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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY DOMINIC GARCIA,

Defendant and Appellant.

H040067

(Santa Clara County

Super. Ct. No. C1121704)

I. INTRODUCTION

Defendant Jeremy Dominic Garcia appeals after a jury convicted him of three counts of assault with a deadly weapon. (Counts 1-3; Pen. Code, § 245, subd. (a)(1).¹) The jury found that defendant committed the assaults for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(C) & (b)(1)(B)) and that he personally used a deadly weapon in the commission of each assault (§ 12022, subd. (b)(1)). As to the assault charged in count 1, the jury found that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).)

The trial court imposed a 15-year prison term for the assault charged in count 1, consisting of a two-year term for the substantive offense, a consecutive three-year term for the associated great bodily injury enhancement, and a consecutive 10-year term for

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

one of the gang enhancements. The trial court imposed concurrent terms for counts 2 and 3 and their associated gang enhancements, and it struck all of the deadly weapon use enhancements.

On appeal, defendant contends: (1) there was no substantial evidence to support the jury's finding regarding the "primary activities" of defendant's gang (see § 186.22, subd. (f)); (2) the gang allegations and great bodily injury allegation must be reversed because the trial court erroneously admitted testimonial hearsay through the prosecution's gang expert; and (3) pursuant to section 1170.1, subdivision (g), the trial court erred by imposing both the great bodily injury enhancement and the 10-year gang enhancement because the two enhancements were based upon defendant's personal infliction of great bodily injury on the same victim in the commission of a single offense.

We will reverse the judgment and remand the matter for retrial of the gang allegations (§ 186.22, subd. (b)(1)(C) & (b)(1)(B)). If the prosecution elects not to retry defendant on the gang allegations, defendant shall be resentenced on the assaults and the remaining allegations.

II. BACKGROUND

A. The Assaults

On October 24, 2011, 18-year-old Carlos Guillen was visiting San Jose, where he had lived before moving to Nevada. Guillen had returned to San Jose so he could attend a baby shower for his friend Frank Goins.

Guillen had a romantic interest in Vanessa C., and he took her to see a movie at the Oakridge Mall. After the movie, Guillen called or texted Goins, arranging to meet at a light rail station near the mall. Vanessa C. went to the light rail station with Guillen.

At the light rail station, Vanessa C.'s ex-boyfriend, Jessy Pedroza, approached. Pedroza was with a group of males, which included defendant. Pedroza argued with Guillen over Vanessa C., then left the light rail station with his group.

After Pedroza left, Guillen stated that he was going to call Pedroza. Guillen made a phone call, then said that he was going to meet up with Pedroza. Goins later told police that he had answered Guillen's phone while they were at the light rail station. A person who he believed to be Pedroza was on the line and said, "You are going to get poked too."

Guillen, Goins, Vanessa C., and two of Vanessa C.'s friends walked to the Guadalupe Trail, where they saw Pedroza and a group of males, including defendant. Vanessa C. later told police that after they arrived, Guillen was asked whether he "banged."

Guillen and Pedroza began fighting. During the fight, Pedroza ended up on the ground. At that point, about five members of Pedroza's group "jumped" Guillen.

Defendant did not initially join the fight, but he pulled out a knife and pointed it at Vanessa C., who had been telling the group to stop jumping Guillen. With the knife pointed at Vanessa C., defendant said that if she was to "get in it," he would "stick" her. Defendant then joined the fight.

Goins later told police that he tried to stop the fight when he saw knives, saying, "No girl is worth a knife fight." Goins also tried to intervene when Pedroza's friends attacked Guillen, but someone swung a knife at him and said, "[G]et back or you are going to get stabbed."

None of the males involved in the fight wore red clothing or yelled any gang slogans. After the fight, Guillen had two stab wounds to his back and abrasions on his nose and on the side of his head. He was taken to the hospital, where he had surgery to repair his lungs.

After the incident, Pedroza's older brother sent a text message to Goins, stating, "A why you tellin' people my bro was the one who got Carlos? You know that ain't true. Look homey my bro caught a case and best believe Ima be in the stands." Pedroza's older brother was a registered gang member who claimed he was a Northerner.

At trial, Guillen claimed he did not know Pedroza and that he did not remember anything that happened after seeing the movie until he woke up in the hospital. Goins also claimed to not know or recognize Pedroza.

B. Gang Expert Testimony

San Jose Police Detective Kenneth Rak testified as a gang expert. Detective Rak had over 150 hours of gang training since receiving basic gang training when he joined the police academy in 2006. As a patrol officer he had at least 200 contacts with gang members, both formal and informal. He had been assigned to the gang unit for almost two years and was the third most senior officer in the unit. In his assignment with the gang unit, he investigated gang cases, primarily those involving Norteño gangs, and he reviewed other officers' police reports of gang-related activity as well as field identification cards prepared by other officers. He went to weekly meetings about gang issues and talked to other officers about gang-related issues.

