Filed 5/24/18 P. v. Dominguez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JUAN BERNARD DOMINGUEZ et al., Defendants and Appellants.	B275920 (Los Angeles County Super. Ct. No. BA429942)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed in part and reversed in part with directions.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant Juan Bernard Dominguez.

Joshua Schraer, under appointment by the Court of Appeal, for Defendant and Appellant Richard Ernesto Mendoza.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Blythe J. Leszkay and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Juan Bernard Dominguez (Dominguez) and Richard Ernesto Mendoza (Mendoza) of two counts of attempted murder as well as shooting at an inhabited dwelling. The jury also found that Dominguez personally discharged a firearm and that the crimes were committed to benefit a criminal street gang. On appeal, Dominguez contends that imposition of the gang enhancement was improper because the prosecution failed to establish the requisite connection between the overarching gang and its subsets and failed to present sufficient evidence that the crimes were committed at the direction of, in association with, or to benefit the gang. We disagree. Mendoza claims that several portions of the gang expert's testimony constituted testimonial hearsay and should have been excluded under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). We disagree. Mendoza also claims that the trial court improperly instructed the jury on premeditated murder based on aiding and abetting liability. We again disagree. However, we do agree that Dominguez's and Mendoza's cases must be remanded for resentencing so that the trial court can decide whether any of the imposed firearm enhancements should be stricken.

BACKGROUND

I. Charges and Sentence

Dominguez and Mendoza were charged with one count of shooting at an inhabited dwelling (Pen. Code,[1] § 246; count 1)

---

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

and two counts of attempted murder (§§ 644, 187, subd. (a); counts 2–3). As to all counts, the amended information also alleged that Dominguez personally discharged a firearm (§ 12022.53, subd. (c)); that a principal discharged a firearm(§ 12022.53, subds. (c) & (e)(1)); and that the crimes were committed to benefit a criminal street gang (§ 186.22, subds. (b)(1)(C) & (b)(4)). The charging document did not identify the name of the criminal street gang. A jury convicted Dominguez and Mendoza on all counts and found all the special allegations to be true. The trial court sentenced Dominguez to a total term of 35 years to life in prison. The trial court sentenced Mendoza to a total term of 27 years to life in prison.

II. Prosecution evidence

A. THE SHOOTING

Blanca Moran (Moran) lived with her husband and children in an apartment in the Rose Hills Housing Development. On February 11, 2014, Jonathan Torres (Torres), the boyfriend of Moran's daughter, visited the home. At 3:00 p.m., Moran washed dishes in the kitchen. Moran's son, Jose Martinez (Martinez), and Torres were taking out the trash when a car pulled up to the two. A person inside the car asked Martinez where he was from. Martinez and Torres heard gunshots and ran back inside.[2] When

---

[2] At trial, Martinez testified that he did not remember a person asking where he was from before the shooting. The parties stipulated that Martinez gave a statement to police on the day of the shooting. Martinez told police that a black car drove slowly in front of his home while he took out the trash. The man in the front passenger seat of the car got out of the vehicle and asked Martinez where he was from. The man wore a black or red baseball hat. Martinez ran into the house and heard gunshots. The parties also stipulated that Torres gave a statement to police

Moran heard the gunshots, she grabbed her three-year-old child and dropped to the floor.

Officer Jose Hildago was in the Lincoln Heights area at this time. Officer Hildago heard gunshots as he was driving. Officer Hildago stopped his car and saw Dominguez firing a gun toward an apartment complex within the Rose Hills Housing Development. Dominguez then entered a black Mercedes Benz and the car sped away. Officer Hildago requested backup on his radio. He tried to follow the black Mercedes but the car was driving too fast. A marked police car took over and a pursuit ensued involving several other police cars and a helicopter. Eventually, the black Mercedes made an abrupt stop. Dominguez and three other men jumped from the car and ran. The car drove away. Three of the suspects ran up Gates Street and one suspect ran toward Lincoln Park. Officers followed the three suspects and set up a perimeter. Officers subsequently apprehended and arrested Dominguez and Mendoza, as well as the other three suspects. Officer Jorge Alfaro, who had been involved in the pursuit, identified Mendoza as the driver of the black Mercedes.

