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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.

DANIEL BRIAN LUKER,

Defendant and Appellant.

G050205

(Super. Ct. No. 12NF0641)

O P I N I O N

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

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Daniel Luker guilty of one count of possession for sale of methamphetamine (Health & Safety Code, § 11378) and found it to be true that he did so for the benefit of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)).¹ In count 2, the jury found defendant guilty of active participation in a criminal street gang. The court sentenced defendant to four years in prison on count 1, and added four consecutive years for the gang enhancement. The court stayed sentencing on count 2 pursuant to section 654. The court found it to be true that defendant had committed a prior serious felony (§ 667, subd. (a)(1)) and imposed five years. The court also found defendant had committed a prior felony Health and Safety Code violation and imposed an additional three years. (Health & Saf. Code, § 11370.2, subd. (c).) The total prison sentence was 16 years.

Defendant raises three issues on appeal. First, he contends the People's gang expert improperly relied on testimonial hearsay in violation of his Sixth Amendment right to confront witnesses. We conclude any such error was harmless. Second, he contends the evidence did not support the conviction as to count 2, active participation in a street gang, because there was no evidence he possessed the methamphetamine for sale in cooperation with another gang member. We agree and reverse count 2. Finally, he contends the evidence does not support the gang enhancement as to count 1. We disagree and affirm as to count 1.

FACTS

On February 29, 2012, officers from the La Habra Police Department and the United States Department of Homeland Security searched two houses pursuant to a search warrant targeting defendant. The first house was in Costa Mesa and the second

¹ All further statutory references are to the Penal Code unless otherwise stated.

was in Huntington Beach. The investigating detective, Nick Wilson, deemed the Costa Mesa house to be a “crash pad,” which he explained is a place where drug dealers and users reside for the purpose of selling and using drugs, with the advantage of being at an address different from a person’s Department of Motor Vehicles address. Wilson believed the Costa Mesa house was a crash pad because Costa Mesa police had contacted multiple people there with extensive criminal histories, and because he had seen defendant coming and going from that house.

The officers arrived at the Costa Mesa home at about 7:00 a.m. and observed defendant’s vehicle nearby. Upon entering the home officers found approximately five people in the house, including Jason Zareczny (who identified himself as Joaquin Zubreros), Breanna Chacon, and defendant. Defendant was in a bedroom with Chacon that had a dresser. Defendant was wearing a shirt that said “LMP,” with a picture of a skateboard below the letters. The investigating detective identified “LMP” as standing for La Mirada Punks, a white supremacist criminal street gang, and identified the skateboard as a symbol associated with La Mirada Punks. Defendant also had tattoos of a swastika, neo-Nazi soldiers, and Adolf Hitler.

Wilson searched the bedroom where he had found defendant and Chacon, and in the top dresser drawer he found a clear plastic bag with approximately one ounce of methamphetamine, which had a street value of between \$2,500 and \$3,000. Next to the methamphetamine he found over 100 unused clear plastic baggies, a digital scale, and a black book that appeared to be a pay/owe sheet. Wilson opined the methamphetamine was possessed for purposes of sale.

Wilson found defendant’s cell phone on top of the dresser. Defendant told Wilson how to unlock the phone by tracing the form of a swastika on the screen. Upon unlocking the phone, it displayed a picture of a swastika. There was only one text message on the phone. It said, “Got bomb?” Wilson explained that “bomb” is slang for either marijuana or methamphetamine. In the same drawer where Wilson found the

drugs and paraphernalia, he found a pair of men's basketball shorts resembling the shorts defendant was wearing, as well as female articles of clothing such as a bra and female underwear.

Prior to searching the bedroom, Wilson had a conversation with Chacon, who told Wilson the drugs were inside a dresser drawer, and that as the police were entering the house, defendant had gotten up, alarmed, and hid the drugs there. She claimed they were defendant's drugs.

In another bedroom in the house, Wilson found "LMP 567" painted very large on the wall of the room. The numbers 567 correspond to the letters "LMP" on a telephone.

Wilson reviewed defendant's Facebook account and saw defendant was friends with several LMP gang members. Photos of defendant wearing a mask with the numbers 567 on it were also on his Facebook account. When officers executed the search warrant at the Huntington Beach house, they located the mask. Defendant's Facebook account also reflected his moniker "Caveman."