Detective Rak was assigned to this case the day after the incident. He spoke with Vanessa C., who identified defendant and Pedroza as being involved. Vanessa C. said that Pedroza "kicks it with [the] Mob," referring to a Norteño subset called the Westside Mob. Detective Rak had at least 15 prior contacts with members of the Westside Mob.

Before testifying at trial, Detective Rak had reviewed field identification cards and police reports, which were not introduced into evidence. He had also spoken to other officers as well as gang members. Many of his contacts with gang members were during the course of an official investigation, and he sometimes memorialized witness statements in police reports, both for the purpose of potential future prosecution and to determine areas of gang activity. He also sometimes filled out field identification cards, and he testified that field identification cards are used for the purpose of identifying gang members for possible future criminal prosecution.

1. Gang Membership Testimony

Defendant was arrested at his home, where he lived in the basement. There was a significant amount of Westside Mob graffiti in the basement. The graffiti included “Fuck S.J.P.D.,” with an X through the S to represent disrespect for Sureños. The graffiti also included “W.S.M.,” for Westside Mob, and “E.B.L.,” for Eastbound Locos, which is an affiliate or subset of the Westside Mob. Additionally, the graffiti included Norteño symbols such as the roman numerals XIV, the word Norte, and the Huelga bird.

Detective Rak described three prior gang-related police contacts with defendant. The information about those prior contacts came from police reports and field identification cards.² On one occasion in 2011, defendant was detained by police after he displayed a knife to someone who tried to stop him from assaulting a female. Defendant admitted being a “Northerner,” and he was found in possession of a red belt, a red cell phone, and a red bandana. On another occasion in 2011, defendant was contacted after a reported vehicle burglary. Defendant was with Manuel Cruz, who was a documented Norteño. Defendant again had a red belt and a red bandana, as well as a black beanie with “408” on it, which is commonly worn by gang members. On a third occasion in 2011, defendant was associating with four Westside Mob gang members.

In Detective Rak’s opinion, defendant was a member of the Westside Mob. He based this opinion on the fact that defendant associated with other members of that subset, the fact defendant had admitted to gang membership, the graffiti in defendant’s basement, and defendant’s actions on October 24, 2011.

Detective Rak also believed Pedroza was a member of the Westside Mob. Pedroza had a “W.S.S.J.” tattoo. He had previously admitted being a Norteño. There were photos of Pedroza making gang signs on his phone and on his Facebook page.

² Defendant objected to this testimony on several grounds, including the Sixth Amendment.

During the arrest of another Westside Mob gang member, Detective Rak learned that defendant's gang moniker was "Green Eyes" and that Pedroza's gang moniker was either "Jessy Boy Loco" or "Bandit."

Detective Rak did not believe that Guillen was an "actual acting [gang] member" at the time of the incident, although he may have been "loosely" affiliated with the Westside Mob. Goins had admitted that he associated with Norteños and specifically members of the Westside Mob.

2. Primary Activities and Pattern of Criminal Gang Activity

Detective Rak testified that the "primary activities" of the Westside Mob are homicides, drive-by shootings, assaults with a deadly weapon, vandalism, and firearm possession. (See § 186.22, subds. (e) & (f).) He had personally investigated or assisted in the investigation of such crimes.

To show that members of the Westside Mob had engaged in a pattern of criminal gang activity (see § 186.22, subds. (e) & (f)), Detective Rak also testified about three prior criminal acts by Westside Mob gang members. Detective Rak testified that he learned about these prior criminal acts through "official law enforcement documents" (including other officers' police reports) and conversations with other officers.³

First, Steven Gonzalez had a loaded .357 revolver in his backpack on March 17, 2010. The revolver's serial number was obliterated. Gonzalez was with Diego Figueroa; both were self-admitted and documented Westside Mob gang members. Gonzalez had "MOB" tattooed on his forehead, and Figueroa had "W.S." tattooed on his face. Court records showed that Gonzalez was charged with violating former section 12031, subdivision (a)(1) [carrying a loaded firearm in public], with a gang allegation that was dismissed when he pleaded no contest.

³ Defendant objected to this testimony on several grounds, including the Sixth Amendment.

Second, on May 22, 2008, Timothy Casarez, Eddie Sandoval, and Allen Ruby were involved in an armed robbery. All were self-admitted Westside Mob gang members. Ruby had “MOB” tattooed on his abdomen and “Norte” on his forehead. Court records showed that all three were charged with second degree robbery, with gang and firearm use allegations. All three pleaded guilty and admitted the allegations, but the gang allegations were stricken at sentencing.

Third, on May 30, 2007, Gary Tavares, Hector Sanchez, Jose Garate, Douglas Nagore, Jr., and Victor Leal approached a person, called him a “scrap” (a derogatory term for Sureños), chased him, and stabbed him. All five were self-admitted “Northerners” or members of the Westside Mob gang. Three of them had Westside Mob tattoos. They were charged with attempted murder, assault with a deadly weapon, and conspiracy, with gang allegations. Tavares pleaded guilty to assault with a deadly weapon and admitted a gang allegation.

3. Expert Opinions

According to Detective Rak, respect is extremely important in gang culture, and it is synonymous with fear. Gang members are obliged to “step up” when they are challenged. If a gang member backs down after being challenged, the entire gang can lose respect. Violent acts by a gang member benefit the entire gang because the acts make the gang look powerful. This is true even if the violence is against non-gang members.

The prosecutor presented Detective Rak with a hypothetical in which two acquaintances fight over a girl. One of them has brought others with him to the fight. When that person begins to lose the fight, his friends jump on the other person, who gets hit, kicked, and knifed. No gang slogans are mentioned and no one is wearing gang clothing, but the person whose friends jumped into the fight and the person with the knife are both gang members. Detective Rak opined that the attack on the stabbing victim would benefit the gang because after a violent act, gang members will get fear and

respect from the victim and from others. If a threat was made with the knife, and the threat was intended to keep the victim's friend and girlfriend at bay prior to the stabbing, the threat would also benefit the gang, for the same reason. The offenses would promote, further, and assist criminal conduct by gang members because gangs thrive off of fear and respect.

C. Charges, Verdicts, and Sentence

Defendant was charged with three counts of assault with a deadly weapon. (Counts 1-3; § 245, subd. (a)(1).) Count 1 charged an assault on Guillen; count 2 charged an assault on Goins; and count 3 charged an assault on Vanessa C. As to all three counts, the information alleged that defendant committed the assaults for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(C) & (b)(1)(B)) and personally used a deadly weapon (§ 12022, subd. (b)(1)). As to the assault on Guillen charged in count 1, the information alleged that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) The jury found defendant guilty of all of the charges and found true all of the special allegations.⁴

The trial court imposed a 15-year prison term. For the assault in count 1, the trial court imposed the two-year lower term, a consecutive 10-year term for the gang allegation, and a consecutive three-year term for the great bodily injury allegation. The trial court imposed concurrent terms for the other counts and the associated gang allegations, and it struck the terms for all of the deadly weapon allegations.

⁴ Pedroza was jointly tried with defendant. The prosecution's theory was that Pedroza was guilty of the assaults on a natural and probable consequences theory of aiding and abetting liability. The jury found Pedroza guilty of the three assaults but found that the assault on Vanessa C. was not gang-related.

III. DISCUSSION

Defendant's first three claims concern the criminal street gang enhancement imposed pursuant to section 186.22, subdivision (b)(1), which 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"

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

The phrase "pattern of criminal gang activity" is defined in section 186.22, subdivision (e) as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons" The charged crime can be one of the two "predicate offenses" required for the "pattern of criminal gang activity." (*People v. Gardeley* (1996) 14 Cal.4th 605, 625 (*Gardeley*)). While the charged crime must have been committed "for the benefit of, at the direction of, or in association with" a criminal street gang (§ 186.22, subd. (b)), the other predicate offense does not need to be gang-related. (*Gardeley, supra*, at p. 621.) The other predicate offense may be one that was committed by the defendant on a separate occasion. (*People v. Tran* (2011) 51 Cal.4th 1040, 1044.) However, evidence that another gang member participated in the current offense does not establish a second

predicate offense, because the combined activity of a defendant and an aider and abettor to the crime results in only a single predicate offense for purposes of section 186.22. (*People v. Zermeno* (1999) 21 Cal.4th 927, 928-929, 931.)

The criminal street gang enhancement is generally “an additional term of two, three, or four years at the court’s discretion,” but a five-year term is mandated if the underlying felony is “a serious felony, as defined in subdivision (c) of Section 1192.7,” and a 10-year term is mandated if the underlying felony “is a violent felony, as defined in subdivision (c) of Section 667.5.” (§ 186.22, subd. (b)(1)(A)-(C).)

A. Gang Enhancement: Primary Activities

Defendant contends the gang allegations must be stricken because there was no substantial evidence to support the jury’s finding regarding the “primary activities” of defendant’s gang. (See § 186.22, subd. (f).)