Officer Spencer Clark searched the property where one of the suspects had been apprehended, which was approximately 2.3 miles away from the Rose Hills Housing Development. The property had four apartment units. At the back of one unit, Officer Clark saw a window with cardboard covering the space where an air conditioner had been. There was a hole punched into the cardboard. The resident said the hole had not previously

---

on the day of the shooting. Torres told police that while he took out the trash, he saw a black car with tinted windows. The man in the front passenger seat of the car wore a black or red baseball hat.

been there and he did not know what caused it. With the resident's permission, Officer Clark searched the unit including the room with the window covered by cardboard. Inside that room, Officer Clark found a Smith & Wesson nine-millimeter handgun inside a black holster. Officer Clark put on gloves and removed the gun from the holster. He checked the magazine and the chamber and found it completely empty. He then gave the gun to Officer Hildago, who put it in an evidence bag. Thirteen discharged cartridge cases were recovered at the scene of the shooting. All had been fired from the recovered gun.

Officers tested both Dominguez and Mendoza for gunshot residue. Dominguez indicated positive for gunshot residue. A Los Angeles Police Department forensic print specialist processed the black Mercedes Benz for fingerprints. The print specialist collected fingerprints from the exterior driver's side window, the exterior rear passenger side window, the interior rear passenger side window and the interior rear passenger side door. A second print specialist analyzed the collected fingerprints and determined that six of the prints belonged to Dominguez. The fingerprints were recovered from the exterior and interior passenger side windows. Dominguez's left palm print was recovered from the interior rear passenger side window. Two of the prints belonged to Mendoza. They had been collected from the exterior driver's side window and the rear passenger side window. Dominguez and Mendoza were fingerprinted in court; the print specialist again concluded that the recovered prints matched Dominguez and Mendoza.

B. GANG EVIDENCE AND EXPERT TESTIMONY

On July 30, 2009, Officer Rosie Powers patrolled in the area known as the 18th Street gang territory. While there,

Officer Powers contacted Mendoza, filling out a field identification (FI) card that included Mendoza's name, description, and the name of his high school. The FI card indicated that Mendoza was with Juan Nava and Saul Martinez. Mendoza admitted hanging out with Eastside 18th Street gang members and Officer Powers identified him on the FI card as an Eastside 18th Street gang associate.

On June 12, 2012, Officer Tony Kuey patrolled in an area claimed by the Clover gang, but that was continually tagged by the 18th Street gang. Mendoza was there with a man named Angel Bolivar. Bolivar was an 18th Street associate or gang member.

On July 17, 2012, Officer Kuey encountered Mendoza again. This time, Mendoza was with Victor Martinez and David Olivares. Both Martinez and Olivares admitted to 18th Street gang membership. The three men loitered at an abandoned house where Officer Kuey would typically see gang members hanging out. Although Mendoza had admitted being an 18th Street gang member on at least one occasion, Mendoza previously denied being a member as well.

On October 25, 2012, Officer David Ramirez responded to a location within the 18th Street gang territory. At least three people were detained for investigation, including Dominguez, Victor Martinez, and Moises Garcia. Given that Dominguez was in 18th Street gang territory, accompanied by documented gang members, Officer Ramirez believed that Dominguez was an 18th Street gang associate. According to Officer Ramirez, such a determination did not mean Dominguez was a gang member.

Officer Jose Carbajal testified as the prosecution's gang expert. According to Officer Carbajal, the 18th Street gang is

very large and has many subsets. Members are located in Los Angeles, other parts of California, as well as other states and countries. There are approximately 20,000 members in California and other countries. The gang takes its name from a street in Los Angeles and associates itself with the number 18. Subsets include 18th Street Westside, which is in the Rampart area, Southside 18th Street, in south Los Angeles, and Eastside 18th Street, which is in the Hollenbeck area, where Officer Carbajal worked. Another subset is the "Babitos," which occupies territory within Eastside 18th Street gang territory. The Babitos are known as the younger crew of the 18th Street gang and are usually between 16 and 23 years old. The Rose Hills gang is a rival of the 18th Street gang. The Rose Hills gang has approximately 17 members and controls a small territory that shares a border with Eastside 18th Street gang territory. For a few years, 18th Street had been trying to take over Rose Hills' territory. The rivalry between the two gangs dates back to 2011 or 2012.

Officer Carbajal testified that many gang members do not have gang tattoos. Older gang members advise younger members against getting gang tattoos so they can avoid being documented as gang members or identified after committing a crime. A tattoo on Dominguez's arm, which he received after the charged offenses, meant "18th."[3]

Officer Carbajal also reviewed an FI card prepared by Officer Finnigan on August 18, 2009, which identified Mendoza as a member of the Eastside Babitos and 18th Street gang.

---

[3] The tattoo said "Dieciocho." Dominguez did not have any tattoos before the instant offense. Dieciocho is 18 in Spanish.