On cross-examination Wilson acknowledged that the pay-owe sheet found in the bedroom was part of a black book, that credit card numbers were also in the black book, and that Zareczny was arrested the same day for using someone else's access card.

Chacon testified as a witness for the People under a grant of immunity. She testified that defendant was her boyfriend. At the time of the police raid, Chacon was living in the Costa Mesa house. Chacon was a user of methamphetamine. She was renting a room in the Costa Mesa house at the time of the raid, and she kept her drugs in a drawer in her bedroom. She testified she had approximately one ounce of methamphetamine at the time of the raid, and that she owned it together with Zareczny. She claimed it was for personal use.

While Chacon was on the witness stand, the People played a recorded jailhouse telephone call between Chacon and Zareczny. In it Chacon offered to "take the

rap for everything” Zareczny replied, “Hey, I already told Danny [defendant] I’m gonna do it for him.”

The search warrant at the Huntington Beach residence was executed by Detective Timothy Shea. Defendant had a bedroom at the Huntington Beach residence. As evidence that the room was defendant’s, the police found a photograph of defendant with some children, a video rental card in his name, and a utility bill in his name. The police also found \$2,900 in cash hidden in a DVD case in a bookshelf, a six milligram vial of human growth hormone, and a clown mask with the numbers 567 written on it. The police also found a cell phone in the room with the names of several La Mirada Punks gang members on it.

The People called detective Ashraf Abdelmuti from the Orange County Sherriff’s Department as an expert witness. Abdelmuti testified that La Mirada Punks had about 50 members in February of 2012, and its primary activities include drug sales, vehicle thefts, and weapon violations. Abdelmuti opined that La Mirada Punks was a criminal street gang.

He opined that Chacon was an active participant of La Mirada Punks. He based this opinion on his own gang investigation of Chacon. During that investigation, Chacon admitted to having associated with members of La Mirada Punks since she was a young child. Her parents were affiliated with the gang. Abdelmuti searched Chacon’s cell phone and found pictures of Chacon with La Mirada Punks members. Abdelmuti also listened to a jailhouse phone call in which Zareczny bragged about becoming a new member of La Mirada Punks, to which Chacon responded, “welcome to the neighborhood,” which Abdelmuti interpreted as a welcome into the gang. Abdelmuti also relied on an incident in which, during a covert narcotics investigation, Chacon arranged a meeting with another La Mirada Punks member. Abdelmuti concluded, however, that there was no evidence to suggest Chacon was an actual member of La

Mirada Punks. To be a member, one needed to be jumped in, walked in, or “crimed” in, and he had seen no evidence to suggest Chacon had undergone such initiation.

Abdelmuti also opined that defendant was an active participant in La Mirada Punks. He noted that defendant had tattoos consistent with membership in the La Mirada Punks, including: the word “skinhead,” multiple swastikas, a crucified skinhead, “MWS” (which stands for Mighty White Skins), the word “pure,” the word “hate,” and a swastika on his penis. He also relied on photographs of defendant with other individuals throwing La Mirada Punks hand signs. Additionally, he relied on defendant being arrested in this case wearing a La Mirada Punks shirt, in a house with La Mirada Punks graffiti on the wall. He relied on the many La Mirada Punks friends present on defendant’s Facebook page, and the mask with 567 written on it found at defendant’s residence.

Over defendant’s hearsay objection, Abdelmuti also based his opinion on a post arrest statement Chacon made during a covert operation. During a covert drug buy, Chacon arranged for another member of La Mirada Punks to sell drugs to Abdelmuti and stated they were going to use the proceeds to raise money for defendant’s bail. Over defendant’s best-evidence objection, Abdelmuti also relied on a jailhouse phone call between Chacon and Zareczny in which Zareczny bragged that defendant told him he would be initiated into La Mirada Punks. Finally, when defendant was booked in the present case, he admitted to being a La Mirada Punks member going by the moniker Caveman.

The prosecutor then presented Abdelmuti with a hypothetical mirroring the evidence in this case. Based on the hypothetical facts, Abdelmuti opined that the defendant in the hypothetical possessed the methamphetamine for the benefit of a criminal street gang. Commenting on the basis for his opinion, Abdelmuti stated, “Gang members are expected to kickback or pay taxes to the gang as part of a benefit to the gang to assist other gang members. It gives other gang members an access to a safe place to

purchase narcotics. It's done in association with the gang. Based on the hypothetical, he's in the presence of another active participant while he's engaged in this crime. He's also wearing a shirt that's promoting that gang name, which comes obviously with protection as that person is selling, and also lets people know that he's who he is and what gang he's claiming."

