice defendant.

“In general, this court and the Courts of Appeal have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case. ‘Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” [Citation.] The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.’ [Citations.]” (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) “Gang evidence, including expert testimony, is relevant and admissible to prove the elements of the substantive gang crime and gang enhancements. [Citation.] Thus, a properly qualified gang expert may testify about a wide range of issues, including a gang’s territory, retaliation, graffiti, hand signals, tattoos, and clothing. [Citation.] [¶] Expert testimony is also relevant and admissible to explain how a gang benefits from [criminal activity] and to prove the gang’s primary activities. [Citation.]” (*People v. Williams, supra*, 170 Cal.App.4th at p. 609.)

“Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Contrary to defendant’s argument, Pirooz’s testimony was not inadmissible because it concerned the ultimate issues in this case. “‘Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.’ [Citations.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see also Evid. Code, § 805.)

With one exception, Pirooz’s opinion testimony satisfied the foregoing requirements. He explained the subculture of criminal street gangs in general, that of Asian gangs in particular, including Asian Boyz. His testimony was based on proper sources including his training and experience, plus “‘personal observations of and discussions with gang members as well as information from other officers

and . . . [police] department[] files.’ [Citation.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.)

Nor can defendant object to Pirooz’s opinions that he committed the other substantive crimes in association with and for the benefit of Asian Boyz simply because they were based on a hypothetical question that closely tracked the evidence in the case. “Generally, an expert may [also] render opinion testimony on the basis of facts given ‘in a hypothetical question that asks the expert to assume their truth.’ [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]” (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) “Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence.” (*People v. Vang, supra*, 52 Cal.4th at p. 1051.)

However, Pirooz’s response to the prosecutor the second time he asked the investigator to explain the basis of his opinion defendant was an active participant in Asian Boyz did go too far. “A witness may not express an opinion on a defendant’s guilt. [Citations.]” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77; see also *People v. Vang, supra*, 52 Cal.4th at p. 1048.) Here, Pirooz’s answer indicated a personal belief that defendant was guilty of the substantive crimes.

However, the admission of this testimony did not prejudice defendant. Contrary to his argument, a claim that a witness “gave inadmissible opinion testimony on the central question of . . . guilt . . . is, in substance, one of erroneous admission of evidence, subject to the standard of review for claims of state law error. [Citation.]” (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 76.) Under this standard, an appellate court reviews the entire record to “determine if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.]” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1140.)

Defendant's assertion that nothing sinister can be inferred from the mere fact of his presence in an unrelated person's house, uninvited, in the middle of the night when a group of gang members are perpetrating a home invasion robbery, coincidentally dressed in the same dark clothing as the gang members, strains credibility. This is even truer since there was evidence one of the robbers lived at the same residence as defendant and defendant knew one and possibly two other participants. Ms. Nguyen also testified that defendant sought her assistance in escaping arrest by concocting a ruse that he was at the house attending a nonexistent party. Furthermore, as noted, the bulk of Pirooz's expert testimony on criminal street gangs was properly admitted. We conclude the evidence overwhelmingly supported defendant's conviction on the substantive crimes.

In addition, the trial court cured any error by giving the special instruction on how the jury was to evaluate Pirooz's testimony. Absent evidence to contrary, jurors are presumed to understand and follow the court's instructions. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 83; *People v. Williams, supra*, 170 Cal.App.4th at p. 613.) Defendant cites the United States Supreme Court's decision in *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] for the opposite conclusion. But *Bruton* involved a different issue, the admission at a joint trial of a codefendant's confession that implicated the complaining defendant. Cases have held "*Bruton* recognized only a 'narrow exception' to the general rule that juries are presumed to follow limiting instructions [citation]" (*People v. Ervine* (2009) 47 Cal.4th 745, 776; see also *Richardson v. Marsh* (1987) 481 U.S. 200, 208 [107 S.Ct. 1702, 95 L.Ed.2d 176].) Here, "defendant offers no rationale for extending the *Bruton* exception to this case." (*People v. Ervine, supra*, 47 Cal.4th at p. 776.)

Consequently, we conclude any error in admitting gang expert testimony in this case did not prejudice defendant.

3. *The Jury Instruction Claims*

a. *The Conspiracy Charge*

Count 3 of the amended information charged the defendants with conspiracy to commit first degree robbery. In support of this count, the prosecution alleged the defendants committed five overt acts: (1) meeting at the victims' residence; (2) five of them wore masks and gloves; (3) entered the residence; and (4) and (5) the intruders tied up each of the victims. The court instructed the jury on the crime of conspiracy, including the need to find the defendants committed at least one of the alleged overt acts, but further told the jury it was "not required to unanimously agree as to . . . which overt act was committed, so long as each of you finds beyond a reasonable doubt that one of the conspirators committed one of the acts alleged . . . to be overt acts."

Defendant contends the failure to instruct the jury it needed to unanimously agree on the overt act committed by the coconspirators was error. He acknowledges the California Supreme Court has rejected this argument, but claims that decision concerns state law only, not his rights under the federal Constitution.

In *People v. Russo* (2001) 25 Cal.4th 1124, the Supreme Court held that while proof of an overt act was essential to support a conspiracy conviction under California law, it is not necessary for the jury to all agree on the specific overt act committed by the perpetrators. "Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy." (*Id.* at p. 1135.)

The holding in *Russo* is binding on this court. (*People v. Johnson* (2012) 53 Cal.4th 519, 527-528; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Furthermore, its reasoning undermines defendant's claim federal law requires an opposite result. *Russo* noted "[a]t common law, and still today where unchanged by

statute, conspiracy consisted of the unlawful agreement, and no overt act was required to establish the crime. [Citations.]” (*People v. Russo, supra*, 25 Cal.4th at p. 1131.) In California, the commission of an overt act is element of the crime of conspiracy and proof of an overt act is essential to a conviction of conspiracy. (*Id.* at pp. 1131, 1134; Pen. Code, §§ 182, subd. (b), 184.) While a jury must unanimously agree that a defendant has committed a specific crime (*id.* at p. 1132), “[t]he key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a ‘particular crime’ [citation] But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.]” (*Id.* at pp. 1134-1135.) Thus, *Russo*’s holding is not at odds with the federal constitutional requirement that to support a conviction the state must establish each element of the crime by proof beyond a reasonable doubt.

b. Motive

The trial court gave the standard instruction “[m]otive is not an element of the crime[s] charged and need not be shown,” but the jury “may consider motive or lack of motive as a circumstance in this case,” and that “[p]resence of motive may tend to establish the defendant is guilty,” while “[a]bsence of motive may tend to show the defendant is not guilty.” Defendant contends that, as to the street terrorism count, the use of this instruction was error because his “motive was effectively an element of the state’s case” Thus, the foregoing instruction “undercut the state’s burden of proof” We disagree.

“We review de novo whether jury instructions state the law correctly. [Citation.] “Review of the adequacy of instructions is based on whether the trial court ‘fully and fairly instructed on the applicable law.’ [Citation.]” [Citation.]’ ““In

determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.’ [Citation.]’ [Citation.]” [Citation.] “Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.’ [Citation.]” [Citation.]’ [Citation.]” (*People v. Jackson* (2010) 190 Cal.App.4th 918, 923.)

It is well established that, “with few exceptions, motive itself is not an element of a criminal offense. [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 740.) In *People Fuentes* (2009) 171 Cal.App.4th 1133, the Court of Appeal rejected the claim raised here; that giving the standard jury instruction on motive “conflicted with the instructions for the substantive offense of criminal street gang participation . . . and lessened the prosecution’s burden of proof on those issues.” (*Id.* at p. 1139.) *Fuentes* rejected the argument: “An intent to further criminal gang activity is no more a ‘motive’ in legal terms than is any other specific intent. We do not call a premeditated murderer’s intent to kill a ‘motive,’ though his action is motivated by a desire to cause the victim’s death. Combined, the instructions here told the jury the prosecution must prove [the defendant] intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it.” (*Id.* at pp. 1139-1140.)

We find this reasoning persuasive. Contrary to defendant’s suggestion the decision in *People v. Hillhouse* (2002) 27 Cal.4th 469 does not support his argument. There the defendant was charged with murder and several other crimes. The trial court gave the standard instruction on motive in a murder prosecution. On appeal, the defendant argued the motive instruction “contradicted the other instructions, because motive *is* an element of the various crimes.” (*Id.* at p. 503.) The Supreme Court disagreed. “[A]lthough malice and certain intents and purposes are elements of the

crimes, as the court correctly instructed the jury, *motive* is not an element. ‘Motive, intent, and malice—contrary to appellant’s assumption—are separate and disparate mental states. The words are not synonyms. Their separate definitions were accurate and appropriate.’ [Citation.] Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice.” (*Id.* at pp. 503-504.)

Here, defendant has not shown that motive, as distinguished from the element of intent, was a separate element of the crime of street terrorism. Therefore, we conclude the trial court properly gave the standard motive instruction in this case.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.