Filed 10/16/12 P. v. Smith CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HOWARD SMITH, Defendant and Appellant.	B232030 (Los Angeles County Super. Ct. No. TA115256)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Shultz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Gail Ganaja, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Howard Dwayne Smith of one count of possession for sale of cocaine base (Health & Saf. Code, § 11351.5) (count 1); false imprisonment (Pen. Code, § 236)[1] (count 2); first degree burglary (§ 459) (count 4); and sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) (counts 5-11). In count 1 and counts 5 through 11, the jury found that defendant suffered a prior conviction for possession for sale of a controlled substance within the meaning of Health and Safety Code section 11370.2, subdivision (b). In count 1 and counts 4 through 11, the jury found that defendant had suffered a prior conviction for a serious or violent felony within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) (the three strikes law). The jury found true a gang allegation under section 186.22, subd. (b)(1)(C) in count 4. The jury found true a gang allegation under section 186.22, subd. (b)(1)(A) in counts 1 and 5 through 11.

The trial court sentenced defendant to a total term of 27 years in state prison. In count 4, the first degree burglary, the court imposed a principal upper term of six years, doubled to 12 years because of defendant's strike conviction. The trial court added 10 years for the gang allegation under section 186.22, subdivision (b)(1)(C) for a total of 22 years in count 4. The court imposed and stayed a sentence of 14 years for possession of cocaine base for sale in count 1. For the misdemeanor false imprisonment in count 2, the trial court imposed a concurrent sentence of one year. The trial court added a consecutive five-year sentence under section 667, subdivision (a) for defendant's prior conviction of a serious felony. In all of the remaining counts (5-11), the trial court struck the allegation under the three strikes law. The trial court imposed the upper term of five years in each of counts 5 through 11 to be served concurrently to each other and the principal term. The trial court struck the allegation that defendant had a prior conviction for possession

---

[1] All further references to statutes are to the Penal Code unless stated otherwise.

for sale of a controlled substance and the allegations of a prior prison term under section 667.5, subdivision (b).

Defendant appeals on the grounds that: (1) the trial court erred in its instruction on the defense of consent to burglary; and (2) the evidence was insufficient to support the gang enhancements in counts 1, 4, and 5 through 11.

FACTS

Prosecution Evidence

On August 3, 2010, Detective Jeffrey Heller was assigned to the narcotics enforcement detail of the Los Angeles Police Department (LAPD). He was conducting surveillance from an observation post in the Avalon Gardens housing project prior to the execution of a search warrant. With the aid of binoculars, he was observing defendant's activity at 633 Caliburn Drive, Apartment 36 within the project. During the two hours he observed defendant, Detective Heller saw approximately seven people approach defendant and hand him what appeared to be United States currency. After receiving the money, defendant walked over to a parked beige Buick. Defendant would lean into the car and extract a long key chain. He would then walk over to the rear door of 633 Caliburn Drive, Apartment 36, and unlock the back door. After one to three minutes inside, defendant would come out, lock the door, and hand the person an object. The recipient would look down at the object and walk away. It was the same pattern every time. In addition to the persons who appeared to be narcotics buyers, Detective Heller saw approximately three other persons with defendant during these two hours of observation.

Approximately 15 officers were involved in the execution of the search warrant at defendant's location. Four officers searched Apartment 36 after forcing their way into the residence when there was no response to their knock. Officers found off-white solids resembling rock cocaine, $64 in different denominations, and several pictures of defendant. Each item was booked into evidence along with a key to the residence that was recovered from the beige Buick and $32 found on defendant's person. The off-white

substance was cocaine in the form of cocaine base with a net weight of 1.2 grams. Defendant, along with three other individuals—David Watson, Justin Clayton, and Takar Smith—were taken into custody. Police detained an older Black male who was in the back bedroom. He was later identified as Houston Carcamo. A water bottle containing urine was found inside the bedroom.

