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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.

FREDDY GUERRERO,

Defendant and Appellant.

G049687

(Super. Ct. No. 10NF1477)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury convicted Freddy Guerrero of prohibited possession of a firearm and ammunition (former Pen. Code, §§ 12021, subd. (a)(1); 12316, subd. (b)(1)) because he had a prior felony conviction, and found true the penalty enhancement allegation that he

committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Defendant admitted in a bifurcated proceeding that the prior conviction qualified as a serious felony (§ 667, subd. (a)(1)) and a sentencing strike (§§ 667, subds. (d), (e)(1); 1170.12, subd. (b), (d)(1)). The trial court sentenced him under the Three Strikes law to a 15-year prison term. Defendant raises several contentions on appeal that boil down to a challenge to the sufficiency of the evidence to support the gang enhancement. As we explain, ample evidence supports the jury's conclusion, and we therefore affirm the judgment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

An Anaheim police officer watched the back of defendant's apartment while other investigators approached the front to conduct a parole search. Defendant was a known South Side Brown Demons (SSBD) gang member. He opened a sliding glass door and placed a backpack in the corner of the back balcony patio before answering the officers' knock at the front door. The officers retrieved the backpack from the balcony and found inside: a .25-caliber semiautomatic handgun wrapped in a brown bandana; a box containing nine live rounds of .25-caliber ammunition; several clear, empty baggies; an official police report relating to SSBD gang member Dominique Duran, and parole paperwork from the California Board of Prison Terms concerning Duran. The handgun's magazine contained five live rounds.

The investigators also searched defendant's bedroom and found numerous items of gang-related paraphernalia, including a pair of sunglasses on which the letters "ABDR" were etched, which a gang expert later explained stood for "Anaheim Brown Demons Rifa," a common sign or symbol of the SSBD gang asserting that the gang "ruled" or was "triumphant." They also found a belt buckle in a style common among gang members based on association with the gang's name or a geographical region, in this case an "A" for Anaheim.

Gang graffiti littered defendant's room on pieces of paper, letters, a photo album, and phone books. At trial, a gang expert deciphered the graffiti, including "SXS BD 13 A," in which "SXS" stood for "South South," "BD" meant "Brown Demons," "13" referred to "M" as the 13th letter of the alphabet and stood for "Mexican Mafia," a powerful prison gang, and the "A" stood for "Anaheim." Other papers contained common gang details recorded in graffiti, including defendant's street name ("Oso"), references to the geographic region ("Southern California Anaheim," "Anaheim," and "Orange County"), and abbreviations for gang entities including the Anaheim Southside Mexican Mafia and the Brown Demons. The photo album restated geographical references, and included the numbers "77" and "23," which stood for "South Side Brown Demons" based on a standard telephone keypad, on which the user presses "7" for "S," "2" for "B," and "3" for "D." The photo album contained snapshots of individuals the police suspected were SSBD gang members or associates.

An investigator found in defendant's dresser drawer a wallet belonging to Ruben Orgaz, which had been stolen during an armed robbery committed four days earlier by SSBD gang members. Along with the wallet, the police located Orgaz's birth certificate, social security card, driver's license, other identification cards, a credit card, and Orgaz's missing cell phone. The search also turned up a pellet gun wrapped in a brown bandana.

The officers arrested defendant and as part of the booking process, examined his tattoos, which included an Anaheim Ducks logo tattooed on his right forearm; tattoos of the letters "B" and "D," one on each tricep, with a star under the "D"; the letter "S" tattooed both on his left middle finger and left ring finger; and his mother's name "Beatriz" tattooed over his heart.

When the police returned Orgaz's phone, Orgaz noticed a new screensaver displaying the numbers "714" for the Anaheim area code, a new homepage photograph, and other photographs he had not taken, including pictures of defendant and of a star

shape with the words “Anaheim Orange County” on it. Orgaz also found new numbers in the contact list and text messages he had not sent. At trial, defendant’s girlfriend admitted defendant had sent her messages from the phone and she used the phone to take photographs of defendant.

Forensic analysis showed defendant was the major contributor of DNA on the trigger of the .25-caliber gun. Consistent with a gang gun, DNA strands from multiple people were found on the gun’s slide, magazine, and trigger. At trial, a gang expert explained that a gun belonging to a gang is held for safekeeping only by trusted gang members. The gang’s active participants will know the location of the gun, and will be able to retrieve it when needed. The expert explained gangs value guns to intimidate the community in their neighborhood or geographic areas they claim as their domain, and they use guns to commit crimes against the general public, law enforcement officers, and rival gang members, as well as in self-defense. The expert also explained only a member in good standing in a gang is permitted to obtain a tattoo that includes the gang’s name or its signs or symbols. A nonmember receiving or attempting to obtain such a tattoo would face retaliation from the gang.