1. Standard of Review

“ ‘On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]’ ” (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) The same standard applies to our review of evidence to support a gang enhancement finding. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

2. Analysis

“The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.]” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*Id.* at p. 324.) “Also sufficient [to show the gang’s primary activities] might be expert testimony,” i.e., testimony by a gang expert based on

the expert's conversations with gang members, the expert's personal investigations of gang crimes, and information the expert has obtained from other law enforcement officers. (*Ibid.*; see *Gardeley, supra*, 14 Cal.4th at p. 620.)

Defendant contends that the expert testimony in this case did not provide the jury with enough facts to determine whether the primary activities of the Westside Mob included the commission of the enumerated offenses. Defendant notes that Detective Rak did not quantify the number of gang investigations he had participated in nor estimate the number of enumerated offenses committed by Westside Mob gang members. Defendant further notes that Detective Rak had been a gang officer for only two years and that he did not provide any details of his approximately 15 prior contacts with Westside Mob gang members.

The evidence in this case was similar to the evidence that supported a primary activities finding in *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*). In *Martinez*, the gang expert was familiar with the defendant's gang "based on regular investigations of its activity and interaction with its members." (*Id.* at p. 1330.) He testified that the gang's primary activities included "robbery, assault—including assaults with weapons, theft, and vandalism," and he testified about two prior gang offenses, both robberies, which had occurred in separate years. (*Ibid.*) The *Martinez* court held that the gang expert's testimony was sufficient "to prove the gang's primary activities fell within the statute." (*Ibid.*)

Here, Detective Rak testified that the primary activities of the Westside Mob are homicides, drive-by shootings, assaults with a deadly weapon, vandalism, and firearm possession, all of which are offenses enumerated in section 186.22, subdivision (e)(1)-(25) or (31)-(33). Detective Rak had personally investigated or assisted in the investigation of such crimes. Detective Rak had at least 15 prior contacts with members of the Westside Mob before the current incident. He had at least 200 contacts with gang members as a patrol officer, and in his then-current assignment with the gang unit, he

investigated gang cases and reviewed reports of gang-related activity, and he primarily investigated crimes committed by Norteño gangs. Although he did not quantify the number of gang cases he had investigated (cf. *Gardeley, supra*, 14 Cal.4th at p. 620), his testimony showed that he was familiar with the defendant's gang "based on regular investigations of its activity and interaction with its members." (*Martinez, supra*, 158 Cal.App.4th at p. 1330.) This evidence was sufficient to support the jury's finding that the primary activities of the Westside Mob were the offenses enumerated in section 186.22, subdivision (e)(1)-(25) or (31)-(33).⁵ (See § 186.22, subd. (f).)

B. Gang Expert Testimony

Defendant contends the gang allegations must be reversed because they were based on testimonial hearsay recounted through the prosecution's gang expert, Detective Rak. Defendant also contends that the testimonial hearsay was prejudicial as to the great bodily injury enhancement.

1. Proceedings Below

Defendant filed a trial brief and motion in limine concerning Detective Rak's anticipated expert testimony. Defendant argued that the trial court should preclude Detective Rak from repeating testimonial hearsay such as statements by gang members that had been memorialized in field identification cards and police reports. Defendant also requested the trial court hold an evidentiary hearing (see Evid. Code, § 402) to ensure that the sources of Detective Rak's information were reliable and the type of information typically relied on by gang experts.

⁵ In concluding the evidence was sufficient to support the jury's finding regarding the primary activities of the Westside Mob, we have not considered the Attorney General's argument that "[e]vidence of the prior convictions by West Side Mob gang members for predicate gang crimes corroborated Detective Rak's expert opinion."

At the hearing on motions in limine, defendant reiterated his position that the Confrontation Clause prohibited Detective Rak from “repeating” testimonial hearsay to the jury. Defendant noted that Detective Rak had not provided “[t]he exact source” of his information when identifying certain individuals as documented Norteño gang members. Defendant asserted that the San Jose Police Department had “a very formal procedure of cataloging gang memberships specifically for the prosecution of gang crimes,” which included admissions of gang membership memorialized on field identification cards. He argued that such statements, as well as statements in other officers’ police reports, were testimonial.

The prosecutor addressed the question of whether the field identification cards should be deemed testimonial, noting that “people are generally released after they do the F.I. card,” that the field identification cards were prepared “well in advance of this crime taking place,” and that “there was not a targeted individual” at the time the field identification cards were prepared.

The trial court indicated it would not rule on the motion “in its entirety,” but that it would rule on individual objections made during Detective Rak’s testimony.