Carcamo was 70 years old and had been living at 633 Caliburn Drive, Apartment 36, since April 2008. He had never lived in public housing before and at first was not aware that it was known for drug dealing. Carcamo had been taking medication for many years for several illnesses, including chronic obstructive pulmonary disease (COPD), which required him to take albuterol by means of an inhaler. He used a motorized chair as a result of back surgery. He also used oxygen and a mobile oxygen tank.

Soon after moving to Avalon Gardens, Carcamo met defendant, whom he knew only as "Solo." Defendant asked Carcamo if he could use his restroom. Then in December of 2009, defendant asked Carcamo if he could "work out of [his] house." Carcamo did not give him permission. A couple of days later, defendant demanded a key. Carcamo believed he had no choice. He heard there were gangs and he saw many of them "coming in and out," and he was scared of the whole situation. Another gang member called Fish had done the same thing to Carcamo before defendant.

Carcamo realized the work Solo referred to was selling cocaine because of the "traffic that was in and out all day long and all night long, knocking at the back door and some come inside of the house or they occupy the kitchen." One of the persons defendant brought into Carcamo's unit pulled out two guns and pointed them at Carcamo from the kitchen. The housing authority told Carcamo to keep "these people" who were selling drugs off his porch. He asked for a transfer. At one point defendant moved out and Carcamo changed his lock. Defendant later demanded another key. Carcamo changed his lock again and defendant "come down with the same question and the same attitude of gang-banging and threatening or whatever and I cannot resist against these youngsters." Guns were stashed in Carcamo's kitchen. Defendant moved clothing,

furniture, and photographs into Carcamo's apartment. Carcamo stayed in the bedroom because he "did not have privilege of '[his] own house because the transaction was going on in the living room and the kitchen." If anyone came in, either defendant or "his other people that he had working for him" would tell Carcamo to go in his room. Solo never took away Carcamo's check, but Carcamo was sometimes forced to pay for things he was told were missing. Carcamo used an empty gallon bottle to urinate in his room.

A gang member named Fish was always there working for Solo. "They were working two, three shifts." Carcamo was watched wherever he went. If he went to the housing office, they would want to know why he went there. Carcamo spoke with the housing authority twice. They said they would get in touch with higher authority, but Carcamo never heard anything from them.

On the day of the search, Carcamo went to the bank in the morning. When he came back, defendant was "in and out" of his home, coming through the kitchen door. Carcamo took a shower and was back in his bedroom when the police kicked in his door. Defendant was arrested that day and Carcamo did not see him again.

Approximately one month after defendant's arrest, Carcamo came home and found Tremaine Johnson waiting inside Carcamo's apartment. Johnson asked Carcamo where his money was. Johnson searched Carcamo's bedroom. He made Carcamo remove his clothing, and he searched him. Carcamo gave Johnson the $90 he had hidden. Johnson said he wanted more and stated, "come up with the money before I call my boys them [*sic*] on you." Carcamo was compelled to go to the ATM in the liquor store and get more money. Tremaine is the brother of defendant's girlfriend and a member of AGC.

Around November 30, 2010, Carcamo testified at a preliminary hearing in the instant case. Before he testified, defendant's girlfriend, Ebony Avery, threatened him, saying, "You better watch yourself old man." Carcamo filed an emergency transfer request with the housing authority and was relocated by the LAPD.

Detective Patrick Foreman participated in execution of the search warrant on August 3, 2010. Detective Foreman had extensive knowledge of the housing projects and

of Avalon Gardens. He knew that the Avalon Gangster Crips (AGC) controlled the Avalon Gardens housing project. He had worked there as an undercover or uniformed officer on over 100 occasions. He had spoken with gang members in the Avalon Gardens housing project on over 100 occasions and made over 15 arrests inside the project for sale and possession of narcotics. On several occasions—over 10 times—he had arrested individuals who had taken over residences in order to sell narcotics. Drug paraphernalia was not found during the police search of Apartment 36.

Officer Armando Leyva testified as a gang expert. One of the gangs assigned to him was AGC. He monitored the area of the Avalon Gardens housing project and conducted field identification interviews of AGC members.