Officer Carbajal also spoke to Officer Finnigan, who said he had observed Mendoza and others tagging in a known 18th Street hangout and thus detained and field identified Mendoza at that time. Officer Carbajal confirmed that law enforcement had field identified Mendoza as either an 18th Street gang member or associate at least four times between 2009 and 2012. Other officers had also field identified Dominguez as an 18th Street gang member or associate. Officer Carbajal opined that both Mendoza and Dominguez were members of the Eastside 18th Street gang.

When given a hypothetical with facts identical to those in the instant case, Officer Carbajal testified that, in his opinion, the crimes were committed for the benefit of, in association with, or at the direction of the 18th Street gang. "In my opinion, having two documented gang members in the vehicle with possibl[e] associate members, it's in a rival territory, to me, they're there to take control of the turf; show that they are a stronghold . . . gang. Not only intimidates two individuals that are taking out the trash, but the community. And yelling out 'Where are you from?' in my opinion, it builds character for the gang, builds a stronghold for the gang that these guys are willing to shoot at anybody." Officer Carbajal further testified that, as "for the associates, in my opinion, it benefits the gang because three individuals that are associates are there to participate in a crime for the gang. It helps the individuals that are members as lookouts which it benefits from. Again, it builds fear to the community with this gang" and instills fear in the smaller, weaker Rose Hills gang.

III. Defense Evidence

Dominguez testified in his own defense. Dominguez said he lived in Perris, California. Although, in 2012, a police officer determined that Dominguez was an 18th Street gang associate, Dominguez insisted he was not in a gang in 2012.

On February 11, 2014, a drunk Dominguez rode in a car and sat in the middle of the back seat. He did not carry a gun. Also in the car were Mendoza, Juan Nava, Georgio Rodriguez, and another person. Dominguez did not remember who else was in the car because he was drunk. He could not identify the person in the car who shot the gun because he was scared. Dominguez did not remember anyone jumping out of the car or any shots being fired. After the car stopped, he remembered jumping out and running because he was scared.

Dominguez denied touching the gun on February 11, 2014, and testified that he had "never shot a gun like that." He denied trying to hide the gun next to an air conditioning unit and said he hid in a trashcan for five or six hours before being found and arrested. The police handcuffed him but did not put bags on his hands. The police tested for gunshot residue after they had transported him to the police station.

Dominguez denied being a member of the 18th Street gang. He did not consider himself an associate of the gang. He had a tattoo on his arm that said Dieciocho, but it did not mean anything to him. He did not have the tattoo on February 11, 2014. He got it while in jail because he was "trying to be cool." He also had a tattoo on his face that said "Klepto," the moniker for his deceased brother's tagging crew. He had gotten the tattoo a few months after his arrest. He had no tattoos at the time of his arrest. Dominguez confirmed that his two brothers were in a

gang and that he had been stopped with one of his brothers, Victor Martinez, before. Another brother, Jose Oleia, was a member of the 18th Street gang.

Dr. Bill Sanders testified as Mendoza's gang expert. In order to determine gang membership, law enforcement and researchers rely on statements by the individuals regarding membership, gang tattoos, and a history of gang related crimes. However, according to his research, people admit to gang membership after being threatened by law enforcement. Dr. Sanders opined that Mendoza was not a gang member. His opinion stemmed from the facts that Mendoza did not identify himself as a gang member to Dr. Sanders, had no gang tattoos, and did not have a history of committing gang-related crimes.

DISCUSSION

I. Gang evidence

Dominguez contends that the imposition of the gang enhancement pursuant to section 186.22, subdivision (b), was improper because the prosecution failed to establish the requisite connection between the 18th Street gang and its subsets, as required by *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*). Dominguez further argues that the enhancement was improper because the prosecution failed to present sufficient evidence that the crimes were committed at the direction of, in association with, or to benefit the Eastside 18th Street gang. We disagree.

A. *People v. Prunty*, *supra*, 62 Cal.4th 59

Section 186.22, subdivision (b)(1) authorizes enhanced criminal punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

Notably, the "enhancement set forth in section 186.22(b)(1) does not . . . depend on membership in a gang at all. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 67–68.) A " 'criminal street gang' " is defined 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 [certain enumerated] criminal acts[,] . . . 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." (§ 186.22, subd. (f).) A " 'pattern of criminal gang activity' " means "the commission of . . . or conviction of two or more of [certain enumerated offenses]" that "were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

In *Prunty*, *supra*, 62 Cal.4th 59, the California Supreme Court addressed "the type of evidence required to support the prosecution's theory that various alleged gang subsets constitute a single 'criminal street gang' under section 186.22(f)." (*Id.* at p. 70.) The court held that "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67–68.) "That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely

hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization. [¶] Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of section 186.22(f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under section 186.22(b). But it is not enough . . . that the group simply shares a common name, common identifying symbols, and a common enemy. Nor is it permissible for the prosecution to introduce evidence of different subsets' conduct to satisfy the primary activities and predicate offense requirements without demonstrating that those subsets are somehow connected to each other or another larger group." (*Id*. at pp. 71–72, fns. omitted.)

