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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERMAN HERNANDEZ,

Defendant and Appellant.

B276313

(Los Angeles County
Super. Ct. No. BA432809)

APPEAL from judgment of the Superior Court of Los Angeles County, Douglas W. Sortino, Judge. Affirmed.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant German Hernandez guilty in count 2 of carrying a loaded unregistered handgun (Pen. Code, § 25850, subd. (a)),¹ and in count 4 of assault with a firearm (§ 245, subd. (a)(2)). As to count 2, the jury found true the allegation that the firearm was not registered to defendant. As to count 4, the jury found true the allegations that defendant personally used a firearm (§ 12022.5, subd. (a)) and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).²

The court sentenced defendant to 14 years in state prison, consisting of the upper term of 4 years in count 4, plus 10 years for the gang enhancement.³ The court imposed a concurrent term of two years in count 2.

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

² Count 3 for driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)) was dismissed prior to trial, and the jury found defendant not guilty of attempted willful, deliberate, and premeditated murder in count 1 (§§ 664/187, subd. (a)(1)).

³ The court concluded the section 12022.5, subdivision (a) enhancement elevated the assault with a firearm in count 4 to a violent felony for purposes of section 186.22, subdivision (b)(1)(C). Having imposed the 10-year gang enhancement, it did not impose an additional firearm enhancement.

Defendant contends: (1) the evidence is insufficient to support the gang enhancement; (2) the prosecution's gang expert's testimony violated his Sixth Amendment right to confrontation; (3) the prosecutor's statements during closing argument impermissibly lowered the burden of proof for conviction; (4) counsel was ineffective for failing to object to hearsay by officers not certified as experts; and (5) the case must be remanded to permit the trial court to exercise its discretion to strike the section 12022.5, subdivision (a) enhancement in light of Senate Bill 620.

We affirm the judgment.

FACTS⁴

The Shooting

On January 11, 2015, at about 4:40 p.m., Ricardo T.⁵ witnessed a shooting near 40th Place in Los Angeles. He

⁴ Defendant did not present evidence in his defense.

⁵ Ricardo T. testified that he did not want to be involved in the case and was afraid to talk to the police. He initially testified that he did not remember what he saw. After a 911 call he made was played for him, he admitted making the call. Los Angeles Police Department Officer Melissa Angert testified that witnesses in the South Central area typically were very afraid to talk to the police because

heard people arguing and then a loud noise. Ricardo T. called 911 and said that he was about 10 feet from the shooter, whom he described as a male Hispanic, wearing jeans and a dark hoodie, and holding a silver handgun. The shooter then ran away with a “Black guy.” Ricardo T. told the operator: “He’s actually shooting again right now. He just shot three shots right now.” Several Los Angeles Police Department officers responded to the radio broadcast of the shooting. Officers Daniel Hayashi and Noe Lopez were responding to the call when their patrol car’s license recognition system alerted them to a stolen car they had just passed. The officers were about 200 yards from the location of the reported shooting. Codefendant Jerome White⁶ was driving the stolen Honda Civic, and defendant was the passenger. The officers followed the car. White drove over the center line into oncoming traffic and drove through a red light. White eventually pulled over. He and defendant exited the vehicle and ran in opposite directions.

Officers Hayashi and Lopez chased White. Defendant ran in a different direction. Defendant and White ignored the officers’ commands to stop. White was eventually detained. Officers found a firearm magazine, containing two

of potential gang retaliation. People who talked to the police could be considered “snitches.”

⁶ White is not a party to this appeal.

rounds of ammunition, and a shaved wrench in White's pocket.

A police helicopter directed officers to defendant's location. Officer Anthony Cabrialess and his partner ordered defendant to stop running. After several requests, defendant did so, and was taken into custody. Officer Cabrialess took an exemplar of defendant's hands with a gunshot residue kit. Gunshot residue was found on defendant's hand.

Officer Manuel Gutierrez and his partner responded to the call and found the white Honda Civic unoccupied with the engine running. Officer Gutierrez found a stainless steel, semi-automatic, .380-caliber handgun on the front passenger seat. One bullet was in the chamber, and six were in the magazine, which held seven rounds. The officer also found thirty-one .380-caliber bullets on the ground next to the driver's side of the car. On the floorboard of the front passenger side of the car, Officer Gutierrez found two wrenches that had been shaved down so they could be used as car keys. Near the shooting location, officers found a spent .380-caliber casing between two cars, and another in a gutter.

Ballistics analysis showed that the magazine found in White's pocket fit the gun and that the recovered casings were fired from that gun. The handgun was unregistered.

Officer Angert spoke with Ricardo T. shortly after the shooting. He told her that he heard shooting outside his house. When he looked outside, he saw two people next to a car, and other people shooting at them. The shooting victims

drove away in a dark Altima. In a field show-up, Ricardo T. identified defendant as the shooter, and White as the driver. Ricardo T. also identified a photograph of the gun retrieved from the Honda as the one he had seen.

A surveillance video from a nearby house captured the shooting. The video showed a car stopped by a wall, and a person exiting. Pedestrians were on the street, and shots were fired. After the shooting, the person got back into the car and drove away. The video quality was too poor to make a facial identification.

Gang Evidence

Officers Joseph Marx and David Dixon testified regarding contacts that they had with defendant and other 41st Street gang members. Defendant admitted 41st Street gang membership. Officer Alfred Garcia testified to a contact with White, in which White admitted 41st Street gang membership and used the moniker “Jay.” White had two gang tattoos on his face. One was a teardrop, and the other was the word “1st.” In Officer Garcia’s experience, “1st” is another name for the 41st Street gang.⁷

Officers Christopher Bellah and Anthony Cabriaes testified as gang experts. Given a hypothetical with facts

⁷ Officer Garcia had been assigned to the area where the shooting took place for 17 years. The 41st Street gang was one of the primary gangs that he investigated.

identical to those in the present case, Cabriales opined the shooting was committed in association with, at the direction of, or for the benefit of the 41st Street gang, and that it was committed with the intent to promote, further, or assist criminal conduct by gang members.