Officer Leyva explained that AGC was a predominantly Black gang that was formed in the early 1970's. They have about five different sets, and their rivals are most Blood gangs. AGC claims the housing project of Avalon Gardens as their territory, along with some territory on the outskirts of the project. The primary activities of the gang include assault with a deadly weapon, shootings, homicides, robberies, burglaries, narcotic sales, and possession of firearms.

Officer Leyva testified regarding convictions suffered by AGC members. Officer Leyva stated that he knew defendant to be a self-admitted AGC member, who went by the name "Solo." Officer Leyva identified three tattoos on defendant. An "E" on his right shoulder and an "S" on his left shoulder for East Side, an "eight eight" on his forearm, and an "A" and "G" on each arm.

In response to a hypothetical question assuming certain facts that corresponded to the facts of the drug sales from Carcamo's home by an AGC member, Officer Leyva was of the opinion that the selling of narcotics from Carcamo's home was done for the benefit of and in direct association with the gang. Officer Leyva believed also that the first degree burglary was committed for the benefit of AGC.

Officer Ben McCauley testified about defendant's prior conviction. McCauley was working an undercover narcotics buy/bust operation in the area of Avalon Boulevard

and 89th Street on December 30, 2009. Officer McCauley met with a Mr. Cleveland and asked for his help in purchasing $20 of rock cocaine. Cleveland led Officer McCauley into the Avalon Gardens housing project. Officer McCauley handed Cleveland a $20 bill, and Cleveland walked away and returned a few moments later with two off-white solids resembling rock cocaine. Officers Rudy Gonzalez and Jose Calderon were also working the buy/bust and saw Cleveland enter Avalon Gardens and meet defendant. Officer Calderon observed defendant walk away from Cleveland and enter apartment 30. A minute later, defendant came out of apartment 30 and engaged in a brief hand-to-hand exchange with Cleveland, who walked back to Officer McCauley. Officer Gonzalez directed officers to detain Cleveland and defendant. Defendant stipulated to his prior conviction for possession for sale of cocaine on January 21, 2010, which was the offense described by Officer McCauley.

Defense Evidence

Defendant took the stand and admitted that he had prior felony convictions for possession for sales of cocaine and assault with a firearm. He also admitted having served a prison term for assault with a firearm. He completed his sentence on December 22, 2009, after a parole violation in that case. Defendant admitted to selling drugs from 633 Caliburn Drive, Apartment 36, on August 3, 2010. Defendant admitted that his prior conviction of possession for sale of cocaine was based on his selling drugs out of an abandoned unit, No. 30, in the Avalon Gardens housing project.

Defendant joined the AGC gang in 1995. Defendant admitted he would probably always be an AGC member. He had been selling drugs on the streets since 1997. On August 3, 2010, he was with Clayton, Watson, and Smith, who are members of AGC, but defendant denied that the three were helping him sell drugs.

Defendant treated Carcamo like a grandfather. Carcamo was buying "product" from appellant, and he wanted defendant to provide him with protection. Defendant believed he had a reputation due to his having been around the project for so long. Other

gang members and people in general listened to him. Avalon Gardens was a secure territory for defendant to sell drugs.

Defendant denied that he and other gang members held Carcamo hostage in his home. Defendant lived at Carcamo's residence. In exchange defendant provided "protection plus product." He also paid Carcamo rent of "like 150 a month." Defendant said he moved from Carcamo's between June and July 2010 because the police had gone in. He went home to his girlfriend. He moved back in July because he "got into it" with his girlfriend. Carcamo let him move back.

Defendant stated that Carcamo used crack cocaine on a daily basis, and defendant had seen him smoking it. Carcamo only wore the oxygen mask when he went out. Defendant believed Carcamo was attempting to appear sympathetic to the jury by looking like an old man with an oxygen tank and a wheelchair. Carcamo owed a lot of people money for drugs before defendant began supplying him. Defendant said that Carcamo used the bottle for urinating by choice. Defendant believed Carcamo testified against him to keep a roof over his head. Carcamo was afraid he would be "put out."