In *Prunty*, *supra*, 62 Cal.4th 59, the defendant identified as a member of the Norteño gang and claimed membership in a particular Norteño subset—the Detroit Boulevard Norteños. The prosecution's theory was that the defendant committed an assault to benefit the overarching Norteño gang. The prosecution's gang expert testified about the primary activities of the Norteño gang. However, the two predicate offenses described by the gang expert involved activities of different Norteño subsets. In the first, Varrio Gardenland Norteños were convicted for the murder and attempted murder of members of the Del Paso Heights Norteños. In the second, members of the Varrio Centro Norteños shot at a former Norteño gang member. No evidence

was offered connecting the subsets' activities to each other or to the Norteño gang in general. The court found sufficient evidence regarding the illicit primary activities of the Norteño gang in general. (*Id.* at p. 82.) "But where the prosecution's evidence fell short is with respect to the predicate offenses." (*Ibid.*) Because there was no evidence that these subsets were connected to one another or to the overarching Norteño group, the court held that this evidence was insufficient to show that the subsets comprised a criminal street gang. (*Ibid.*)

B. STANDARD OF REVIEW

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains 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. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar*, *supra*, 51 Cal.4th at pp. 59–60; accord, *Prunty*, *supra*, 62 Cal.4th at p. 71 [we apply deferential standard of review when deciding whether sufficient evidence satisfied STEP Act's criminal street gang definition].) "This standard applies whether direct or circumstantial evidence is involved." (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56; see *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.)

C. MERITS

The charging document did not identify the name of the criminal street gang. However, the prosecution's gang expert testified that both Dominguez and Mendoza were members of the Eastside 18th Street gang and that the charged offenses were committed for the benefit of, in association with, or at the direction of the 18th Street gang.[4] Dominguez argues that there was insufficient evidence to support the gang enhancement because the prosecution did not establish the requisite connection between the 18th Street gang and two of its subsets—Eastside 18th Street and Babitos—as required by *Prunty*, *supra*, 62 Cal.4th 59.[5] The People contend that *Prunty* does not apply

---

[4] Dominguez contends that the prosecution's gang expert described the defendants as Babitos, members of an 18th Street clique, members or associates of 18th Street or as members of Eastside 18th Street. However, when specifically discussing Dominguez, the prosecution's expert testified only that Dominguez had been field identified as a member or associate of the 18th Street gang once before and he was confident Dominguez was a member of the Eastside 18th Street gang—an established subset of the 18th Street gang.

[5] After the prosecution's case in chief, the trial court ruled that the gang evidence was sufficient to withstand *Prunty* and allowed the jury to decide whether the gang enhancement should be imposed. In so holding, the trial court relied upon *People v. Garcia* (2016) 244 Cal.App.4th 1349 and *People v. Ramirez* (2016) 244 Cal.App.4th 800. In *Garcia*, one of the three defendants belonged to the Eastside gang in San Diego. The other two defendants belonged to the Diablos gang in Escondido. (*Garcia*, at p. 1354.) The prosecution's gang expert did not opine that the Eastside gang was a criminal street gang or a subset of a larger criminal gang to which both the Eastside gang and the Diablos

because the prosecution did not attempt to establish the existence of the larger 18th Street gang through the conduct of its two subsets. Rather, it demonstrated the existence of Eastside 18th Street by its own actions. (See *id.* at p. 71, fn. 2 [*Prunty* applies when prosecution's theory of why criminal street gang exists turns on conduct of one or more gang subsets]; *People v. Ewing* (2016) 244 Cal.App.4th 359, 372-373 [*Prunty* not applicable because prosecution did not use predicate crimes of subset gang members to prove criminal street gang's existence].) In short, as Dominguez concedes, the prosecution demonstrated that Eastside 18th Street was a criminal street gang within the meaning of section 186.22, subdivision (f).[6] Therefore, the People argue, the

---

gang were associated. However, the court noted, section 186.22, subdivision (b) does not require that a defendant be a member of a criminal street gang, only that the defendant commits a felony either to benefit a gang, or in association with a gang and that the defendant has a specific intent to aid gang members in the commission of a felony. (*Id.* at p. 1369.) Thus, while one defendant belonged to a different gang in a different part of San Diego County, a reasonable fact finder could still find he committed the charged crimes in association with and for the benefit of the Diablos. (*Ibid.*) *Ramirez* held that the gang evidence was "insufficient to support the prosecution's contention that the Sureños [were] a single 'criminal street gang' " under section 186.22, subdivision (f). (*Ramirez*, at pp. 813–814.) While the prosecution's expert referred to two predicate offenses involving two alleged subsets of the overarching gang, he failed to connect the subsets to one another or to the overarching gang. (*Id.* at pp. 815–816.)