The gang expert provided background information about SSBD, including demographics (about 40 members), claimed territory (multiple Anaheim locations), and the gang’s preference for brown or blue as an identifying color. The expert also explained the gang’s common symbols or signs included “SSBD,” sometimes including a “V” for “Varrio” to designate the gang’s claim to a neighborhood or “turf.” SSBD members often added in graffiti the letter “R” for “Rifa” or “Rifamos,” meaning “the best” or as a reigning claim to “my area,” and added “LS” for “locos” or “locates,” meaning “crazy” or “crazy ones,” and the numbers “7723.” The expert testified that SSBD engaged in a pattern of criminal gang activity and its primary activities included felony possession of firearms and vandalism.

The expert opined that defendant was an active SSBD gang member at the time of his alleged firearm and ammunition possession offenses. He noted law enforcement officers had contacted defendant several times with other SSBD members in SSBD's claimed territory, defendant wore SSBD gang tattoos, etched symbols of the gang on his sunglasses and owned other gang-typical clothing, including his belt buckle. His room and possessions were rife with the gang's graffiti, photographs of other gang members, and letters discussing gang matters. He also possessed: (1) both a firearm and pellet gun wrapped in brown bandanas, the gang's color, and (2) the parole paperwork and a police report concerning an influential fellow gang member. Additionally, he possessed and used Orgaz's phone, which had been stolen in a gang confrontation and included photographs since the robbery depicting SSBD symbols.

Presented with a hypothetical based on the facts of the case, the expert concluded the firearm and ammunition possession offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. The expert also concluded the crimes would promote or assist in criminal conduct by the gang.

Defendant's sister, with whom he lived, testified their mother's initials were "BD" for Beatriz Duran. She explained defendant obtained a tattoo of the Anaheim Ducks logo because he attended their hockey games and not for any geographical association. She knew nothing of the South Side Brown Demons and was not aware of defendant's involvement in any gang. According to her testimony, guns were not allowed in their home, and she had never seen defendant with a gun.

## II

### DISCUSSION

#### A. *Substantial Evidence Supports the Gang Enhancements*

Defendant challenges the sufficiency of the evidence to support the gang enhancements on his firearm and ammunition possession offenses. He contends the gang expert exceeded the bounds of a proper hypothetical in opining possession mirroring the

facts of this case benefited a gang and, absent the expert's bare opinion, the evidence did not support the enhancements. We are not persuaded.

An appellant challenging the sufficiency of the evidence “bears an enormous burden.” (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) It is the jury's exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*Ibid.*) The reviewing court must view the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict (*People v. Johnson* (1980) 26 Cal.3d 557, 577; *Jackson v. Virginia* (1979) 443 U.S. 307, 318), not whether the appellate panel is persuaded the defendant is guilty beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Accordingly, we must presume in support of the judgment the existence of facts reasonably drawn by inference from the evidence. (*Ibid.*; see *People v. Stanley* (1995) 10 Cal.4th 764, 792 [same deferential standard of review applies to circumstantial evidence].) The fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

Defendant argues the expert strayed outside the bounds of a proper hypothetical by using a proper name, i.e., Dominique Duran, the name of the SSBD gang member on the police report and parole paperwork recovered in defendant's backpack. In effect, defendant challenges the transparency of the expert's opinion concerning a hypothetical gang member's possession of a gun for the benefit of his or her gang. Because the hypothetical included Duran's name, defendant reasons the hypothetical could refer to no one but defendant. Not so. The expert did not refer to defendant by name (see *People v. Killebrew* (2002) 103 Cal.App.4th 644), and by its strict terms, the expert's opinion did not — as defendant claims — invade the jury's province by declaring *his* guilt. (See also *People v. Vang* (2011) 52 Cal.4th 1038, 1048, fn. 4

[observing that “in some circumstances, expert testimony regarding the specific defendants might be proper”].)

More to the point, the Supreme Court has endorsed the use of hypotheticals over defense protests of transparency precisely because an expert’s testimony must “‘be rooted in facts shown by the evidence.’ [Citations.]” (*Vang, supra*, 52 Cal.4th at p. 1045.) Accordingly, an expert’s opinion based on hypothetical facts must “be based on what the evidence showed *these* defendants did, not what someone else might have done.” (*Id.* at p. 1046, original italics.)

Defendant attempts to distinguish *Vang* because the expert and the prosecutor there used no proper names, but defendant’s thin distinction based only on relatively greater or lesser transparency fails. Our high court has squarely rejected as “clearly unwarranted” challenges to hypotheticals “thinly disguis[ing] the fact they were based on the evidence.” (*Vang, supra*, 52 Cal.4th at pp. 1049-1050, fn. 5.) An expert opinion on an ultimate issue is not necessarily forbidden where it aids the jury on unfamiliar topics, but only where it is “unhelpful” because it preempts a conclusion the jury can reach unaided by the testimony. (See, e.g., *People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3 [expert may properly testify concerning typical gang member motivations and intent, though this touches on ultimate issues of motive and intent].) *Vang* concluded “[i]t has long been settled that expert testimony regarding whether a crime was gang related is admissible” (*Vang*, at p. 1049, fn. 5), and we are bound by that conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Of course, an expert’s opinion “‘is no better than the facts on which it is based.’” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Defendant asserts no jury reasonably could conclude on the facts here that he possessed the firearm or ammunition for his gang’s benefit. Section 186.22, subdivision (b)(1), authorizes a penalty enhancement for “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.” A gang expert’s bare unsupported opinion is insufficient to find an offense gang related. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) “[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.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, original italics.)

Defendant relies on *In re Frank S.* (2006) 141 Cal.App.4th 1192 for his claim “the evidence outside expert opinion was insufficient to support the gang enhancement.” *Frank S.* is readily distinguishable. There, an officer detained a minor for failing to stop his bicycle at a red light. The minor was carrying a knife, a small bundle of methamphetamine, and a red bandana. The minor claimed he carried the knife for protection against a local gang, and later admitted he was affiliated with a rival gang. The prosecution’s expert testified that carrying the knife benefited the minor’s gang by providing them protection if confronted by a rival gang. (*Id.* at pp. 1195-1196.) The only evidence that the minor had any reason to expect to use the knife in a gang-related offense was his statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. (*Id.* at p. 1199.) The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. (*Ibid.*) The appellate court emphasized the evidence showed no more than the minor’s affiliation with a gang, and membership alone does not establish the requisite specific intent. (*Ibid.*) The court therefore determined insufficient evidence supported the gang enhancement, explaining “nothing besides weak inferences and hypotheticals show the minor had a gang-related purpose for the knife.” (*Ibid.*)

In *Frank S.*, the prosecution’s gang expert failed to present evidence connecting the minor’s possession of the knife to criminal conduct by members of his

gang, such as evidence the minor's gang used knives to commit crimes. (See *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 [noting link where defendant's offense coincides with gang's primary activities].) Notably, one of defendant's gang's primary activities was felonious firearm possession.

Nor did *Frank S.* involve a gang gun or the overwhelming gang evidence permeating defendant's possession offense here. Unlike in *Frank S.*, the gang expert in this case explained the importance of guns to gangs to project force and intimidate the community and rivals, whether a specific offense is planned or not. The expert here also explained a gang gun is held only by trusted members, and is accessible by other members through that person as a conduit.

Defendant's active participation in his gang stands in contrast to the minor's affiliate status in *Frank S.*, strengthening the inference defendant held the gun with the intent to promote, further, or assist the criminal conduct of his fellow gang members. A reasonable jury could infer the multiplicity of DNA evidence on the gun helped mark it as a gang gun, and the brown bandana in which defendant kept it clearly tied it to his gang. While the minor in *Frank S.* also had a bandana, it bore no obvious relation to the knife the minor carried, nor was there any supporting concept or evidence of a knife as a group weapon entrusted to a key member. The minor's possession in *Frank S.* did not occur in gang territory, but defendant kept his gun in an area he saturated with gang indicia, including graffiti and gang paraphernalia. He did not segregate the gun in any manner suggesting personal use, but instead kept it with other gang-related items, including parole and police paperwork directly bearing on his gang. The evidence amply supported the enhancements.

**B. *Defendant's Right to Confront Witnesses and Cross-Examine the Gang Expert***

Defendant contends the trial court erred by rejecting his pretrial motion to exclude on confrontation grounds any reference the gang expert might make at trial to

statements SSBD gang members or affiliates may have made in field contacts with police about *their* involvement with the gang before defendant was arrested on the present charges. Defendant contends statements in which others allegedly admitted their affiliation with SSBD implicated *him* in this trial as an active participant in the gang based on his association with admitted SSBD gang members. He argues his failure to object at trial when the expert referenced one or more of those statements does not forfeit his claim because it would have been futile to object, since the trial court denied his pretrial motion. At the time, the trial court ruled the Sixth Amendment was not implicated by “these statements that were made to the police by other individuals” because they “are not being used here for the truth of the matter asserted. They’re here being used for a different purpose, as a basis for the [expert]’s opinion.”

“The general rule is that ‘when an *in limine* ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal’ [citation], although a sufficiently definite and express ruling on a motion in limine may also serve to preserve a claim. [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 547.) Evidence Code section 353 prohibits reversal for erroneous admission of evidence unless “[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion.” (See, e.g., *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305, 313, fn. 3 [“The right to confrontation may, of course, be waived, including by failure to object to the offending evidence”].)

Here, even assuming defendant’s pretrial motion preserved his confrontation claim despite his failure at trial to renew his objection, his argument is unavailing. As defendant recognizes, the issue of whether hearsay statements in police field contacts with gang members are testimonial in character is currently pending in the Supreme Court in *People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted May 14,

2014, S216681. In the meantime, we are bound by the high court's conclusion in *Gardeley* that hearsay statements testified to by a gang expert as the basis of an opinion are not offered for their truth. (*Gardeley, supra*, 14 Cal.4th at p. 619; but see *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127 [concluding such statements are necessarily offered for their truth, but acknowledging *Gardeley*'s binding force].) Because *Gardeley* is still controlling, defendant's argument cannot gain him the reversal he seeks, but his claim may present a basis for habeas review, pending the outcome in *Sanchez*.

Paradoxically, *Gardeley* offers some support to defendant's final claim. He argues the trial court infringed his right to cross-examine the gang expert on an asserted alternate meaning for the "SS" tattoo on his fingers, which the expert opined stood for "South Side" in short and, in full, defendant's South Side Brown Demons gang. On cross-examination, defendant asked the expert if the initials actually had a different meaning, referencing a police report of an interview with defendant when he was arrested. The prosecutor objected, and in a sidebar, explained defendant claimed in the interview that "SS" were the initials of a former girlfriend. The prosecutor objected to defendant's attempt to cross-examine the expert as a backhanded way of "getting into [defendant's] statement." The prosecutor objected to defendant's alternate explanation in the police report as self-serving hearsay unworthy of credence.

Constrained by *Gardeley*, defense counsel did not attempt to gain admission of the statement for its truth, but to cross-examine the gang expert on whether he considered evidence of alternate meanings for defendant's "SS" tattoo. The trial court rejected the distinction, concluding "it would be used for the truth of the matter asserted that it really stands for a girlfriend [and] not for south side. [¶] So I think that would be — elicit[ing] hearsay. If counsel simply wants to ask hypothetically if it's possible that there could be an explanation — an alternate explanation for SS, he can ask it. And if he wants to ask do you know whether the defendant ever had a girlfriend by the name of, what's — whatever, then I think counsel can ask that too." The court observed, "[B]ut as

I said, asking [about] the defendant's statement to the police . . . would I think elicit hearsay.”

Under *Gardeley*, as discussed, statements informing an expert's opinion are *not* admitted for their truth, and therefore in seeming contradiction to the trial court's ruling, *cannot* constitute hearsay. There is, admittedly, inescapable tension in the trial court's rulings that placed before the jury as nonhearsay the inculpatory gang-affiliation statements of defendant's cohorts, but excluded as hearsay defendant's exculpatory police statement explaining the “SS” initials. But the tension does not aid defendant.

Even assuming arguendo the Supreme Court overrules *Gardeley* in *Sanchez* and concludes statements in an underlying report admitted through an expert's testimony may indeed constitute hearsay insofar there is a risk jurors will consider them for the truth of the matter asserted, the trial court retained discretion to exclude defendant's statements. The trial court has authority to exclude statements “made under circumstances” indicating a “lack of trustworthiness.” (Evid. Code, § 1252; see, e.g., *People v. Linton* (2013) 56 Cal.4th 1146, 1200 [court properly precluded defense expert from testifying about statements defendant made to him while charges were pending, because “[t]here was a clear incentive at that time for defendant to minimize his culpability in his statements”].)

But the trial court erred in denying Guerrero the right to impeach the gang expert on grounds the expert selectively relied only on inculpatory hearsay statements in forming his opinions, and ignored contrary statements like defendant's explanation for his “SS” tattoo. As trial counsel explained, Guerrero was entitled to point out to the jury the expert's alleged bias. Like any other witness, an expert's credibility is at issue, and therefore the expert is subject to questioning that may disclose bias. (Evid. Code § 780, subd. (f).) A witness may be impeached with “any matter that has any tendency in reason to prove or disprove the truthfulness of [the witness's] testimony at the hearing” (Evid. Code, § 780), and for an expert, that includes the basis for his or her opinion (Evid.

Code, § 721). The trial court erred by insulating the gang expert from wholly proper cross-examination.

Although the trial court erred, the error was harmless under the circumstances here. As discussed, the evidence was overwhelming that defendant harbored a gang-related purpose in his possession offenses. Nothing indicated a purely personal reason for defendant to possess a loaded firearm wrapped up in his gang's identifying color and stashed directly with paperwork reflecting a gang purpose and among extensive gang paraphernalia. Had the gang expert been impeached, we cannot say there is any reasonable doubt the result would have been different. The error therefore was harmless under the most stringent standard. (*Chapman v. California* (1969) 386 U.S. 18.)

### III

#### DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.