Defendant's sister, Lasheeka Smith, testified that she worked for Carcamo doing odd jobs such as cleaning and running errands in the summer of 2008 for approximately two months. Lasheeka saw Carcamo smoking cocaine through a clear pipe. His fingers were crusty and burned. Lasheeka never saw defendant or anyone else sell or give drugs to Carcamo. Lasheeka was not a member of AGC but was affiliated with them. When she went to Carcamo's residence between January of 2010 and August of 2010—during the period when her brother was selling drugs out of the residence— she saw other AGC members in the apartment. She did not know if they were helping her brother sell.

Ebony Avery is defendant's girlfriend, and he is the father of her four children. They had "dated" for over 13 years. Ebony denied saying anything to Carcamo at the preliminary hearing on November 30, 2010. She was arrested for threatening a witness and pleaded no contest to a witness intimidation charge. She was in custody for around

two weeks. She had to plead because she has "kids and a life," and it was her best option to plead no contest.

Rebuttal Evidence

Based on his background, training, and experience in the area of recognizing people under the influence of cocaine or cocaine base, Officer Darren Stauffer was of the opinion that, on August 3, 2010, Carcamo did not exhibit any signs of someone under the influence of cocaine. Officer Stauffer saw Carcamo on numerous occasions when he brought him to court and during interviews, and he had not once suspected that Carcamo was under the influence of cocaine. Officer Stauffer conducted a thorough search of Carcamo's residence at 633 Caliburn Drive and found no means of ingesting rock cocaine there.

DISCUSSION

I. Jury Instruction on Consent to Burglary

A. Defendant's Argument

Defendant contends that the jury was incorrectly instructed on the standard of proof for the defense of consent to burglary. The trial court's instruction did not communicate to the jury that defendant needed only to raise a reasonable doubt as to whether Carcamo actively invited defendant into his apartment, knowing that defendant intended to possess cocaine base for sale, and that defendant was aware that Carcamo knew of defendant's intent and did not challenge it. According to defendant, the error interfered with his federal constitutional rights to a jury trial under the Sixth Amendment and to due process under the Fifth and Fourteenth Amendments.

B. Proceedings Below

At a discussion of jury instructions, defense counsel stated that, having read *People v. Felix* (1994) 23 Cal.App.4th 1385, he believed the trial court needed to instruct on "something to do with consent" regarding the entry element of burglary. Defense counsel agreed with the language of the trial court's proposed instruction but requested that the trial court add language to the effect that "in some cases consent may be a

defense to . . . the entry requirement of [the crime of] burglary." Recognizing that this language came from the use notes, the trial court did not think it necessary, since it was an explanation for the bench and counsel. (See CALCRIM No. 1700.)

The trial court instructed the jury with the standard burglary instruction that a burglary was committed if the defendant entered Carcamo's property with the intent to commit the crime of possession for sale of a controlled substance. (CALCRIM No. 1700.) The trial court then read this additional paragraph: "If you find that Mr. Carcamo clearly and expressly gave the defendant consent to enter the premises in order to possess cocaine base for purposes of sales and you find that Mr. Carcamo knew of the defendant's felonious intent, you cannot find the defendant guilty of residential burglary."

C. Relevant Authority

Any person who enters a house or building with the intent to commit a felony or theft is guilty of burglary. (§ 459.) There are circumstances in which consent by the owner of property will constitute a defense to a burglary charge. One such circumstance occurs "when the owner *actively* invites the accused to enter, *knowing* the illegal, felonious intention in the mind of the invitee. [Citation.] But the invitation by the owner must be express and clear; merely standing by or passively permitting the entry will not do. [Citation.] . . . T]he owner-possessor must know the felonious intention of the invitee. There must be evidence 'of informed consent to enter *coupled* with the "visitor's" knowledge the occupant is aware of the felonious purpose and does not challenge it.'" (*People v. Felix*, *supra*, 23 Cal.App.4th at pp. 1397-1398; see also *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1302; *People v. Salemme* (1992) 2 Cal.App.4th 775, 777-778.)