[6] Thus, Dominguez's reliance on *People v. Nicholes* (2016) 246 Cal.App.4th 836 is misplaced. In that case, the existence of a

gang enhancement was properly based on the crime benefitting the Eastside 18th Street gang.

We agree. Despite the 18th Street gang's numerous subsets, there was little confusion as to which subset Dominguez belonged or the determination that the crime was intended to benefit that same subset. Dominguez, Mendoza, as well as three other suspects, drove to a housing development controlled by the Rose Hills gang during an ongoing feud over territory. The Rose Hills gang and Eastside 18th Street gang shared a border. When they came across two young Hispanic men as they stood outside, one of the suspects asked one of the young men where he was from. Dominguez then opened fire. Addressing a hypothetical based on identical facts, the prosecution's gang expert testified that the defendants went to the housing development "to take control of the turf" and "show that they are a stronghold . . . gang." Yelling "[w]here are you from?" at the victims "builds character for the gang" and "builds a stronghold for the gang that these guys are willing to shoot at anybody." In addition to demonstrating their willingness to commit crimes for the gang, the associates' presence also helps members because they can serve as lookouts. Their presence also instilled fear in both the community and the smaller, weaker Rose Hills gang. Thus, substantial evidence supported the determination that the crimes were committed at the direction of, in association with, or to benefit the Eastside 18th Street gang.

---

gang was based on predicate offenses and/or primary activities of the gang's subsets. (See *id.* at p. 840)

II. Gang expert testimony

Mendoza contends that three portions of Officer Carbajal's gang expert testimony were testimonial hearsay and should have been excluded under *Sanchez*, *supra*, 63 Cal.4th 665, including: (1) Officer Carbajal's testimony that an FI card prepared by Officer Finnigan identified Mendoza as member of the Babitos gang; (2) Officer Carbajal's testimony relaying Officer Finnigan's out-of-court statement as to why he filled out that FI card; and (3) Officer Carbajal's testimony that Mendoza had been field identified as an 18th Street gang member or associate at least four times between 2009 and 2012. We disagree.

A. *Sanchez*, *supra*, 63 Cal.4th 665

In *Sanchez*, *supra*, 63 Cal.4th 665, the defendant was charged with drug and firearm offenses as well as active participation in the Delhi street gang. At trial, a gang expert relied upon a "STEP notice," police documents, and an FI card as the basis for his expert opinion.[7] Those documents indicated

---

[7] Police officers issue STEP notices to individuals associating with known gang members. The purpose of the notice is to both provide and gather information. The notice informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may face increased penalties for his conduct. The officer records the date and time the notice is given, along with other identifying information like descriptions and tattoos, and the identification of the recipient's associates. Officers also prepare field identification or FI cards that record an officer's contact with an individual. The card contains personal information, the date and time of contact, associates, and nicknames. STEP notices and FI cards may also record statements made at the time of the interaction. (*Sanchez*, *supra*, 63 Cal.4th at p. 672.)

Sanchez associated with, and had been repeatedly contacted by police while in the presence of, Delhi gang members. (*Id*. at pp. 671–673.) The expert had never met Sanchez and had not been present when the STEP notice was issued or during any of Sanchez's other police contacts. His knowledge derived solely from the police reports and FI card. Based on the information in the STEP notice, the police documents, and the FI cards, as well as the circumstances of the offense at issue, the expert opined that Sanchez was a member of the Delhi gang and that the charged crimes benefitted the gang. (*Id*. at p. 673.)

Sanchez, *supra*, 63 Cal.4th 665 held that the case-specific statements relayed by the expert witness regarding the defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford v. Washington* (2004) 541 U.S. 36.[8] Furthermore, the error was not harmless beyond a reasonable doubt. (*Sanchez*, at pp. 670–671.)

Sanchez, *supra*, 63 Cal.4th 665 distinguished between an expert's general knowledge and case-specific facts about which the expert has no independent knowledge. "Case-specific facts

---

[8] In *Crawford v. Washington*, *supra*, 541 U.S. 36, the United States Supreme Court held that the Sixth Amendment's confrontation clause generally bars admission of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68.)

are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) Over time, the distinction between background information and case-specific hearsay had become blurred, the court noted, leading to the rule that an expert could explain the "matter" upon which he or she relied, even if that matter was hearsay. (*Id.* at pp. 678–679.) California law allowed such hearsay "basis" testimony if a limiting instruction was given; in cases where an instruction was inadequate, the evidence could be excluded under Evidence Code section 352.[9] (*Id.* at p. 679.)