The parties next discussed defendant’s request for an evidentiary hearing regarding the sources of information that Detective Rak would be relying on. Defendant anticipated that Detective Rak’s opinions would be based on unreliable “aggregate hearsay from persons unknown.” The prosecutor asserted that Detective Rak would testify about the basis of his opinion and that defendant could cross-examine him “about who said what.” The trial court denied defendant’s request for an evidentiary hearing.

During Detective Rak’s testimony, defendant objected on numerous occasions when Detective Rak referred to information he had obtained from other officers or from “official law enforcement documents” such as police reports and field identification cards. The trial court overruled each of defendant’s objections.

2. Confrontation Clause Analysis

The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right “to be confronted with the witnesses against him [or her].” In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that this provision prohibits the admission of testimonial hearsay unless the witness is unavailable or there was a prior opportunity for cross-examination. (*Id.* at p. 68.) In *Crawford*, the court held that the Confrontation Clause barred the prosecution from introducing a statement made during a formal police interview, explaining that “interrogations by law enforcement officers fall squarely within” the definition of testimonial hearsay. (*Id.* at p. 53.)

The *Crawford* court did not provide a definition of “ ‘testimonial’ statements” but noted that there were “[v]arious formulations” of the term, including: “ ‘*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ [citation]; ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ [citation]; ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ [citation].” (*Crawford, supra*, 541 U.S. at pp. 51-52.)

The high Court also declined to “attempt[] to produce an exhaustive classification” of testimonial statements in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*). In *Davis*, the court held that a victim’s statements to a 911 operator during and immediately after the crime were not testimonial because their “primary purpose was to enable police assistance to meet an ongoing emergency” (*id.* at p. 828), whereas a victim’s statements made to a police officer were testimonial because “[t]here was no emergency in progress”

and the primary purpose of the interrogation “was to investigate a possible crime” (*id.* at pp. 829, 830).

The *Davis* court set forth “what has been come to be known as the ‘primary purpose’ test” (*Ohio v. Clark* (2015) 576 U.S. ___ [135 S.Ct. 2173, 2179] (*Clark*)): “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis, supra*, 547 U.S. at p. 822, fn. omitted.) The court held that the Confrontation Clause did not apply only to “testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath” and noted that “the protections of the Confrontation Clause can[not] readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.” (*Id.* at p. 826.)

“[A]dditional clarification” of the primary purpose test was provided in *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*), where the court explained that “the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” (*Id.* at p. 360, fn. omitted.) In *Bryant*, the court held that a shooting victim’s statement to the police, made while the victim lay bleeding in a parking lot, was not testimonial because the objective circumstances indicated “that the ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency.’ ” (*Id.* at p. 378.)

The United States Supreme Court considered whether the Confrontation Clause permitted the prosecution to introduce “ ‘certificates of analysis’ ” in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 308 (*Melendez-Diaz*). In *Melendez-Diaz*, the police had found some plastic baggies containing a white substance in a car the defendant had been in. The baggies were submitted to a lab for forensic analysis, which revealed that the substance was cocaine. Because “the *sole purpose* of the affidavits” was to provide evidence for use at trial, the affidavits were testimonial hearsay. (*Id.* at p. 311.)

The court reaffirmed that “[a] document created solely for an ‘evidentiary purpose,’ . . . made in aid of a police investigation, ranks as testimonial” in *Bullcoming v. New Mexico* (2011) 564 U.S. ___, ___ [131 S.Ct. 2705, 2717, 2710] (*Bullcoming*). In *Bullcoming*, the court held that a certified forensic laboratory report prepared to determine a suspect’s blood alcohol content could not be admitted “through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.” (*Id.* at p. ___ [131 S.Ct. at p. 2710].) The court declined to distinguish *Melendez-Diaz* on the basis that the laboratory reports were not signed under oath, explaining that in determining whether a document is testimonial, “ ‘the absence of [an] oath [i]s not dispositive.’ ” (*Id.* at p. ___ [131 S.Ct. at p. 2717].) Additionally, the court rejected the claim that a document prepared during a police investigation is outside the scope of the Sixth Amendment simply because it “record[s] an objective fact,” such as “the address above the front door of a house or the read-out of a radar gun,” specifically noting that a police report containing such information would be testimonial. (*Id.* at p. ___ [131 S.Ct. at p. 2714].)

The United States Supreme Court considered whether “basis evidence” —that is, evidence that provides a basis for an expert opinion—is admissible under the confrontation clause in *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221] (*Williams*). In *Williams*, the question was, “does *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about

which the expert is not competent to testify?” (*Id.* at p. ____ [132 S.Ct. at p. 2227].) The *Williams* court examined whether a laboratory expert could rely on a DNA report from a prior criminal case in rendering his opinion that the defendant’s DNA profile matched the prior sample. In a 4-1-4 opinion, the court held that admission of the expert’s testimony did not violate the confrontation clause.

A plurality of the *Williams* court found that even if the “basis evidence” was offered for its truth, it was not testimonial. (*Williams, supra*, 567 U.S. at p. ____ [132 S.Ct. at p. 2228] (plur. opn. of Alito, J., joined by Roberts, C. J., Kennedy & Breyer, JJ).) The DNA report was “produced before any suspect was identified,” it was sought “for the purpose of finding a rapist who was on the loose” rather than to obtain evidence against the defendant, and it was “not inherently inculpatory.” (*Id.* at p. ____ [132 S.Ct. at p. 2228].) Justice Thomas agreed that the “basis evidence” was not testimonial, but for different reasons: it “lack[ed] the solemnity of an affidavit or deposition,” and, “although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.” (*Id.* at p. ____ [132 S.Ct. at p. 2260] (conc. opn. of Thomas, J.).)

In *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), the California Supreme Court noted that although the United States Supreme Court “has not agreed on a definition of ‘testimonial,’ testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution.” (*Id.* at p. 619.)

The United States Supreme Court recently reaffirmed that “a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.” (*Clark, supra*, 576 U.S. at p. __ [135 S.Ct. at p. 2180; *id.* at p. 2181] [three-year-old child’s statement to teachers, which described child abuse inflicted by the defendant, was “not made with the primary purpose of creating evidence”].)

The California Supreme Court has not yet decided whether the Confrontation Clause prohibits a gang expert from relying on testimonial hearsay as the basis of an opinion, nor whether a gang expert may rely on testimonial hearsay to provide evidence of the elements of the gang enhancement.⁶ In *Gardeley*, *supra*, 14 Cal.4th 605, the court reasoned that, “[c]onsistent with [the] well-settled principles” concerning expert witness testimony, a detective “could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay.” (*Id.* at p. 619.) *Gardeley* reasoned that a gang expert can rely on inadmissible hearsay in rendering an opinion, because such evidence is not offered as “ ‘independent proof’ of any fact.” (*Ibid.*) *Gardeley* did not address a Confrontation Clause claim nor the question whether testimonial hearsay can be admitted through a gang expert to prove elements of the gang enhancement such as the “pattern of criminal gang activity.” (§ 186.22, subd. (f).)

3. Application to This Case

Defendant contends that Detective Rak improperly conveyed to the jury testimonial hearsay—specifically, information he obtained from police reports, field identification cards, “and other materials generated by the police while pursuing their duties of investigating crime.” Defendant contends that the gang allegations must be reversed because testimonial hearsay provided the basis for the jury’s findings regarding (1) the primary activities of the Westside Mob, (2) the Westside Mob’s pattern of criminal gang activity, and (3) the gang-related nature of the current offenses. Defendant also contends that the admission of the testimonial hearsay was prejudicial as to the great bodily injury enhancement.

⁶ The California Supreme Court is currently considering whether the Sixth Amendment right to confrontation bars a gang expert’s reliance on testimonial hearsay. (*People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted May 14, 2014, S216681; see also *People v. Archuleta* (2014) 225 Cal.App.4th 527, review granted June 11, 2014, S218640 [briefing deferred pending consideration and disposition of *People v. Sanchez*].)

We begin by addressing the burden of proof. The Attorney General contends that defendant had the burden to show that testimonial statements were relayed to the jury, and that he failed to do so, while defendant argues that the prosecution had the burden of showing that the admission of the challenged statements would not violate the Confrontation Clause. We agree with defendant. Defendant filed a written motion in limine objecting to the admission of testimonial statements through Detective Rak, he requested an evidentiary hearing regarding the sources of Detective Rak's information, and he made timely and specific Sixth Amendment objections throughout trial. Thus, the prosecution, "as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause," had the burden of proving that the statements that Detective Rak relied upon were not testimonial. (*Idaho v. Wright* (1990) 497 U.S. 805, 816 (*Wright*).

We next examine whether the prosecution met its burden of showing that the admission of the challenged evidence would not violate the Confrontation Clause. We requested that the parties submit supplemental briefs focusing on the sources of Detective Rak's testimony about the prior offenses that were admitted to show that members of the Westside Mob had engaged in a "pattern of criminal gang activity." (§ 186.22, subd. (f).) In particular, we asked the parties to discuss whether the record established the specific documents or information that provided the basis for Detective Rak's testimony that the defendants in those cases were members of the Westside Mob. (See *Gardeley, supra*, 14 Cal.4th at p. 623 [criminal street gang enhancement requires evidence that members of the defendant's gang "individually or collectively have actually engaged in 'two or more' acts of specified criminal conduct committed either on separate occasions or by two or more persons"]; *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 328 [evidence failed to establish that members of the defendant's gang had committed any of the enumerated offenses within three years of the charged offense].)

Detective Rak's testimony about the three prior offenses was based in part upon court records establishing the convictions, which were introduced into evidence. The certified conviction records related to the three prior offenses were admissible as official records. Thus, the records did not constitute testimonial hearsay and Detective Rak's reliance on them did not give rise to a confrontation clause violation. (See *Crawford, supra*, 541 U.S. at p. 56; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [records that are "prepared to document acts and events relating to convictions and imprisonments" are beyond the scope of *Crawford*].)

However, Detective Rak specified that he learned the *details* of the three prior offenses from conversations with other police officers and from his review of law enforcement documents such as police reports and field identification cards. Detective Rak learned the facts of the first predicate offense (the carrying of a loaded firearm by Steven Gonzalez) from a police report and from a conversation with an officer who had been an investigator on the case. Detective Rak did not specify what information came from the police report or what information came from the conversation, and the police report was not introduced into evidence. Regarding the second predicate offense (the armed robbery committed by Timothy Casarez, Eddie Sandoval, and Allen Ruby), Detective Rak testified that all of his sources of information were "official law enforcement documents" containing statements from "actual witnesses" or from police officers who had interviewed witnesses. Detective Rak did not specify whether the documents were police reports or other types of documents, and none of the documents he relied on were introduced into evidence. As to the third predicate offense (the attempted murder/assault committed by Gary Tavares, Hector Sanchez, Jose Garate, Douglas Noagore, Jr., and Victor Leal), Detective Rak again confirmed that the only source of his information was "the official documents" in the case, but he did not further describe the documents, which were not introduced into evidence.

The Attorney General contends that field identification cards and “certain statements made to police officers” are not testimonial, noting that police officers routinely gather information about gangs for purposes such as “accumulating expertise” and “protecting communities.” (Cf. *People v. Valadez* (2013) 220 Cal.App.4th 16, 36.) Even assuming that field identification cards and conversations with other police officers would not be testimonial hearsay, the record here does not support a finding that Detective Rak relied only on those sources of information when he testified about the details of the prior offenses.

On this record, where defendant objected to Detective Rak’s testimony about the prior offenses on the basis of the Sixth Amendment, the prosecution did not carry its burden to show that the statements Detective Rak relied on were not testimonial hearsay. The prosecution failed to show that the law enforcement documents were not prepared with any “degree of formality or solemnity” or that the primary purpose of the documents or the underlying statements did not “pertain[] in some fashion to a criminal prosecution.” (*Dungo, supra*, 55 Cal.4th at p. 619; see also *Melendez-Diaz, supra*, 557 U.S. at p. 310.) The prosecution did not carry its burden to show that the documents and statements Detective Rak relied on were not “created solely for an ‘evidentiary purpose,’ . . . made in aid of a police investigation.” (*Bullcoming, supra*, 564 U.S. at p. __ [131 S.Ct. at p. 2717].) The prosecution could have carried its burden by showing that Detective Rak had personal knowledge of the gang membership of the defendants in the prior offense cases or that his information came from specific sources of information that did not constitute testimonial hearsay. When defendant objected to Detective Rak’s testimony on Sixth Amendment grounds, the prosecution was required to either (a) show that Detective Rak’s information about the prior offenses came from non-testimonial sources or (b) call another officer to testify about that information without relying on testimonial hearsay. But on the record before us, we cannot conclude that Detective Rak was relying on statements that were made informally or documents that were prepared for

a purpose other than criminal prosecution when he testified that the prior offenses were committed by members of the Westside Mob. Thus, the prosecution did not meet its burden of proving that the statements that Detective Rak relied upon were not testimonial hearsay. (See *Wright, supra*, 497 U.S. at p. 816.)

The Attorney General contends that the police reports and other documents that Detective Rak relied on cannot be deemed testimonial *as to defendant* if they documented past crimes that were unrelated to him. The Attorney General relies on *Williams, supra*, 567 U.S. ___ [132 S.Ct. 221], in which the plurality noted that the DNA report “plainly was not prepared for the primary purpose of accusing a targeted individual.” (*Id.* at p. ___ [132 S.Ct. at p. 2243]; but see *id.* at p. ___ [132 S.Ct. at p. 2262] (conc. opn. of Thomas, J.) [criticizing the plurality’s “targeted individual” test as having “no textual justification” and being inconsistent with “[h]istorical practice”]; *id.* at p. ___ [132 S.Ct. at p. 2273] (dis. opn. of Kagan, J.) [same].) However, the “targeted individual” test was not “able to garner majority support” and thus does not state the appropriate standard for determining whether a particular statement is testimonial. (*Dungo, supra*, 55 Cal.4th at p. 618.)