DISCUSSION

Sufficiency of the Evidence Supporting the Gang Enhancement

Defendant argues there is insufficient evidence to support the gang enhancement under section 186.22, subdivision (b), on the assault with a firearm conviction in count 4. Defendant reasons the evidence is insufficient to demonstrate he committed the assault with a firearm for the benefit of, at the direction of, or in association with the 41st Street gang. We disagree. A reasonable trier of fact could conclude beyond a reasonable doubt that defendant committed the shooting in count 4 in association with, and for the benefit of, his street gang.

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. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*Ibid.*) 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. Lindberg* (2008) 45 Cal.4th 1, 27.) 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' (*Ibid.*)" (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*).)

“There is rarely direct evidence that a crime was committed for the benefit of a gang. For this reason, “we routinely draw inferences about intent from the predictable results of action. . . . We can discover mental state only from how people act and what they say.”” (*People v. Ewing* (2016) 244 Cal.App.4th 359, 379 (*Ewing*), citing *People v. Miranda* (2011) 192 Cal.App.4th 398, 411–412 (*Miranda*).)

Section 186.22, Subdivision (b)(1)

Section 186.22, subdivision (b)(1), provides: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the

punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished” There are two prongs to the enhancement: the first requires proof that an offense was committed for the benefit of, at the direction of, or in association with a criminal street gang; the second requires proof the offense was committed with the specific intent to promote, further, or assist other criminal conduct by gang members.⁸ (*Albillar, supra*, 51 Cal.4th at p. 51.)

“[T]he Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it ‘clear that a criminal offense is subject to increased punishment under [section 186.22, subdivision (b)(1)] only if the crime is “gang related.” [Citation.] Not every crime committed by gang members is related to a gang.” (*Albillar, supra*, 51 Cal.4th at p. 60.)

Gang Expert Testimony at Trial

Officer Bellah testified that gang members possess guns for a variety of reasons, including committing crimes, protecting the gang’s territory, and intimidating witnesses. A gang member venturing into another gang’s territory is likely to meet a violent reaction. In the area of the location

⁸ Defendant challenges the sufficiency of the evidence supporting the first prong only.

where the targets of the charged shooting were standing was a building with 41st Street gang graffiti, covered by a black “X.” The “X” was a sign of disrespect. Gang members protect their turf against such acts. Officer Bellah expressed the opinion that an armed gang member seeing this type of disrespectful act would retaliate with violence. Gang members would confront someone they did not know if the person entered the gang’s territory. Typically the gang member would identify his gang, brandish a weapon, and tell the other person to leave.

Officer Cabriaes provided additional opinion testimony, based on his three years of experience dealing with the 41st Street gang. Defendant’s commitment to the gang was evidenced by the large tattoo “41” on his chest and stomach and another reading “187,” the Penal Code section for murder, on his trigger finger. The “187” tattoo is a gang tattoo that “can indicate the level of violence that some individuals are willing to go to.” Members have to receive permission from the gang before getting a tattoo. A gang member cannot obtain approval if he has not shown commitment, usually by “putting in work”—i.e., committing crimes.

Officer Cabriaes testified that gang members commit crimes for profit, allowing the gang to earn money without its members having legitimate employment. The crimes can be committed in public without fear. The public’s perception of gangs as violent deters the reporting of crimes to law enforcement. Territory is important, particularly when it

comes to control of drug sales. The more territory a gang claims, the more sales it can make. Increased territory also yields more opportunity to extort money from legitimate businesses and to recruit additional gang members. A gang with a larger territory inspires even greater fear in the community. Individuals who enter gang territory but are not recognized by a gang member will be confronted.

Officer Cabriales was aware that the 41st Street gang has numerous rivals. Despite being largely out-numbered by one rival—the Playboys gang has over twice the membership of the 41st Street gang—the gang survives by being “extremely violent” and committing acts of violence “just to show force.” The gang’s primary activities are felony vandalism, narcotic sales, robberies, assault with a deadly weapon, shootings, and murders. Officer Cabriales was familiar with two incidents of assault with a deadly weapon by 41st Street gang members.⁹

Officer Cabriales testified that 41st Street gang graffiti located within the gang’s territory had been crossed out with black spray paint. Crossing out gang graffiti is “a huge sign of disrespect.” It could show that a rival gang or individual is attempting to move into the gang’s territory, or “there might be an ongoing beef.” The crossing out of graffiti is taken seriously, because fear and respect are central to a gang’s ability to conduct business openly. Officer Cabriales

⁹ The prosecution introduced certified minute orders for both convictions.

believed the 41st Street gang would retaliate if the person responsible for crossing out their graffiti was located.

Gang members will patrol their territory for rivals to protect their territory and business. Officer Cabriales had arrested gang members for possession of firearms who explained that they were out “hunting” and patrolling. Gang members patrol in groups, with each person taking a specific role, such as lookout, driver, and shooter.

Officer Cabriales testified that it was not unusual for witnesses to crimes to be hesitant to come forward in the area where the shooting took place. In his three years of experience in the area, this had happened on “almost a daily basis” because “[t]here’s a huge fear of retaliation.”

Officer Cabriales was presented with a hypothetical question mirroring the facts of the case. He opined the shooting was committed in association with, or at the direction of, or for the benefit of the 41st Street gang, and that it was committed with the intent to promote, further, or assist criminal conduct by gang members. His opinion was based on the location of the shooting, in an area claimed by the 41st Street gang, where its graffiti had been crossed out. He believed the confrontation with the unidentified victims escalated to the point where the gang was determined to kill.

The shooting benefited the gang, in Officer Cabriales’s opinion, because it showed that even a verbal confrontation with the 41st Street gang can escalate to a shooting or killing. Because the shooting occurred in the daytime, there were more people exposed to the crime, which would result

in community members being afraid of the gang and less likely to report crimes. The shooting also benefitted the gang by serving as “an example to even a younger group within that gang to show how business is done if you’re confronted.” The presence of a second gang member benefitted the gang, because he could report the incident to other gang members and verify its occurrence.

Analysis

Defendant argues that “the only solid evidence presented was that two gang members committed the crimes at issue in their gang’s claimed territory,” which is insufficient evidence to sustain the jury’s finding. Defendant’s characterization of the facts omits other substantial evidence in support of the gang enhancement, however, and ignores the total lack of evidence that defendant and White committed the shooting independently of the 41st Street gang.