However, *Sanchez*, *supra*, 63 Cal.4th 665 concluded, "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Id.* at p. 679.) "Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (*Id.* at p. 684.) Alternatively, the court held, "the evidence can be admitted through an appropriate witness and the expert may

---

[9] Under Evidence Code section 352, a court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

assume its truth in a properly worded hypothetical question in the traditional manner." (*Ibid.*)

However, *Sanchez*, *supra*, 63 Cal.4th 665 made clear that its holding did not do away with all gang expert testimony. "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," that is, he or she may "relate generally" the "kind and source of the 'matter' upon which his opinion rests." (*Id.* at pp. 685–686.) "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Id.* at p. 685.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

To determine whether admission of the challenged testimony constituted prejudicial error, we use the two-step analysis required by *Sanchez*. "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation

if the statement is *testimonial hearsay*, as the high court defines that term."[10] (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

B. STANDARD OF REVIEW

Ordinarily, the erroneous admission of nontestimonial hearsay is a violation of state statutory law (*Sanchez*, *supra*, 63 Cal.4th at p. 685) and is subject to the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Stamps* (2016) 3 Cal.App.5th 988, 997.) Under this standard, reversal is required only if it is reasonably probable that the defendant would have achieved a more favorable result if not for the error. (*People v. Wall* (2017) 3 Cal.5th 1048, 1060.) However, the erroneous admission of testimonial hearsay in violation of a defendant's right to confront witnesses against him is "an error of federal constitutional magnitude" and requires reversal unless the error is "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Sanchez*, at pp. 685, 698.)

---

[10] "Although the high 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. The high court justices have not, however, agreed on what the statement's primary purpose must be." (*People v. Dungo* (2012) 55 Cal.4th 608, 619.) "On appeal, we independently review whether a statement was testimonial so as to implicate the constitutional right of confrontation." (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.)

C. FORFEITURE

The People contend that by failing to object to Officer Carbajal's testimony that officers field identified Mendoza as a gang member or associate at least four times from 2009 and 2012, Mendoza has forfeited his challenge to this portion of Officer Carbajal's testimony. (See Evid. Code, § 353, subd. (a); *People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Dykes* (2009) 46 Cal.4th 731, 756.) We disagree. At trial, Mendoza's defense counsel—citing hearsay and confrontation clause grounds—objected to Officer Carbajal's testimony regarding the FI card prepared by Officer Finnigan as well as Officer Finnigan's out-of-court statement to Officer Carbajal as to why he filled out the FI card.[11] Counsel did not object to Officer Carbajal's testimony that Mendoza had been field identified as an 18th Street gang member or associate at least four times between 2009 and 2012.

However, lodging more specific or additional confrontation clause objections would have been futile because at the time of trial, California law allowed an expert to testify to hearsay evidence that formed the basis of the expert's opinion. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 617–618, disapproved by *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13; *People v. Stamps*, *supra*, 3 Cal.App.5th at p. 995 [*Sanchez* occasioned "paradigm shift" in law]; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 [review granted Mar. 22, 2017, S239442, opn. ordered to remain precedential]; *Conservatorship of K.W.* (2017) 13

---

[11] Officer Carbajal testified that Officer Finnigan said he detained Mendoza and completed an FI card after spotting Mendoza and a group of juveniles tagging "18th St. BVS" in a known 18th Street gang hangout. According to Officer Carbajal, BVS is an abbreviation for Babitos.

Cal.App.5th 1274, 1283 [because *Gardeley* was controlling at time of trial, counsel was "not required to assert objections that would have been clearly, and correctly, overruled"]; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507–508.) Thus, Mendoza's claim has not been forfeited.

D. MERITS

We first address Officer Carbajal's testimony that an FI card prepared by Officer Finnigan identified Mendoza as member of the Babitos gang and Officer Carbajal's testimony relaying Officer Finnigan's out-of-court statement as to why he filled out that FI card. The People maintain this was nontestimonial hearsay, and thus did not violate Mendoza's confrontation clause rights. "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 689.)