Based on the same hypothetical, Abdelmuti also opined that the defendant's conduct was intended to promote, further, or assist La Mirada Punks. He explained, "It's a certification or status booster when a member of the gang is engaged in narcotic sales. It's a recruiting tool for other individuals who look up to the gang as a gang that's got access to narcotics and engaged in sales. It promotes the gang, again, within the gang subculture within the community as individuals that have access to these narcotics and are selling narcotics. It assists the gang in that the money that's gained from these narcotic sales goes back to fellow gang members in a taxation form where they're able to bail each other out, put money on phones to continue communication between the individuals who are in custody and individuals who are out of custody."

Based on the same hypothetical, Abdelmuti also opined that defendant is an active participant in La Mirada Punks. He explained, "The individual is in possession of items that are specific to the La Mirada Punks or LMP gang. The individual is in communication with other individuals who are active participants of that gang. The individuals involved in recruiting other gang members, and based on my training and experience, you have to be an active participant in order to recruit somebody and grant them membership into that gang."

On cross-examination, Abdelmuti conceded that there is no evidence in this case that defendant was going to pay taxes to the gang from the proceeds of the narcotics sales. He also acknowledged that defendant had no tattoos specific to La Mirada Punks.

Multiple recorded phone calls were played for the jury at trial. In one call between Chacon and Zareczny, Chacon stated, "[I]f I have to take the rap for

everything . . . , I will, dude.” Zareczny responds, “Hey, I already told Danny [defendant] I’m gonna do it for him.” In a subsequent conversation between the two, Zareczny said, “Hey you know what, . . . I got a claim now. Danny told me I was LMP (laughing). Did he tell you?” “He said hey dog, . . . he’s all you’re my best homeboy dog . . . well I mean Smokey told me I was LMP when I was 13 too, but he’s like . . . you go any those tanks you take the keys you tell them you’re from La Mirada Punks.” (Abdelmuti explained that, in gang culture, the “keys” is “basically a slang term for being a shot caller.”) Chacon responded, “Welcome to the neighborhood dog.” Zareczny replied, “Hey when I see Danny on Monday . . . I’m gonna just tell him to . . . start bobbing on me or I’m gonna swing on him or something and then like maybe they’ll be a jump in, you know what I mean? (laughing).” Chacon replied, “Who would you jump in with?” To which Zareczny said, “I’ll have Danny jump me in” Chacon went on to discuss the details of the drug bust with Zareczny to aid in his taking the rap.

In another phone call Chacon and defendant discuss Zareczny taking the rap for defendant, and also discuss a backup plan of Chacon taking the rap if it did not work out with Zareczny. However, in a subsequent police interview with Chacon that was played for the jury, Chacon said she did not want to take the rap: “[Defendant] wants me to . . . take this case for him, dude, I’m gonna get wrapped up in that shit if I do that? Why the fuck would you want me to do that dude if you . . . loved me dude. You know what I mean? If he was looking at life, well then that’s another story, you know what I mean? But at the same time now, now that I could get wrapped up on all that shit, fuck no dude, I’m not.” The jury also heard testimony regarding another interview between Chacon and detectives in which she stated “she wasn’t going to take the rap for Danny. She felt bad for him. She said that he hadn’t sold drugs for a long time, but he only started selling drugs recently when he lost his job.”

Defendant testified on his own behalf. He denied that the clown mask was related to La Mirada Punks and claimed his LMP shirt was just related to skateboarding.

He claimed his tattoos were from over 20 years in the past. He testified that earlier in 2012, child support services threatened to throw him in jail because he was getting behind on child support payments. He testified that he purchased the methamphetamine to sell it to make more money. He testified that, while he associated with La Mirada Punks his whole life, he was selling the drugs “just to pay [his] bills and hopefully see [his] daughter again.” He denied being a member of La Mirada Punks. But when confronted with his recorded statement to Zareczny that he was LMP now, he said he did not remember saying that.