Under the circumstances of this case, the evidence that defendant committed the shooting with a fellow gang member inside gang territory is sufficient to support the finding that the crimes were committed in association with a criminal street gang. Where there is no evidence to suggest “a frolic and detour,” “the jury [can] reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.” (*People v. Morales* (2003) 112 Cal.App.4th

1176, 1198 (*Morales*); see also *Ewing*, *supra*, 244 Cal.App.4th at p. 379; *Miranda*, *supra*, 192 Cal.App.4th at pp. 412–413.) Here, there was no evidence to suggest that the shooting was the result of “a frolic and detour” unrelated to the 41st Street gang. (*Morales*, *supra*, at p. 1198.) As defendant concedes, the prosecution demonstrated that he committed the shooting with White, a fellow gang member, within 41st Street gang territory—more specifically next to graffiti that openly challenged the 41st Street gang’s claim to that territory. Substantial evidence supports the finding that the shooting was committed in association with a criminal street gang.

Substantial evidence that the shootings were in association with a criminal street gang alone is sufficient to support the gang allegation. Here, there is also substantial evidence that defendant shot at the victims for the benefit of the 41st Street gang. Defendant argues that the record does not support Officer Cabriales’s testimony, and that by itself the testimony is insufficient to find an offense gang related within the meaning of section 186.22, subdivision (b)(1). We conclude that there was “an underlying evidentiary foundation” for the officer’s testimony. (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261, citing *People v. Ochoa* (2009) 179 Cal.App.4th 650, 659.) In conjunction with other evidence presented at trial, the gang expert’s testimony may support a finding that the offense was gang related. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

The independent evidence in this case included photographs of defendant that depicted tattoos that covered a significant portion of his body, and signified his 41st Street gang affiliation. Evidence was also presented—in the form of lay witness testimony, photographs, video surveillance footage, and the transcript of a 911 call made by a percipient witness—that defendant was with another 41st Street gang member when he shot at the victims in territory claimed by the 41st Street gang, next to 41st Street gang graffiti that had been crossed out in black.

The combination of expert testimony and independent evidence was damning. Officer Cabriales testified that defendant's tattoos evidenced his deep commitment to the 41st Street gang, and that gang members could only get tattooed if they showed their loyalty. (See *Albillar, supra*, 51 Cal.4th at p. 62 [gang tattoos demonstrated a strong affiliation with gang].) In particular, the “187” tattoo on defendant's trigger finger signified his willingness to resort to deadly violence on the gang's behalf. The 41st Street gang was able to hold its territory against much larger neighboring gangs “by being extremely violent, by committing violent acts against their rivals or committing violent acts period . . . just to show force.” The gang's primary activities included felony vandalism, narcotics sales, street robberies, assault with a deadly weapon, shootings, and murder. Both predicate offenses used to establish the gang's primary activities were assaults with a firearm. The evidence of defendant's commitment to preserving the 41st

Street gang’s violent reputation supports the inference that defendant committed the shooting to benefit the 41st Street gang. (See *id.* at p. 63 [“Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1)”]; see also *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354; *People v. Romero* (2006) 140 Cal.App.4th 15, 18–19.)

The jury could reasonably infer that defendant and White were “patrolling” the gang’s threatened territory at the time the shooting took place, and that defendant shot at the victims to protect 41st Street gang territory. Officer Cabriales testified that gang members patrol their territory for rivals to maintain control and protect their business. Officer Bellah testified that gang members regularly carry guns when defending their territory. Officers discovered a loaded stainless steel semi-automatic .380-caliber handgun on the front passenger seat of the stolen getaway car, and thirty-one .380-caliber bullets on the ground next to the driver’s side of the car. Defendant was clearly armed. The graffiti at the scene of the shooting—41st Street gang graffiti crossed out in black—showed that a rival entered the gang’s territory to demonstrate extreme disrespect. Defacement of 41st Street gang graffiti could also signal that the rival gang was “attempting to move into their turf or there might be an ongoing beef.” The surveillance footage shows the victims’

car pulling into the area where the graffiti was located. The jury could reasonably conclude that defendant perceived the victims' presence in disputed territory to be a challenge to the 41st Street gang's authority. Cabriales opined that the 41st Street gang would retaliate against the gang member or gang responsible for crossing out 41st Street gang graffiti if possible. It would be reasonable to infer that the shooting was retaliation for real or imagined disrespect.

Evidence was presented that defending 41st Street gang territory would serve multiple purposes. Maintaining their territory against larger gangs would increase the gang's reputation. Protecting territory also benefitted the gang in narcotics sales—larger territory equaled an increase in customers. Narcotics sales, in turn, benefitted 41st Street gang members by allowing them to make money without working legal jobs. Preservation of territory also allowed the 41st Street gang to maintain sources of extortion within its boundaries, and gave it greater access to potential new gang members to increase its ranks and assist in committing further crime.

The gang also benefitted because more than one member was present and could verify what transpired. Cabriales testified that gang members support each other, using their presence to assist in gang crimes and further intimidate victims. The evidence showed that defendant and White “relied on their common gang membership and the apparatus of the gang in committing the [shooting]” (*Albillar, supra*, 51 Cal.4th at p. 60.) A resident who

witnessed the crime reported that defendant and White were together when defendant fired at the victim. White aided defendant by driving the stolen getaway car. He was apprehended with a firearm magazine containing two rounds of .380-caliber ammunition, and a shaved wrench that could be used to steal a car in his pocket. Both the additional ammunition and the car theft tool could be used to facilitate defendant in the crime. As a witness to the shootings, White could bolster the gang's reputation for violence and defendant's personal standing in the gang by recounting the shooting to other 41st Street gang members. From White's presence and actions during the shootings, the jury could reasonably find the crime was committed to benefit the gang by increasing its reputation for violence.

The gang's ability to commit crimes was also enhanced by the manner of the shootings, which defendant committed in an open area in broad daylight, accompanied by a fellow gang member, who had a 41st gang tattoo on his face where it could be seen by a victim. Officer Cabriaes expressed the opinion that violent gang crimes committed in the open tend to intimidate the community and deter cooperation with law enforcement. He opined that the shooting benefitted the gang by demonstrating that even a verbal confrontation could escalate to a shooting or killing. Officer Cabriaes's opinion is borne out by the record. The victims of the shooting never came forward. The resident reporting the shooting provided details of the incident to a 911 operator and to Officer Angert on the night of the shooting, but by the

time of trial his entire memory of the incident inexplicably vanished, until the witness was confronted with the recording of his statements. Officer Angert testified that witnesses in the gang's neighborhood are afraid to cooperate due to gang retaliation, and that the reporting resident here told her several times he did not want to testify. Officer Cabriaes also testified that witnesses are regularly deterred from assisting law enforcement by the threat of gang retaliation. The jury could rationally find that the witness's dubious memory failure provided factual support for Officer Cabriaes's opinion testimony that the gang's public displays of violence benefit the gang by intimidating members of the community into not cooperating with the police.

Our dissenting colleague misconstrues our holding by taking a single sentence out of context. We stated, "Under the circumstances of this case, the evidence that defendant committed the shooting with a fellow gang member inside gang territory is sufficient to support the finding that the crimes were committed in association with a criminal street gang." Our use of the words "under the circumstances" signifies that we find substantial evidence in the record presented. Our opinion correctly applies the substantial evidence rule, in accordance with a large body of well-established case law. An expert witness testified that two of the primary activities of the 41st Street gang are shootings and murders, and that the 41st Street gang is surrounded by larger rival gangs but holds its own territory against the odds by committing acts of extreme violence. At the time of

the shooting the gang was engaged in an active struggle to maintain its territory, which was critical to the gang's ability to generate income and increase its ranks. Defendant demonstrated his commitment to the gang through the tattoos covering a large section of his body, and in particular through the tattoo "187" inked on his trigger finger, which broadcasted his willingness to kill for the gang. The shooting occurred when the intended victims pulled up in front of a wall on which a rival gang had shown blatant disrespect by crossing out 41st Street gang graffiti. Defendant and White were already present at the location, armed and in a stolen vehicle. An expert testified that gang members often carry weapons when on patrol for rivals. White had gang tattoos on his face, which declared 41st Street gang affiliation to any potential victim. There were no indications that White and defendant were on a "detour" or "frolic." All of the evidence presented demonstrated that the men were acting to benefit the 41st Street gang. There was no evidence of some other motive for the shooting.

Our holding today does not interpret section 186.22, subdivision (b)(1) to apply whenever fellow gang members commit a crime together. As stated, we interpret section 186.22, subdivision (b)(1) to apply when fellow gang members commit a shooting together *under the circumstances presented in this case*. Whether there is sufficient evidence to support a true finding under section 186.22, subdivision (b)(1) when gang members commit a crime together is dependent on the facts of the particular

case. In this case, the evidence was more than sufficient. Substantial evidence supports the jury's true finding on the section 186.22, subdivision (b)(1)(C) enhancement in count 4.

Right to Confrontation

Defendant contends that Officer Cabrialess's testimony regarding the two predicate offenses offered to prove that the 41st Street gang was a criminal street gang under section 186.22, subdivision (b), violated his Sixth Amendment right to confront witnesses as interpreted in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). At trial, evidence was presented that 41st Street gang members Heriberto Gomez and David Portillo were each convicted of assault with a firearm in violation of section 245, subdivision (a)(2), and that both convictions included a gang enhancement under section 186.22, subdivision (b). Defendant does not challenge the men's gang membership or the convictions. He instead argues that the officer's testimony regarding the underlying facts of the predicate offenses "included 'case-specific facts' relating 'to the particular events and participants alleged to have been involved in the case being tried'" "because the offenses charged incorporated these predicate offenses as part of the gang enhancement." We

hold that there is no error under *Sanchez*, and that regardless, defendant has suffered no prejudice.¹⁰

“To establish that a group is a criminal street gang within the meaning of [section 186.22, subdivision (b)(1)], the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group’s primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group’s members must engage in, or have engaged in, a pattern of criminal gang activity.’ (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) ‘A “pattern of criminal gang activity” is defined as gang members’ individual or collective “commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more” enumerated “predicate offenses” during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]’” (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 581.)

¹⁰ The Attorney General argues defendant forfeited this issue by failing to object on confrontation clause grounds in the trial court. Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert “basis” evidence does not violate the confrontation clause. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1128–1131.) We will therefore address the merits of this claim.

Our Supreme Court’s holding in *Sanchez* prohibits an expert from “supply[ing] case-specific facts about which he has no personal knowledge.” (*Sanchez, supra*, 63 Cal.4th at p. 676.) “Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.”¹¹ (*Ibid.*) In this case, the particular events involved in the predicate offenses and the individuals who committed them were unrelated to the case being tried against defendant. There is no *Sanchez* violation.

Assuming Officer Cabriales’s testimony included inadmissible details of the predicate offenses, any error is harmless under both the federal and state constitutions. Defendant concedes Officer Cabriales had personal knowledge that Gomez and Portillo were members of the 41st Street gang. Following *Sanchez*, gang experts “[may still] rely on information within their personal knowledge” (*Sanchez, supra*, 63 Cal.4th at p. 685.) The predicate convictions were conclusively established by the certified court records showing the convictions and the gang findings, a fact that defendant also concedes. Independent evidence of the predicate offenses demonstrated that the 41st Street

¹¹ In *Sanchez*, the prosecution’s gang expert testified to specific content relating to police contact with the defendant in the course of several gang-related incidents, which were contained in a STEP notice. The expert had no personal knowledge of the defendant, and testified that his knowledge of the individual incidents was derived from police reports.

gang had a pattern of criminal activity, and that its primary activities included assault with a deadly weapon. Defendant suffered no prejudice.

Ineffective Assistance of Counsel

Defendant contends that his counsel was ineffective for failing to object to testimony elicited from Officers Marx, Dixon, and Garcia, who were not testifying as “certified” gang experts.¹² Defendant argues that although his admissions that he was a 41st Street gang member were admissible as party admissions, the membership admissions of fellow 41st Street gang members, including White, were inadmissible hearsay. He asserts that if this testimony and

¹² Officer Marx contacted defendant and filled out a field identification card for him on July 15, 2011. Defendant told him that he was in the 41st Street gang, in the Tiny Gangsters clique, and that his gang moniker was “Solo.” Defendant had a gang tattoo on his chest that read, “41.” He was also with another admitted 41st Street gang member.

Officer Dixon encountered Kamal Cleveland, who admitted to being a 41st Street gang member on September 10, 2014. Cleveland had a “41” tattoo that covered his face. He was with defendant, who again admitted he was in the 41st Street gang.