It is unclear whether the FI card contained testimonial hearsay. *Sanchez*, *supra*, 63 Cal.4th 665 concluded that FI cards may be testimonial, but did not hold they always are. (*Id.* at p. 697.) Statements made to officers in the course of informal interactions, and not gathered for the primary purpose of use in a later criminal prosecution, are not generally testimonial. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 585; *People v. Valadez* (2013) 220 Cal.App.4th 16, 35–36.) In contrast, if an FI card is "produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Sanchez*, at p. 697.) Thus, whether an FI card should be deemed testimonial depends on the purpose and circumstances

surrounding its preparation. (*Ibid.*) Information obtained during encounters between officers and suspected gang members does not necessarily constitute testimonial hearsay, as "such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution." (*Valadez*, at p. 36.)

Nevertheless, Mendoza notes that Officer Finnigan filled out the FI card at issue here after catching Mendoza and other individuals tagging BVS. Thus, according to Mendoza, Officer Finnigan filled out an FI card because he caught Mendoza committing a crime and used the card to document Mendoza's crime and gang membership. However, there is no evidence that Mendoza was prosecuted, or even arrested, for this crime—or, for that matter, any gang-related crime prior to the instant offense.[12] Therefore, we do not know if Officer Finnigan completed the FI card to document a crime or for "some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 689.) In any event, we cannot simply assume that the information recorded by Officer Finnigan in 2009, and ultimately relayed by Officer Carbajal in 2016, was testimonial hearsay. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 585.) Because there was no further evidence regarding the circumstances under which this particular FI card was prepared, the record is insufficiently developed to allow us to determine whether the challenged statements were testimonial.

---

[12] Indeed, according to trial counsel, before Mendoza was convicted of the instant offense, he had a single conviction for statutory rape and no convictions for gang-related or violent behavior.

Nevertheless, although Mendoza has the burden on appeal to demonstrate error, the People had the burden at trial to show that the challenged testimony did not relate to testimonial hearsay. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 584.) Based on the insufficiently developed record in this case, we cannot conclude that the People met this burden. However, even if the FI card constituted testimonial hearsay, the improper admission of this evidence was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. 18.) At trial, Officer Powers and Officer Kuey both testified about their personal interactions with Mendoza. Officer Powers had contact with Mendoza on July 30, 2009, and identified him as an Eastside 18th Street associate.[13] Officer Kuey encountered Mendoza on June 12, 2012, and July 17, 2012, and testified that, on at least on occasion, Mendoza had previously admitted being an 18th Street gang member.[14] Notably, when discussing

---

[13] Although, on appeal, Mendoza describes Officer Powers' identification methods as over-inclusive, Officer Powers was available for cross-examination on this point. Indeed, Mendoza's own gang expert addressed this issue. But the jury credited Officer Powers' testimony and "it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

[14] Thus, Officer Carbajal's testimony that Mendoza was field identified as an 18th Street gang member or associate at least four times between 2009 and 2012 was a recitation of properly admitted evidence. When a case-specific fact has been independently proven by competent evidence, an expert is permitted to reiterate that fact in support of his opinions, even if the expert has no personal knowledge of it. (*People v. Burroughs*

Mendoza in closing argument, the prosecutor did not reference eight encounters with law enforcement (one with Officer Finnigan, one with Officer Powers and two with Officer Kuey as well as the alleged four additional encounters with unnamed officers) as one would expect. Instead, the prosecutor admitted, the jury could well think: "[Y]ou have not proven to me beyond a reasonable doubt that Mr. Mendoza is a gang member. There's a couple [of] F.I. cards, but it's not enough."

In sum, Dominguez, a documented 18th Street gang associate, Mendoza, a documented Eastside 18th Street associate and admitted 18th Street gang member, and three other suspects drove to a housing development controlled by the Rose Hills gang during an ongoing feud over territory. Upon coming across two young Hispanic men, a suspect asked one of the young men where he was from and opened fire. Officers identified Dominguez as the shooter and Mendoza as the driver. When addressing a hypothetical based on identical facts, the prosecution's gang expert opined that the crimes were committed for the benefit of, in association with, or at the direction of the 18th Street gang. Thus, properly admitted evidence revealed beyond a reasonable doubt that the shooting was gang-motivated.

III. Aiding and abetting instruction

Mendoza contends that the trial court improperly instructed the jury on premeditated murder based on aiding and abetting liability. He claims that the trial court "failed to

---

(2016) 6 Cal.App.5th 378, 403, 407.) Although Mendoza contends that Officer Carbajal's testimony was actually referencing four *additional* encounters with other, unnamed, non-testifying, officers, we do not read the record in this way.

instruct the jury that in order to convict [him] of willful, deliberate, and premeditated attempted murder on an aiding and abetting theory, the jury had to find that [he] harbored those mental states." (Capitalization omitted.)