Evidence Code section 502 provides: "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a

fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt."

"With respect to many defenses, as 'ha[s] been and [is] extremely common in the penal law' [citation], a defendant has been required merely to raise a reasonable doubt as to the underlying facts. Such defenses relate to the defendant's guilt or innocence. . . ." (*People v. Mower* (2002) 28 Cal. 4th 457, 479 (*Mower*), fn. omitted.) Evidence Code section 115 allows a defendant to "'prove'" the elements of a given defense merely by raising a reasonable doubt as to their existence or nonexistence. (*Mower*, at p. 483.) "A trial court must instruct the jury on the allocation and weight of the burden of proof [citations], and, of course, must do so correctly. It must give such an instruction even in the absence of a request [citation], inasmuch as the allocation and weight of the burden of proof are issues that 'are closely and openly connected with the facts before the court, and . . . are necessary for the jury's understanding of the case.' [Citation.]" (*Id*. at pp. 483-484; accord, *People v. Tewksbury* (1976) 15 Cal.3d 953, 963 [when raising defense that negates element of crime charged, defendant need only raise "reasonable doubt as to the existence or nonexistence of the fact in issue"].) The consent defense is material to the element of entry and directly relates to a defendant's guilt or innocence. Therefore, a defendant has the burden to raise a reasonable doubt as to the facts underlying the defense. (*People v. Sherow, supra,* 196 Cal.App.4th at pp. 1308-1309.)

We review a claim of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) The "'test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.] . . . [Citation.] . . . [I]n examining the entire charge we assume that jurors are '"'"'intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]'" [Citations.]' [Citation.]" (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

D. Harmless Error

Under *Mower*, the trial court has a duty to instruct specifically on the allocation of the burden of proof on the defense of consent. Therefore, the trial court's failure to do so constituted error. (*Mower*, *supra*, 28 Cal.4th at pp. 483-484.) The error in failing to instruct the jury that defendant needed only to raise a reasonable doubt as to whether he had consent was, however, harmless on this record. Even assuming that defendant is correct in his position that the standard of prejudice is harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), we find no prejudice.

The trial court correctly instructed the jury on the exact nature of the consent that Carcamo had to give defendant in order to find defendant not guilty of burglary. The jury had to find that Carcamo clearly and *expressly* consented to defendant entering the premises for the purpose of keeping cocaine there and selling cocaine from Carcamo's home. The trial court properly instructed the jury on the prosecutor's burden of proof with CALCRIM No. 220, which defines reasonable doubt and correctly states that defendant is presumed to be innocent, and respondent bears the burden of proving guilt beyond a reasonable doubt. (§ 1096.) Additional instructions provided to the jury amplified or supported the general principle that the burden of proof remained with the prosecution as to all essential elements, such as CALCRIM Nos. 224 (Circumstantial Evidence), 225 (Circumstantial Evidence: Intent or Mental State), and 251 (Union of Act and Intent). CALCRIM No. 301 told the jury that the testimony of any one witness could prove a fact, and CALCRIM No. 302 instructed the jury that it must decide what evidence to believe among conflicting evidence. CALCRIM No. 200 instructed the jury that it must consider the instructions together. Moreover, in pre-instructing the jury at the outset of the trial, the court also admonished the jury about the presumption of innocence and the prosecution's burden of proving all essential elements beyond a reasonable doubt.

Our review of the jury instructions in their totality leads us to conclude that a reasonable jury would not have been confused or misled, but would have understood that the burden of proof remained with the prosecution as to all essential elements of the

crime of burglary. "'[T]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions'" given to them. (*People v. Delgado* (1993) 5 Cal.4th 312, 331; see also *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.)