Officer Garcia encountered White and completed a field identification card on March 21, 2014. White admitted he was an active 41st Street gang member with the gang moniker of “Jay” and had gang tattoos on his face.

Cabriales's testimony regarding the underlying facts of the predicate offenses had been excluded, the jury would not have found the gang enhancements true. We reject the contention.

In order to succeed on a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance fell below an objective standard of reasonableness and that actual prejudice flowed from counsel's performance—i.e., a reasonable probability of a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 691–692.) We defer to trial counsel's tactical decisions. (*People v. Frye* (1998) 18 Cal.4th 894, 979; *People v. Bolin* (1998) 18 Cal.4th 297, 333; *People v. Scott* (1997) 15 Cal.4th 1188, 1212.) If the record does not explain counsel's action, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. (*People v. Weaver* (2001) 26 Cal.4th 876, 926; *People v. Earp* (1999) 20 Cal.4th 826, 896.)

Defendant's claim of ineffective assistance of counsel is not cognizable on direct appeal because the record fails to indicate the motivations for counsel's acts or omissions. “If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Otherwise, the claim is more appropriately raised in a

petition for writ of habeas corpus. [Citation.]’ [Citations.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) Here, defense counsel could have reasonably decided that hearsay testimony was preferable to the prosecutor calling additional witnesses to provide non-hearsay, but potentially more damaging, testimony on the issues. Because the record is silent as to counsel’s reasoning, the issue must be addressed in a habeas corpus petition.

Prosecutorial Error¹³

Defendant contends that the prosecutor’s statements during closing and rebuttal arguments improperly equated reasonable doubt with common sense, thereby lowering the burden of proof for conviction in violation of his Fifth and Fourteenth Amendment due process rights.¹⁴ The contention is forfeited and without merit.

¹³ Defendant characterizes the prosecutor’s conduct as error rather than intentional or knowing misconduct.

¹⁴ Defendant specifically challenges the following statements that the prosecutor made to the jury:

“Ladies and gentlemen, amongst you, 12 of you, you have over 100 years of common sense In this case we need be [*sic*] to be reasonable and we need you to evaluate the evidence in the reasonable interpretation and context of how this occurred, why it occurred and when it occurred.”

Defendant acknowledges that he did not object to the prosecutor's statement at trial, but argues that there is no waiver because an objection would have been futile under existing California law. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.) But this case does not involve a situation in which an objection to the claimed misconduct would have been futile under then-existent law but is now meritorious due to a change in the law. Instead, defendant claims that existing law forecloses his objection. Defendant points to an opinion that the California Supreme Court issued denying review of *People v. Bickerstaff* (1920) 46 Cal.App. 764. In *Bickerstaff*, the appellate court held it was error to instruct the jury that reasonable doubt was "a fair doubt, based upon the testimony, reason and common sense." (*Id.* at p. 772.) In denying review, the California Supreme Court disapproved of that portion of the Court of Appeals' analysis. Noting that the trial court's reasonable doubt instruction was similar to one it had twice approved, the Supreme Court stated the

"In this case, ladies and gentlemen, you have a lot of evidence. You don't just have Ricardo T.'s eyewitness testimony. You have the scientific evidence. You have the video evidence. You have the evidence of defendant's flight. You have the evidence of motive. And that's why I tell you do not outsmart your common sense. Consider it all. Consider it all in its context."

instruction “should not be considered erroneous, although it is not as full and possibly not as clear as the instruction usually given.” (*Id.* at p. 775 [Supreme Court’s opinion on denial of hearing].)

Even if defendant has not forfeited his contention, we are bound to reject it because binding Supreme Court precedent holds the statement was accurate. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [courts exercising inferior jurisdiction must accept the law as declared by courts exercising superior jurisdiction].) We need not decide whether California law permits a prosecutor to equate common sense with reasonable doubt because we conclude any error was harmless. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35 [“To establish prosecutorial misconduct . . . it is necessary to show the right to a fair trial was prejudiced.”].) The trial court instructed the jury as to the reasonable doubt standard and instructed that it must ignore any contrary argument by counsel.¹⁵ “We must presume the jury followed [those] instruction[s] [such] that [any] error was thereby rendered harmless.” (*Id.* at p. 37.)

¹⁵ Specifically, the trial court instructed the jury with CALCRIM No. 220 (reasonable doubt) and CALCRIM No. 200 (“If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.”).

Section 12022.5, Subdivision (a) Enhancement

Finally, defendant contends that the trial court now has discretion, under recently enacted Senate Bill No. 620, to strike the firearm enhancement in this case. He argues the case should be remanded to allow the trial court to exercise its discretion to strike the firearm enhancement, because the court lacked the power to do so at the time of sentencing. Senate Bill No. 620 takes effect January 1, 2018.

The Attorney General does not dispute that Senate Bill No. 620 will apply to all non-final judgments. He responds with three points explaining why defendant is not entitled to relief: (1) Senate Bill No. 620 is not effective until January 1, 2018, so it is premature to afford relief; (2) there is no relief to afford because the trial court has already dismissed the firearm use allegation; and (3) there is no reasonable possibility the trial court would exercise its discretion in view of the court's comments at sentencing and the upper term sentence imposed.

The Attorney General is correct that we cannot reverse based on legislation which has no present legal effect. (*People v. Righthouse* (1937) 10 Cal.2d 86, 88 ["It has been uniformly held in this state that a statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactments. It speaks from the date it takes effect and not before. Until that time it is not a law and has no force for any purpose."].) This problem could be

easily remedied by vacating the submission and issuing an opinion after January 1, 2018, so we do not see it as a significant bar to relief.

On the other hand, we conclude defendant is not entitled to have the cause remanded for the trial court to exercise its discretion. The trial court has dismissed the firearm use finding, after utilizing it to bring into play the 10-year gang enhancement applicable to violent felonies. There is no firearm use finding for the court to dismiss. Moreover, the trial court made clear that defendant's conduct warranted the maximum possible sentence under the law. Invoking the procedure set forth in *People v. Rodriguez* (2009) 47 Cal.4th 501, 508–509, the court imposed the upper term for the assault with a firearm, and structured the sentence to include the 10-year gang enhancement by relying on the firearm use finding to elevate the substantive charge to a violent felony. Had the court desired to impose a lesser sentence, it could have instead imposed the low term of two years or middle term of three years for assault with a firearm in count 2, and also the low term of three years or the middle term of four years for use of a firearm, in lieu of the gang enhancement. The court's deliberate imposition of the upper term on the substantive offense and ten years on the gang enhancement, combined with dismissal of the alternative punishment for use of a firearm, establishes that there is no point to remand for the court to exercise its new discretion to strike a firearm use finding. There is no reasonable probability the court would

do so. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand to allow trial court to exercise its discretion to dismiss a conviction under the three strikes law unnecessary where the trial court had imposed the maximum sentence including the upper term on one count and discretionary enhancements].)

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P. J.

I concur:

DUNNING, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The People v. German Hernandez
B276313

BAKER, J., Concurring in Part and Dissenting in Part

Today's decision effectively interprets Penal Code section 186.22, subdivision (b)(1)¹ to authorize enhancing a defendant's sentence just so long as the prosecution proves two gang members were involved in the commission of a crime. The majority is not shy about the reach of its holding, proclaiming that "under the circumstances of this case the evidence that [defendant and appellant German Hernandez (defendant)] committed the shooting with a fellow gang member inside gang territory is sufficient to support the finding that the crimes were committed in association with a criminal street gang." That view, however, cannot be squared with the statute the Legislature passed.

Correctly understood, the gang enhancement statute requires proof satisfying two separate elements: the People must prove the substantive crime(s) were committed "for the benefit of, at the direction of, or in association with any criminal street gang" (the gang-related element) and the

¹ Statutory citations that follow are to the Penal Code.

People must also prove the crime(s) were committed “with the specific intent to promote, further, or assist in any criminal conduct by gang members” (the specific-intent element). (§ 186.22, subd. (b)(1).) Joint commission of a crime by gang members is ordinarily sufficient to satisfy the second of these elements. (*People v. Albillar* (2010) 51 Cal.4th 47, 68 “[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members”] (*Albillar*).) But it alone is not enough to satisfy the first. (*Id.* at p. 60 “[T]he Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it ‘clear that a criminal offense is subject to increased punishment under the [Street Terrorism Enforcement and Prevention (STEP)] Act only if the crime is “gang related””].)

As I will endeavor to demonstrate, some courts—including this one—appear to be collapsing these separate elements when undertaking an analysis of the evidence offered to support the “in association with” prong of the gang enhancement statute. In doing so, they ease the prosecution’s burden of proof in a manner inconsistent with both the Legislature’s expectations in enacting the STEP Act and our Supreme Court’s decision in *Albillar*. Properly applied, the “in association with” prong was not satisfied by

the evidence in this case, and the proof that defendant's shooting was undertaken "for the benefit of" a criminal street gang was just as weak, if not weaker. I therefore dissent from the portion of the majority's opinion that affirms the true finding on the section 186.22, subdivision (b)(1) enhancement. As to the other issues raised by defendant, I agree the majority reaches the correct result.

I

The evidence at trial was straightforward, albeit with some obvious holes.

A

In the afternoon on January 11, 2015, Ricardo T. (Ricardo) heard people arguing outside his home, followed by a loud bang. Ricardo could not hear what the people were saying, nor could he tell whether the voices belonged to men or women. Ricardo called 911 and reported gunshots had been fired. He stated he saw a light-skinned "Mexican" man with a mustache shoot in the direction of two people standing next to a Nissan Altima. The shooter was accompanied by a Black man, and both were wearing jeans and dark hoodies.

After a car chase, police apprehended two men generally consistent with the assailant descriptions provided by Ricardo. In a field show-up, Ricardo positively identified both men as the people he had seen outside his home. Jerome White (White) was the driver of the getaway vehicle,

and an officer found a gun magazine loaded with two rounds of ammunition in White's back pocket. Defendant was the vehicle's passenger. A sample taken from his hands when he was apprehended tested positive for the presence of gunshot residue. No gunshot residue was found on White. When officers searched the getaway vehicle, they found an unregistered semiautomatic handgun on the front passenger seat.

According to police officers who had prior contact with defendant, he had admitted he was a member of the 41st Street criminal street gang (41st Street) and was known by the moniker "Solo." Defendant had tattoos related to 41st Street on his torso and arms; he also had "187" (the Penal Code statute for murder) tattooed on his index finger. White had also previously told a police officer he was a member of 41st Street and that his moniker was "Jay." White had a tattoo under one eye that read "1st."

A private security camera recorded video footage (with no audio) of a portion of the area in front of Ricardo's house at the time of the shooting. The video shows that at approximately 4:40 p.m., a sedan drives past Ricardo's house and parks on the side of the street opposite the house. A man walks along the sidewalk in front of Ricardo's house, and then comes into the middle of the street, moving in the direction the sedan was driving. The man raises his arm while holding an object, and a person standing near the sedan then moves out of the frame (presumably entering the vehicle) and the sedan pulls away. The video surveillance

camera's distance from the events in question was too great for the authorities to identify the man as defendant or the object he held as a gun. Police officers, however, believed the man was defendant based on the other findings in their investigation.

Along the street corner parallel to where the sedan had parked was a wall covered with "a bunch of graffiti" in red and black spray paint. In several places, the graffiti read "41st." In one place, 41st Street graffiti spray painted in red was crossed out by an "X" in black spray paint. The "X" was "shinier, brighter, and newer in comparison to the other paint on the building," but it was "dry" to the touch and "had been there." Other graffiti on the wall, which police officers could not attribute to any particular gang, had also been marked out. The surrounding area was also "plagued with graffiti." None of the graffiti on the wall referred to defendant's gang moniker (Solo), and there was no testimony identifying the person or persons responsible for spray painting any of the graffiti on the wall.

Investigators were never able to identify the intended victims, meaning the people at whom defendant shot.

B

Officers Bellah and Cabriaes were the prosecution's gang expert witnesses at trial. Both testified that marking out gang graffiti was meant to assert dominance over the territory and to convey disrespect to the person or gang identified by the defaced graffiti. Officer Cabriaes testified

that “fear and respect [were] the most important thing to gang members” because it allowed them to “conduct their business openly.” Officer Bellah testified it was extremely important for gang members to “retaliate” or “do something to get their respect back” if someone showed the gang or one of its members disrespect because otherwise the gang or gang member would appear weak and lose credibility. Officer Bellah also testified gang members generally were known to “patrol their area,” knew who did and did not belong there, and would confront people they did not recognize, especially if they were perceived to be rival gang members.

The prosecution posed the following hypothetical question to Officer Cabriaes: “It’s a Sunday at about 4:40 p.m. It’s daylight. Two members of a gang, let’s use in this case 41st Street[,] are together in a stolen vehicle. There is a firearm, a semiautomatic gun. Amongst them there are over 30 rounds of live ammunition and they are near an area, specifically a street corner where 41st Street graffiti has been crossed out. [¶] At this particular location an individual, perhaps two, stands alongside the wall. [¶] . . . [¶] So there appears to be some yelling going between the two groups. One of the gang members from 41st Street shoots at the other group next to the graffitied wall [where] 41st Street graffiti is crossed out. [¶] Thereafter, both the shooter and the person with the shooter flee in a car. However, [they] remain within a block area of the location. [¶] Do you have an opinion based on that hypothetical

whether that crime would be committed for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote or further or assist in any criminal activities by gang members?”

Officer Cabriales answered “yes.” He explained his opinion was based on the hypothetical facts indicating a “confrontation occurred in an area where 41st had claimed but was crossed out.” Officer Cabriales believed the hypothetical scenario suggested that someone showed disrespect to a 41st Street gang member, and that escalated to a degree that the gang member tried to shoot and kill the person showing disrespect. The officer was of the view that the crime benefited the gang because it showed “that even a verbal confrontation against the 41st Street gang” could get someone “potentially killed.” Furthermore, committing the crime in broad daylight on a Sunday meant more people would witness it, which would instill greater fear in the community and intimidate people from reporting future gang activity.

Officer Cabriales additionally testified the crime personally benefited the shooter because it improved his reputation in the gang and could serve as an example to younger gang members. Officer Cabriales opined (over a defense objection on grounds of assuming facts not in evidence) that the presence of the shooter’s fellow gang member was significant: the fellow gang member not only assisted the crime by serving as “a lookout or identifying the

threat,” he was also able to substantiate and spread word of the shooter’s conduct to other gang members.

On cross-examination, defense counsel asked Officer Cabriales whether a public shooting by a gang member would benefit the gang if the shooter acted for personal reasons unrelated to his gang membership. Officer Cabriales opined a gang member who shot a gun in public because of purely personal issues would still be acting for the benefit of a gang because the question of whether the shooting benefits the gang depended on “how the public perceives that action.” In Officer Cabriales’s view, the public would not see a gang member acting for personal reasons; they would “see[] a gang member irate, firing a gun in the air so that’s showing the rest of the community we’ve got to watch out for this gang because they’re out of control shooting guns in the air.” Defense counsel pressed further and asked, “What if the community doesn’t know that he’s from a gang?” Officer Cabriales maintained the crime would still be gang-related.

Defense counsel posed another hypothetical question to Officer Cabriales: If a store owner who happened to be a gang member shot a gun to protect his business from being robbed by someone who was not a gang member, would the shooting be for the benefit of the gang? Officer Cabriales opined it would, because the gang member’s failure to protect his store would be “detrimental to the perception his gang [had] of him”; it would “show[] a big sign of weakness.” Defense counsel then asked: “So it’s your testimony that an

individual within the society who [is] a gang member is perceived to commit acts for his gang just because society sees it that way?” When Officer Cabriales indicated he did not understand the question, the trial court interjected and asked, “[w]ould you agree that membership in a gang defines who the individual is to the extent it’s known in the community?” Officer Cabriales responded, “I would say yes.”

C

As the foregoing summary suggests, the evidence presented at trial left several factual questions unanswered. The identity of the people defendant shot at was unknown. There was no evidence as to why the intended shooting victims stopped their car when and where they did, nor, of course, was there any evidence they were responsible for the gang graffiti on the nearby wall. The jury did not know what, if anything, was said between defendant and the intended victims before the shooting. There was also no evidence from which a reasonable jury could infer the intended victims or other bystanders knew defendant or White were gang members—no evidence of gang names called out, gang signs displayed, or prominent 41st Street tattoos visible. And Officer Cabriales did not testify that members of 41st Street would commit crimes together to increase their chances of success, to bolster their confidence in one another, or because the gang had a “code of silence” that would protect them if the police ever came around asking questions.

II

Putting aside speculation masquerading as inference, there is no substantial evidence that defendant's assault with a deadly weapon was committed in association with the 41st Street gang. There was certainly evidence defendant committed the crime with White, but that is not enough. (*Albillar, supra*, 51 Cal.4th at pp. 61-62 ["in association with" requirement met because the "defendants' conduct exceeded that which was necessary to establish that the offenses were committed in concert"].) And there was little more evidence than that—just the fact that the shooting happened to occur near a wall with gang graffiti of largely unknown provenance and formulaic gang expert opinion testimony ungrounded in the evidence presented at trial. Neither suffices to make the insubstantial substantial. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046; *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [expert's opinion cannot be based on assumptions of fact without evidentiary support, or speculation or conjecture]; see also CALJIC No. 2.80 ["An [expert] opinion is only as good as the facts and reasons on which it is based"].)

The evidence that the firearm assault was committed for the benefit of 41st Street is also insufficient. Most significantly, there was no evidence that would allow the jury to infer that either the intended victims or members of the community would have known the shooter (i.e., defendant) was a member of 41st Street or that the shooting was gang-related. The gang expert's broadly expressed

opinion that simply assumed the contrary cannot suffice to make up for the evidentiary deficit.

A

The Legislature enacted the STEP Act in 1988 to address the “state of crisis . . . caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.” (§ 186.21.) The intent behind the STEP Act was to eradicate “criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.” (§ 186.21.) The STEP Act was not intended to punish gang members based solely on their affiliation with a gang. (§ 186.21; see also *People v. Mesa* (2012) 54 Cal.4th 191, 196-197.)

Section 186.22, subdivision (a)—not the subdivision at issue here—makes gang participation a substantive offense. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).) Subdivision (a) provides for punishment of “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” (§ 186.22, subd. (a).)