DISCUSSION

Any Error in Admitting Hearsay Evidence Was Harmless

Defendant’s first contention is that the court erroneously permitted the People’s expert to testify to certain hearsay statements. Defendant contends this violated both the hearsay rule, and defendant’s Sixth Amendment right of confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

At the outset we note an important distinction: the rule is well settled that experts may rely on hearsay information. (*People v. Linton* (2013) 56 Cal.4th 1146, 1200.) To the extent defendant is contending the court’s evidentiary rulings were based on simple hearsay objections, therefore, we reject the contention. Whether an expert’s reliance on *testimonial* hearsay violates *Crawford* is an issue currently before our Supreme Court. (*People v. Sanchez*, review granted May 14, 2014, S216681 [per the judicial branch’s Web site, the issue presented is: “Was defendant’s Sixth Amendment right to confrontation violated by the gang expert’s reliance on testimonial hearsay (*Crawford v. Washington* (2004) 541 U.S. 36)?”].² Thus the only evidence we need to

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<<http://www.courtinfo.ca.gov>>

concern ourselves with is testimonial hearsay. Because we conclude that any hearsay relied upon by the expert was harmless, however, we need not reach the question of whether such evidence was testimonial hearsay. We assume, for purposes of our harmless error analysis only, that the testimony defendant identifies as problematic is in fact testimonial hearsay.

Defendant identifies three portions of Abdelmuti's expert testimony that he asserts presented testimonial hearsay: the statement Chacon made to Abdelmuti that she attempted to sell drugs to raise money for defendant's bail, a police report indicating a La Mirada Punks gang member was present at defendant's residence during a search in 2006, and a police report from 2000 stating that contact information for a La Mirada Punks gang member was found at defendant's residence. We must determine whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict in the absence of this evidence. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

We first address Chacon's statement that she was attempting to raise money for defendant's bail. This evidence borders on irrelevance. Chacon was defendant's girlfriend. A girlfriend trying to raise bail money for her boyfriend. How does this bear on whether defendant is a gang member whose earlier possession was for the benefit of the gang? Perhaps it is marginally relevant in that Chacon was also an active participant of La Mirada Punks, but given the extensive evidence of defendant's other interactions with Chacon and other La Mirada Punks members, Chacon's statement was, at best, merely cumulative and did not impact the outcome of the trial.

Next we address the police reports. The police reports were relevant to show defendant associates with La Mirada Punks members. But there was ample evidence aside from these reports to prove that point, and thus the reports were cumulative. Defendant's Facebook page was replete with friends that are La Mirada Punks members, he was caught wearing a La Mirada Punks t-shirt, he had tattoos consistent with the gang's ideology, he had a clown mask with 567 written on it, and,

most importantly, he *admitted* to being a member of the gang. Given the ample evidence of defendant's involvement with La Mirada Punks, the police reports were harmless beyond a reasonable doubt.

The Evidence Does Not Support Count 2, Active Participation in a Street Gang

“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 by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.” (§ 186.22, subd. (a).) Defendant contends there was no evidence that he assisted felonious criminal conduct “by members” of the gang, since the only person with him at the time of his possession was Chacon, who is not a member of La Mirada Punks, but merely an associate. We agree.

In *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), the defendant, a member of the Norteño gang, committed attempted robbery. (*Id.* at p. 1128.) “Two gang experts testified that robbery was a primary activity of the Norteño gang and both opined that the attempted robbery of [the victim] was committed for the benefit of the gang. There was no evidence that defendant acted with anyone else.” (*Id.* at p. 1129.) The defendant was found guilty of active participation in a criminal street gang based on the attempted robbery. (*Ibid.*) The Court of Appeal reversed (*ibid.*), and our Supreme Court affirmed the judgment of the Court of Appeal (*id.* at p. 1139). A plurality reasoned, “The plain meaning of section 186.22[, subdivision] (a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member.” (*Id.* at p. 1132.) Justice Baxter concurred and found the plurality's reasoning “persuasive in this regard.” (*Id.* at p. 1140 (conc. opn. of Baxter, J.).)

Here, unlike the defendant in *Rodriguez*, defendant was not alone when caught with the methamphetamine, he was with Chacon. However, the *Rodriguez* court concluded a mere active participant could not trigger liability under the statute. Responding to a hypothetical in which an active participant provides a gang member a gun to use in shooting rival gang members, the court stated, “If the active participant is *not* a gang member, he would be no more guilty of violating section 186.22[, subdivision] (a) than the gang leader because only one member of the gang — the gang leader — committed the shootings.” (*Rodriguez, supra*, 55 Cal.4th at p. 1138.)

The People do not dispute these legal principles, and they acknowledge that the People’s expert specifically opined that there was no evidence that Chacon was a member of La Mirada Punks. The People argue, however, that there was substantial evidence from which the jury could disagree with the People’s expert and conclude Chacon was, in fact, a member of La Mirada Punks. The People point to the fact that Chacon associated with La Mirada Punks members all her life, that her parents were involved with the gang, that she was photographed with gang members, and that in a phone conversation with Zareczny, she stated, “welcome to the neighborhood dog,” which is tantamount to welcoming someone into a gang.

But all of this evidence is consistent with being a mere active participant, and the People’s expert was clear in his testimony that “to be a member, you have to have been granted membership, either walked into the gang, jumped into the gang or crimed into the gang, and based on my background I don’t have any evidence to support her membership.” There was no evidence that Chacon had undergone any of the three paths to membership. Accordingly, because defendant’s possession was not done with “members” of the gang, the conviction for active participation in a criminal street gang must be reversed.

Substantial Evidence Supports the Gang Enhancement

Section 186.22, subdivision (b), provides, “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, 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 as follows.” This penalty enhancement for participation in a criminal street gang thus requires proof of the following elements: (1) a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members.

While at first blush the second element would seem to mirror subdivision (a)’s requirement of criminal conduct by more than one gang member, our high court concluded otherwise in *Rodriguez, supra*, 55 Cal.4th 1125. At issue in *Rodriguez* was whether section 186.22, subdivision (a), required the participation of more than one member of a gang. The plurality and Justice Baxter agreed that it does, as noted above. In reaching that result, however, both the plurality and Justice Baxter commented on the seemingly similar requirement in subdivision (b) that the crime be committed “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” The plurality noted, “A lone gang member who commits a felony will not go unpunished; he or she will be convicted of the underlying felony. Further, such a gang member would not be protected from having that felony enhanced by section 186.22[, subdivision] (b)(1) Because the gang enhancement under section 186.22[, subdivision] (b)(1) requires both that the felony be gang related and that the defendant act with a specific intent to promote, further, or assist the gang, these requirements provide a nexus to gang activity sufficient to alleviate due process concerns.” (*Rodriguez, supra*, 55 Cal.4th at pp. 1138-1139.)

Justice Baxter agreed and explained his interpretation in greater detail. After noting the seeming similarity between subdivisions (a) and (b), Justice Baxter stated, “[S]mall but significant differences in grammar and context make clear that the enhancement provision lacks the same multiple-actor condition as the gang offense.” (*Rodriguez, supra*, 55 Cal.4th at p. 1140, (conc. opn. of Baxter, J.)) “First, section 186.22[, subdivision] (b)(1), unlike section 186.22[, subdivision] (a), applies where the defendant, even if acting alone, ‘specific[ally] inten[ds]’ by his felonious action to promote, further, or assist in any criminal conduct by gang members. Section 186.22[, subdivision] (b)(1)’s reference to promoting, furthering, or assisting gang members thus merely describes a culpable *mental state*. By contrast, the gravamen of section 186.22[, subdivision] (a) is that the defendant’s own criminal *conduct* must itself directly promote, further, or assist felonious criminal conduct by members of the gang.” (*Id.* at pp. 1140-1141 (concur. opn. of Baxter, J.)) “The relevant two subdivisions also treat criminal conduct by gang “members” differently. As noted, section 186.22[, subdivision] (a) plainly requires felonious criminal conduct committed in tandem by at least two gang members, one of whom may be the defendant. In contrast, nothing in section 186.22[, subdivision] (b)(1) states or implies that the criminal conduct by gang members which the defendant intends to promote, further, or assist *is the same criminal conduct* underlying the felony conviction subject to enhancement.” (*Id.* at p. 1141 (conc. opn. of Baxter, J.))