Moreover, unlike *Mower* and other cases cited by defendant, the trial court gave no erroneous instruction on the defendant's burden of proof for the consent defense. The error in *Mower* was not failure to give a sua sponte instruction but rather an erroneous instruction that the defendant bore the burden of proving the underlying facts by a preponderance of the evidence. (*Mower*, *supra*, 28 Cal.4th at pp. 483-484.) Likewise, in *People v. Sherow*, *supra*, 196 Cal.App.4th 1296, the trial court erred by instructing the jury that the defendant had the burden to prove the consent defense to burglary by a preponderance of the evidence. (*Id*. at p. 1309.) Defendant's case is also unlike *People v. Simon* (1995) 9 Cal.4th 493, disapproved on another point in *People v. Salas* (2006) 37 Cal.4th 967, 982, where reversible instructional error was found because the trial court read an instruction stating that the defendant bore the burden of proving his exemption defense in a securities case, but failed to explain that the defendant needed only to present some evidence showing a reasonable doubt that he sold nonexempt securities. (*People v. Simon*, at pp. 500-501.) In the instant case, there was no misinstruction.

Defendant also claims the prosecutor's arguments incorrectly suggested that defendant was required to affirmatively prove the elements of the consent defense rather than merely raise a reasonable doubt as to its underlying facts. We disagree. The prosecutor told the jury he surmised the defense would argue defendant was not guilty of burglary and guilty only of drug sales because Carcamo is a drug addict, and Carcamo let defendant stay in his home and sell drugs out of there. The prosecutor then stated, "But why is that theory not reasonable? Because let's remember we're dealing with a standard of reasonable doubt. . . . Why is it unreasonable to think Mr. Carcamo is a crack head?" The essence of this argument is that defendant's evidence had to raise a reasonable doubt as to whether Carcamo's testimony was truthful.

In addition, the defense argument discussed the burden of proof when arguing the issue of Carcamo's consent with respect to the false imprisonment and the burglary. With regard to the burglary, defense counsel told the jury that consent was a defense to burglary, and that there was no burglary if Carcamo was complicit in the drug sales—if he knew what was going on and allowed it to happen. Defense counsel questioned whether it was "so unbelievable" that Carcamo used drugs just because he did not fit the stereotype. Defense counsel stated that the jury must weigh the evidence of defendant's testimony and that of his sister and girlfriend and ask if any of the evidence caused them to have a reasonable doubt about the truth of the charges. If the doubts they had were reasonable, they had a duty to acquit.

We find the failure to instruct on defendant's burden of proof for his consent defense was harmless on this record even under the standard of *Chapman v. California*, *supra*, 386 U.S. at page 24 (harmless only if it is beyond a reasonable doubt the error did not contribute to the verdict obtained). We therefore reject defendant's argument that the trial court's error resulted in the denial of his right to a jury trial and to due process.

II. Sufficiency of the Evidence for the Gang Enhancements

A. Defendant's Arguments

Defendant contends that there was no evidence presented at trial that the crimes charged in counts 1, 4, and 5 through 11 were committed in association with or for the benefit of AGC. The gang expert's opinion that the crimes were gang related did not inspire confidence, since the premises upon which Officer Leyva based his opinion were either without evidentiary support or were illogical. There was no substantial evidence of association with AGC members because there was no evidence defendant committed the burglary and drug offenses in concert with other AGC members on August 3, 2010, the day of his arrest. Defendant also contends that there was a lack of substantial evidence that he committed the burglary and drug offenses with the specific intent to promote, further, or assist any criminal conduct by AGC members. According to defendant, the evidence showed only that defendant was a gang member who committed crimes.

B. Relevant Authority

To obtain a true finding on an allegation of a criminal street gang enhancement, the People must prove the crime at issue was "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 . . . ." (§ 186.22, subd. (b)(1).) In evaluating these claims we must determine whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find the gang enhancement allegation true beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054 [if substantial evidence supports the jury's finding, the fact the record could reasonably be interpreted to support a contrary finding will not warrant reversal].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132; see *People v. Bolin*, at p. 331 ["[r]eversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]'"].)