Mendoza did not object to the trial court's instructions at trial and his claim is thus forfeited. (*People v. Valdez* (2004) 32 Cal.4th 73, 137.) In arguing against forfeiture, Mendoza cites *People v. Kitchens* (1956) 46 Cal.2d 260 (*Kitchens*), which held that the failure to object at trial did not constitute a waiver on appeal because objecting "would have been futile, and '[t]he law neither does nor requires idle acts.' " (*Id*. at p. 263.) However, *Kitchens* concerned an objection which would have been baseless at trial, but was applicable on appeal due to a change in the law following trial. Such is not the case here. " '[A] trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for a reason asserted at trial. A defendant may not argue on appeal that the court should have excluded the evidence for a reason not asserted at trial.' " (*People v. Chaney* (2007) 148 Cal.App.4th 772, 778, italics omitted.)

According to Mendoza, unlike *People v. Kitchens*, *supra*, 46 Cal.2d 260, although the law here has not changed following trial, this distinction is irrelevant. Mendoza contends that the controlling consideration is whether, at the time of trial, the law is settled and is adverse to the argument the defendant makes on appeal. Although *Kitchens* recognized that a defendant need not anticipate unforeseen changes in the law and make objections based upon the hope that the law will change, on appeal,

Mendoza argues that the law has in effect *already* changed, although our Supreme Court has yet to explicitly connect the dots between its decisions and make note of this.[15] Thus, before the trial court, Mendoza could have made the same argument he posits on appeal. His failure to do so constitutes forfeiture of the argument here.

In any event, the jury was properly instructed under controlling California Supreme Court precedent. The trial court instructed the jury with CALCRIM No. 401, which provides that in order to prove a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that the perpetrator committed the crime; the defendant knew that the perpetrator intended to commit the crime; before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

Furthermore, the trial court instructed: "Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are

---

[15] Mendoza argues that viewing *People v. Lee* (2003) 31 Cal.4th 613 in light of *People v. Seel* (2004) 34 Cal.4th 535 "one must conclude that just as an aider and abettor must personally harbor an intent to kill in order to be convicted of non-premeditated attempted murder, an aider and abettor must personally harbor an intent to kill, premeditation and deliberation, and must act willfully, to be convicted of premeditated attempted murder."

proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

As Mendoza acknowledges, our Supreme Court has held that section 664, subdivision (a) "properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not require that an attempted murderer personally acted with willfulness, deliberations, and premeditation, even if he or she is guilty as an aider and abettor." (*People v. Lee*, *supra*, 31 Cal.4th at p. 627.) Thus, a trial court does not "err by failing to instruct the jury to determine personal willfulness, deliberations, and premeditation in the case of an aider and abettor." (*Id.* at p. 628.) Although Mendoza invites this court to hold that *Lee* was wrongly decided, we decline the invitation as the Supreme Court's decisions remain binding on us and the trial court's instruction followed this still-controlling law. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

IV. Remand for resentencing

On October 11, 2017, the Governor signed Senate Bill 620, which amends section 12022.53 to give the trial court the authority to strike in the interests of justice a firearm enhancement allegation found true under that statute. Effective January 1, 2018, section 12022.53, subdivision (h), is amended to state: "The court may, in the interest of justice pursuant to

Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2(h).)

Citing *In re Estrada* (1965) 63 Cal.2d 740, Mendoza and Dominguez argue that the section 12022.53, subdivision (h), amendment applies because their cases are not yet final on appeal. We agree. Under *Estrada*, courts presume that, absent evidence to the contrary, the Legislature intends an amendment reducing punishment under a criminal statute to apply retroactively to cases not yet final on appeal. (*Id*. at pp. 747–748; see *People v. Brown* (2012) 54 Cal.4th 314, 324.) *Estrada* has been applied not only to amendments reducing the penalty for a particular offense, but also to amendments giving the court the discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 75.)

Thus, Dominguez and Mendoza contend that their cases must be remanded for resentencing so the trial court can consider whether to strike the firearm enhancements imposed in this case. The People agree that the amendment to section 12022.53 is subject to *In re Estrada* and will apply retroactively to cases not final on appeal. But they have argued that because the amendment does not become effective until January 1, 2018, the issue is not yet ripe. Accordingly, the People contend, "this Court should not consider the claim until January 2018." As this opinion will be handed down after January 1, 2018, the issue is now ripe. Although we express no opinion as to how the trial court should exercise its newly granted discretion under section

12022.53, subdivision (h), we do conclude that the trial court must exercise this discretion in the first instance.

DISPOSITION

Upon remand, the trial court shall hold a sentencing hearing to consider whether, pursuant to Penal Code section 12022.53, subdivision (h), to strike or dismiss an enhancement otherwise required by Penal Code section 12022.53. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

BENDIX, J.