It is, of course, true that the *Rodriguez* court’s comments on section 186.22, subdivision (b) were dicta. The court in *People v. Rios* (2013) 222 Cal.App.4th 542, however, concluded the *Rodriguez* court’s dicta should be followed: “Even though the court’s comments on section 186.22[, subdivision] (b)(1) in *Rodriguez* are dicta, Supreme Court dicta generally should be followed, particularly where the comments reflect the court’s considered reasoning. [Citation.] The *Rodriguez* plurality relied on the availability of the sentencing enhancement as reassurance that its interpretation of section

186.22[, subdivision] (a) would not leave lone gang members who commit gang-related felonies inadequately punished. [Citation.] Since the court’s statements in dicta were not ‘inadvertent, ill-considered or a matter lightly to be discarded’ we consider them in our analysis.” (*Id.* at p. 563.) We agree.

Additionally, with regard to the “criminal conduct” aspect of the specific-intent element of subdivision (b), our high court has held “that the scienter requirement in section 186.22[subdivision] (b)(1) — i.e., ‘the specific intent to promote, further, or assist in any criminal conduct by gang members’ — is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” (*People v. Albillar* (2010) 51 Cal.4th 47, 66.)

Turning to the facts of the present case, there is substantial evidence to support the first element of section 186.22, subdivision (b): that the crime was committed for the benefit of, or, at minimum, in association with, the gang. Defendant was arrested in a La Mirada Punks crash pad with two other associates of La Mirada Punks present, Chacon and Zarcezny. Further, the pay-owe sheet found with the methamphetamine contained evidence of credit card theft in addition to drug sales, from which the jury could conclude defendant’s possession was part and parcel of the overall criminal enterprise of the gang. This evidence was sufficient to conclude the crime was committed in association with the gang. Further, the People’s expert testified that a gang member — which defendant admitted to being — is expected to pay taxes to the gang on drug sales, and these taxes plainly benefit the gang. With regard to the second element of the gang enhancement, specific intent, since that element is satisfied when a lone gang member intends to further his own criminal conduct, the evidence plainly supports that element as well.

Defendant contends there was no substantial evidence that the crime was committed for the benefit of the gang, relying on cases finding that an expert’s opinion

about general gang practices, standing alone, is insufficient. In *In re Frank S.* (2006) 141 Cal.App.4th 1192 a minor gang member was found with a concealed dirk in his possession. (*Id.* at p. 1194.) Reversing a gang enhancement, the court commented, “the prosecution presented no evidence other than the expert’s opinion regarding gangs in general and the expert’s improper opinion on the ultimate issue to establish that possession of the weapon was ‘committed for the benefit of, at the direction of, or in association with any criminal street gang’ (§ 186.22, subd. (b)(1).) “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.” (*Id.* at p. 1199.) *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657, stated the general rule, “A gang expert’s testimony alone is insufficient to find an offense gang related.” (See also *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 [“The People’s expert simply informed the jury of how he felt the case should be resolved. This was an improper opinion and could not provide substantial evidence to support the jury’s finding. . . . While it is possible [the defendants] were acting for the benefit of the gang, a mere possibility is nothing more than speculation. Speculation is not substantial evidence”]; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1363-1364 [expert opinion regarding benefit to the gang belied by the evidence]; *Rios, supra*, 222 Cal.App.4th at p. 574 [mere possibility that a stolen vehicle could be used for gang crimes insufficient to demonstrate theft was for the benefit of the gang].)

Defendant’s contention fails for at least three reasons. First, as we noted above, the evidence supports the conclusion that the crime was committed in association with the gang, and thus even if the expert’s testimony would not support a benefit to the gang, the evidence was sufficient to support the enhancement. Second, unlike the cases defendant relies upon, the evidence here that the crime was committed in association with the gang tends to support the expert’s opinion in that defendant was not going rogue, as it were, and thus the usual rules regarding taxation would apply. Finally, the cases

defendant relies upon most heavily predate *Abillar, supra*, 51 Cal.4th 47, which held, “Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22[, subdivision] (b)(1).” (*Id.* at p. 63.) The expert’s opinion in *Abillar* was based on nothing more than the nature of the crime (rape), together with the way in which such crimes generally enhance the gang’s reputation in the community. (*Ibid.*) This suggests the possibility that expert testimony, standing alone, *is* sufficient. But even if that is not true in all cases, it is certainly true where the testimony has the sort of factual mooring present here.

DISPOSITION

The conviction under count 2 for active participation in a criminal street gang (§ 186.22, subd. (a)) is reversed, and the court is directed to enter a judgment of acquittal on count 2. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

RYLAARSDAM, J.