C. Evidence Sufficient

We disagree with defendant. At the outset, defendant himself admitted membership in the gang and expressed his loyalty to the gang, of which he had been a member for approximately 16 years. The Avalon Gardens housing project was known as being the territory of the AGC gang. The evidence at trial established that defendant was arrested in the company of three gang members (Clayton, Watson, and Smith) outside Carcamo's unit—the place where defendant transacted the business of dealing cocaine. They were with him the entire time he was being watched by Detective Heller, and during that time defendant conducted seven drug transactions. Defendant's sister, Lasheeka, testified that she would frequent Carcamo's apartment while her brother was selling cocaine from the apartment and there were other AGC members in the apartment.

Carcamo testified that the gang member known as Fish was "always there" working for defendant. Carcamo said there were numerous persons whom he identified as gang members in and out of his unit all day.

In addition, "[i]it is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach . . . a finding on a gang allegation. [Citation.]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) Although a gang expert may not testify as to whether a particular defendant committed the crime for the benefit of a gang, an expert "properly could . . . express an opinion, based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) As stated in *Vang*, "'[e]xpert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*Ibid*.)

Based on a hypothetical drawn from the facts of defendant's offenses, the prosecution's gang expert testified that the crime of possession for sale of cocaine base was committed for the benefit of the AGC gang. Officer Leyva explained that defendant was conducting the drug sales in a manner very open to the public, where the residents of Avalon Gardens could see them occurring every day. The sales created an atmosphere of fear and intimidation among the citizens. The residents were too scared to call the police if a crime occurred. This atmosphere allowed the gang members to engage in other illegal activities with little or no police presence.

Also, there was the obvious benefit of monetary gain. The more drugs sold, the more money the gang had for buying weapons and facilitating their crimes, such as street robberies and home invasion robberies, or retaliatory acts against rival gangs. Officer Leyva explained that gangs require money and violence to be successful, and the money is made by selling drugs. The individual seller also benefits because his reputation within the gang is enhanced, and reputation and respect are everything for a gang member.

Defendant claims that Officer Leyva's opinion that AGC received a benefit when one of its members sold drugs because the member's reputation within AGC was enhanced was illogical, because this would only benefit the member and not the gang. It is true that defendant testified he sold drugs for his own personal benefit. Since he apparently had no employment, drug sales probably supplied most of his income. However, there is nothing in the statute that requires the underlying crime to be committed exclusively for the benefit of a gang. Otherwise, a jury could never find true a gang enhancement allegation in any case where the defendant obtained any kind of personal benefit.

As for the burglary charged in count 4, Officer Leyva testified that the burglary in this case was committed by defendant in concert with other gang members in order to commit the felony of drug sales in a place where they had no right to be. The gang members are involved in many residential burglaries inside their own housing projects, and they benefitted by instilling fear to the degree that victims, especially an elderly man, would not report the burglary to the police. The housing project of Avalon Gardens is their turf. Therefore, residential burglaries in Avalon Gardens benefit the gang. Officer Leyva was personally aware of many instances where the residents of Avalon Gardens told him they were victims of crimes but did not call the police. AGC members often work in concert with two, three, or four members at a time, creating and enforcing the intimidation. As stated in *People v. Albillar* (2010) 51 Cal.4th 47, 63, "[e]xpert 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'"].

The record reflects that Officer Leyva's opinion was properly rooted in evidence presented at trial. The hypothetical the prosecutor posed was based on facts that were not objected to by the defense—facts brought out by the testimony. Considered as a whole, Officer Leyva's testimony and the corroborating evidence were sufficient to support the

specific intent element of the gang allegation as well. (See *People v. Gardeley* (1996) 605, 619.)

Under these circumstances, the jury reasonably could have found that the offenses in counts 1, 4, and 5 through 11 were committed for the benefit of and/or in association with defendant's gang, and there was sufficient evidence to support the jury's true finding on the gang enhancement in these counts.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST