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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. ANGEL ANTHONY GUZMAN, Defendant and Appellant.	G045708 (Super. Ct. No. 10WF0495) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Joe T. Perez, Judge. Affirmed in part and reversed in part, with directions.

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, Julie L. Garland, Assistant Attorney General, Christopher Beesley and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Angel Anthony Guzman of attempted second degree robbery and street terrorism (Pen. Code, §§ 664, subd. (a), 211, 212.5, subd. (c), 186.22, subd. (a), all further statutory references are to this code), and found gang and personal use firearm enhancements (§§ 186.22, subd. (b), 12022.53, subd. (b)) true on the attempted robbery count. Guzman argues the prosecution's gang expert erred by opining he was an active participant in a criminal street gang and by suggesting through an overly specific hypothetical that he committed the attempted robbery to benefit his gang. He also argues section 654 required the trial court to stay sentencing on the street terrorism count instead of imposing an eight-month sentence consecutive to the 11 years and four months he received on the robbery count and firearm enhancement. Because only Guzman's section 654 claim has merit (*People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*)), we direct the trial court (§ 1260) to enter a stay on the street terrorism count, and we affirm the judgment in all other respects.

I

FACTUAL AND PROCEDURAL BACKGROUND

The issues raised on appeal necessarily determine the scope of our background discussion, which here is accordingly brief. Guzman attacked Emilio Lopez Delacruz when he exited into an alley after finishing his restaurant shift. Guzman grabbed Delacruz by the neck and put a gun to the back of his head, but Delacruz elbowed his way free and ran until he heard Guzman chamber a round. Delacruz turned to see Guzman pointing the gun at him; Guzman struck Delacruz in the head with the gun, drawing blood, but fortunately some restaurant coworkers entered the alley and Guzman ran off. One of the coworkers found a cell phone ringing at the attack site and turned it over to police, who concluded it was owned by a "Big Stanton" gang member,

because it displayed a screen banner with the common Big Stanton abbreviation "STN" and recent text messages sent and signed by "Chambrs," which was Guzman's legacy moniker, handed down from his father's former active Big Stanton gang membership.

At trial, the prosecution's gang expert, Deputy Sheriff Victor Vollner, identified Guzman by name instead of in the form of a hypothetical when he opined that "Angel Guzman was actively participating as a member of the Big Stanton criminal street gang" at the time of the offense. Vollner also opined in responding to a hypothetical posed by the prosecutor exactly mirroring the facts of the case that, successful or not, the hypothetical offense provided one or more benefits to the Big Stanton gang. Had it been successful, robbery proceeds "could be . . . used to buy other weapons, narcotics" or "to bail other members out of jail." And though foiled, the violence inherent in the gun attack nevertheless would instill fear in the community, bolstering Big Stanton's criminal activities by dissuading victims or witnesses from reporting crimes, and enhancing the perpetrator's and Big Stanton's status in the gang subculture as a violent and therefore respected force.

Specifically, the prosecutor posed her hypothetical and elicited Vollner's responses as follows: "Now I'm going to give you a hypothetical. Let's say that on March 21st of 2010 a member actively participating in the criminal street gang Big Stanton goes to a location in an alleyway between Beach Boulevard and Pacific to a restaurant called Nelbom. When he arrives at this location he grabs a victim by the back of the neck, asks for money or demands money, and then the victim elbows him. He takes a gun, has it to the victim's head. As the victim tries to flee, he cracks him on the back of the head. As the victim tries to flee further he chambers a round in the gun and

points the gun directly at the victim, as the victim is running backwards looking at this individual.

"After the crime occurred, a cell phone is located at the area of the struggle [and] has 'STN' on it as well as the signature line for Chambrs. And an individual arrives on scene on a bike and tries to call that particular cell phone.

"Do you have an opinion as to whether or not — oh, and this crime occurred within the territory of the criminal street gang of Big Stanton.