In sum, the prosecution failed to show that the details about the three prior offenses did not come from testimonial hearsay, and thus the admission of that evidence violated the Confrontation Clause.

4. Harmless Error Analysis

A violation of the Confrontation Clause is subject to harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), in which the United States Supreme Court held that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”

We agree with defendant that without Detective Rak’s testimony based on police reports and other “official law enforcement documents,” the prosecution did not establish that members of the Westside Mob had engaged in a “pattern of criminal gang activity.”

(§ 186.22, subd. (f).) Without the testimony about the gang membership of the defendants in each of the prior cases, the evidence did not establish that members of the Westside Mob had committed any of the statutorily enumerated offenses within three years of the current offense. (See *id.*, subd. (e); *Gardeley, supra*, 14 Cal.4th at p. 623.) Therefore, the jury’s true findings on the gang enhancements must be reversed. (See *Chapman, supra*, 386 U.S. at p. 24.)

However, we do not agree with defendant that the great bodily injury enhancement (§ 12022.7, subd. (a)) must also be reversed due to the “inherently prejudicial nature of much of the testimonial hearsay Detective Rak recounted.” Defendant focuses on Detective Rak’s testimony about the prior incident in which defendant was detained after he displayed a knife, admitted being a “Northerner,” and possessed gang indicia, which Detective Rak learned about from police reports and field identification cards. Assuming, *arguendo*, that the sources of Detective Rak’s information about that prior incident constituted testimonial hearsay, any error was harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.)

The evidence establishing that defendant personally inflicted great bodily injury during the charged offense came from Vanessa C. She testified that defendant pulled out a knife, threatened her with the knife, then joined the fight, making punching motions. The evidence of defendant’s prior gang-related contacts came from Detective Rak, in the context of his expert testimony. The jury was instructed that it could “consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged” and for determining motive and credibility of witnesses, including the gang expert. The jury was instructed not to “consider this evidence for any other purpose.” Thus, the instructions specifically precluded the jury from considering the evidence of defendant’s prior gang activity when considering issues such as whether he personally inflicted great bodily injury during the charged offenses. We presume “that

limiting instructions are followed by the jury.” (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Beyond a reasonable doubt, the evidence of defendant’s prior gang-related contacts did not affect the jury’s finding that he personally inflicted great bodily injury during the assault on Guillen. (See *Chapman, supra*, 386 U.S. at p. 24.)

C. Great Bodily Injury Enhancement

Defendant asserts and the Attorney General concedes that as to count 1, the trial court erred by imposing a concurrent three-year enhancement for great bodily injury under section 12022.7, subdivision (a) in addition to a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). We will address this issue in the event that defendant is retried on the gang allegations.

We find the Attorney General’s concession appropriate. Section 186.22, subdivision (b)(1)(C) provides that when the underlying “felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.” A violent felony includes “[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7. . . .” (§ 667.5, subd. (c)(8).)

Section 12022.7, subdivision (a) provides that “[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.”

Under section 1170.1, subdivision (g): “When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.”

In *People v. Gonzalez* (2009) 178 Cal.App.4th 1325 (*Gonzalez*), the court held that section 1170.1, subdivision (g) prohibits the imposition of both a three-year enhancement under section 12022.7, subdivision (a) and a 10-year enhancement under section 186.22,

subdivision (b)(1)(C) when “[t]he same infliction of great bodily injury on the same victim” turns an “underlying assault offense into a ‘violent felony’ under section 667.5.” (*Gonzalez, supra*, at p. 1332.) Instead, the court held that the trial court should impose “only the greatest of those enhancements.” (*Ibid.*)

In this case, the trial court imposed a 10-year term for the gang enhancement (§ 186.22, subd. (b)(1)(C)) and a consecutive three-year term for the great bodily injury enhancement (§ 12022.7, subd. (a)). Both enhancements were imposed based on defendant’s infliction of great bodily injury on the same victim in the commission of a single offense. Thus, section 1170.1, subdivision (g) precludes the imposition of both enhancements; only the 10-year gang enhancement should have been imposed. (See *Gonzalez, supra*, 178 Cal.App.4th at pp. 1331-1332.)

IV. DISPOSITION

The judgment is reversed and the matter is remanded for retrial of the gang allegations (Pen. Code, § 186.22, subd. (b)(1)(C) & (b)(1)(B)). If the prosecution elects not to retry defendant on the gang allegations, defendant shall be resentenced on the assaults and the remaining allegations.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MÁRQUEZ, J.