"Do you have an opinion as to whether or not this crime and this particular offense was committed for the benefit of or in the association of the criminal street gang of Big Stanton?"

Vollner answered: "[B]ased on my training and experience, speaking to deputies that responded to that call and Investigator Navarro, and the totality of those circumstances, I believe it was for the benefit — that Angel Guzman was actively participating as a member of the Big Stanton criminal street gang."

The prosecutor asked further whether "in that hypothetical does it benefit a gang financially" if "he," i.e., the perpetrator, "would have succeeded" and also asked whether the offense would have earned "the individual in that hypothetical" respect for himself and his gang in the gang subculture and larger community. Vollner answered affirmatively and explained his reasons as noted above.

II

DISCUSSION

Guzman asserts Vollner exceeded the bounds of permissible expert testimony by testifying "'Angel Guzman' had committed the attempted robbery for the benefit of the gang." Guzman has forfeited this challenge by failing to object below.

(*People v. Lindberg* (2008) 45 Cal.4th 1, 48.) We nevertheless address the issue because Guzman argues he received ineffective assistance of counsel when his trial attorney failed to object to Vollner's testimony. Guzman acknowledges expert witnesses, including gang experts, may offer opinion testimony in response to hypotheticals that closely mirror the facts of the case (*People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*)), but he insists Vollner strayed into forbidden territory by opining a "'specified individual had specific knowledge or possessed a specific intent,'" namely that Guzman intended his conduct to benefit the Big Stanton gang.

Guzman is mistaken in two respects. First, Vollner named Guzman when opining that Guzman was *an active participant* in the Big Stanton criminal street gang, *not* in responding to the prosecutor's question whether "in that *hypothetical* does [the attempted robbery] benefit the gang" financially or otherwise. (Italics added.) It is well established that an expert may opine on whether a specific defendant is an active participant in a criminal street gang at the time of the underlying offense because a "defendant's membership in a gang [i]s a matter beyond the common knowledge of jurors and thus a proper subject of expert testimony." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506 (*Valdez*).)

Second, even assuming Vollner effectively testified Guzman rather than a hypothetical person committed the offense for the benefit of the Big Stanton gang, *Valdez* holds such testimony may be proper. (*Valdez*, *supra*, 58 Cal.App.4th at pp. 507-509.) As *Valdez* observed, "Such an opinion was not tantamount to an opinion of guilt or, in this case, that the enhancement allegation was true, for there were other elements to the allegation that had to be proved." (*Id.* at p. 509.) Moreover, Guzman in essence challenges the transparency of the prosecution's hypothetical, given that in its specificity

it could refer to no one but him, whether or not he was expressly named, and therefore invades the jury's province to determine the truth of enhancement allegations. But the Supreme Court has concluded this challenge has no merit. (*Vang*, *supra*, 52 Cal.4th at p. 1048 [expert may opine assault was for a gang purpose, "based on hypothetical questions that tracked the evidence"].) We are bound by this conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Consequently, an objection by his trial counsel would have been futile, and Guzman's ineffective assistance of counsel claim therefore fails.

Guzman has more success on his section 654 challenge. Guzman correctly anticipated the Supreme Court's holding in *Mesa* that imposition of sentence on a street terrorism conviction (§ 186.22, subd. (a)) must be stayed under section 654 when the conviction is based on an underlying felony for which the defendant is or has been punished. (*Mesa*, *supra*, 54 Cal.4th at p. 195 [section 654 prohibits "'multiple punishment for a single "act or omission"'"].) Guzman's street terrorism conviction rested on his attempted robbery of Delacruz, for which the trial court imposed the low term of 16 months. A defendant may only be punished once for what the Supreme Court has determined is the same, single act, and therefore the trial court was required to stay imposition of sentence on Guzman's street terrorism conviction.

III

DISPOSITION

Guzman's eight-month sentence for street terrorism (count 2, § 186.22, subd. (a)) is reversed. The trial court is directed to enter a stay under section 654 on that count and to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.