“Section 186.22(a) and section 186.22(b)(1)[, however,] strike at different things” (*Rodriguez, supra*, 55 Cal.4th at

p. 1138), and liability under the different provisions is not coextensive. “The enhancement under section 186.22(b)(1) punishes gang-related conduct, i.e., felonies committed with the specific intent to benefit, further, or promote the gang. [Citation.] However, ‘[n]ot every crime committed by gang members is related to a gang.’ [Citation.] As such, with section 186.22(a), the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang-related.” (*Ibid.*) Thus, while subdivision (a) of the statute can be satisfied with mere proof of criminal action in concert (plus knowledge of a gang’s pattern of criminal activity), section 186.22, subdivision (b)(1) is more demanding. (*Id.* at pp. 1134-1135.)

1

In Court of Appeal decisions following soon after the STEP Act’s enactment, courts found sufficient evidence to support a section 186.22, subdivision (b)(1) enhancement where the defendant was a gang member who committed the underlying crime in order to harm a rival gang. (See *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484-485 [robbery and killing committed for purpose of pinning crime on rival gang]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1366-1367, 1386 [victim killed after proclaiming himself a member of rival gang that had defaced graffiti promoting defendants’ gang] (*Olguin*); *People v. Gamez* (1991) 235 Cal.App.3d 957, 963, 978 [retaliatory shooting of people associated with rival

gang], disapproved on another ground in *People v. Gardeley* (1996) 14 Cal.4th 605, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665.) These early cases, however, did not always specify whether the evidence demonstrated the crime was committed to benefit a gang, in association with a gang, or at the direction of a gang.

In later cases, courts began to more finely demarcate the circumstances sufficient to show a crime was committed for the benefit of, or in association with, a criminal street gang under section 186.22, subdivision (b)(1). Crimes were deemed to benefit a gang when they provided intangible advantages, such as enhancing or protecting the gang's reputation, business, or territory. (See, e.g., *People v. Carr* (2010) 190 Cal.App.4th 475, 481 & fn. 5 [the defendant shot victim, whose car bore insignia associated with Hispanic gangs, in disputed gang territory]; *People v. Mendez* (2010) 188 Cal.App.4th 47, 51 [the defendants identified themselves as members of gang before committing carjacking] (*Mendez*); *People v. Romero* (2006) 140 Cal.App.4th 15, 17, 19 [the defendant shot victims at rival gang hangout].) Crimes were also deemed to benefit a gang when they provided tangible benefits that could be used to further the gang's illicit activities. (See, e.g., *Mendez, supra*, at p. 57 [money from robberies]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1506, 1512 [loaded, unregistered firearm].)

As for crimes allegedly committed in association with any criminal street gang, *People v. Morales* (2003) 112 Cal.App.4th 1176 (*Morales*) is one of the first cases to

attempt to detail the proof that would suffice. In *Morales*, the jury convicted the defendant of committing robberies with two fellow gang members and found the defendant committed the crimes for the benefit of, at the direction of, or in association with a gang pursuant to section 186.22, subdivision (b)(1). (*Id.* at p. 1184.) On appeal, the defendant challenged the gang enhancement on the ground that the evidence the defendant committed the crimes “in association with other gang members” was “circular”—and therefore insufficient—to prove he committed the crimes “in association with” a gang. (*Id.* at p. 1198.)

The *Morales* court was not persuaded. The court conceded it was “conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang,” but it found no evidence to support that theory on the record presented. (*Morales, supra*, 112 Cal.App.4th at p. 1198.) The *Morales* court therefore believed “the jury could reasonably infer the requisite association from the very fact that [the] defendant committed the charged crimes in association with fellow gang members.” (*Ibid.*) The Courts of Appeal in subsequent cases relied on *Morales*, and in particular, the excerpt from the opinion we have just quoted, to affirm gang enhancements when a defendant participated in the crime with other gang members. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 625 (*Williams*); *People v. Leon* (2008) 161 Cal.App.4th 149, 162-163 (*Leon*); *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332 (*Martinez*).)

At the same time, the Courts of Appeal also began to identify limits to the reach of section 186.22, subdivision (b)(1). Enhancements were reversed in cases where a lone defendant acted without evidence of a gang motive or absent indicia of gang membership. (See, e.g., *In re Frank S.* (2006) 141 Cal.App.4th 1192; *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*)). Gang enhancements were also reversed where a defendant acted with others but there was no evidence of the existence of a gang motive (see *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*); *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*)).²

2

In 2010, our Supreme Court's decision in *Albillar*, *supra*, 51 Cal.4th 47, provided more authoritative guidance on the proof requirements of section 186.22, subdivision

² Although the defendant in *Ramon* was with a fellow gang member when he committed the crimes in that case, the Court of Appeal considered only whether the defendant committed the crimes to benefit a gang. The *Ochoa* court criticized the *Ramon* decision in light of *Morales*, asserting, "the fact in *Ramon* that the defendant had a fellow gang member in the stolen vehicle with him would support a finding that he acted in association with the gang." (*Ochoa*, *supra*, 179 Cal.App.4th at p. 661, fn. 7.) The defendant in *Albarran* acted with a second shooter in committing the crimes in that case, but there was no evidence the other shooter was a gang member. (*Albarran*, *supra*, 149 Cal.App.4th at pp. 220, 227 & fn. 9.)

(b)(1). *Albillar* involved three defendants who were members of the same family (two brothers and a cousin) and also members of the same criminal street gang. (*Albillar*, *supra*, at p. 51.) The defendants were convicted of multiple sexual assault offenses and a violation of the substantive gang participation statute (section 186.22, subdivision (a)); the jury also found true gang sentencing enhancements alleged under the subdivision at issue here, section 186.22, subdivision (b)(1). (*Albillar*, *supra*, at p. 50.)

On appeal, the defendants challenged the sufficiency of the evidence supporting the gang enhancements imposed pursuant to section 186.22, subdivision (b)(1) (as well as their convictions on the section 186.22, subdivision (a)(1) substantive gang charge). (*Albillar*, *supra*, 51 Cal.4th at p. 51.) The evidence at trial established that as each defendant raped the victim, the others facilitated the rapes by holding the victim down, preventing her escape, or blocking third persons from coming to her assistance. (*Id.* at pp. 52-53, 61.) The victim knew at least two of the defendants were gang members, and the defendant's apartment where the crimes took place was "saturated" with gang paraphernalia." (*Id.* at pp. 51-52, 62.) The *Albillar* court concluded there was enough evidence to show the defendants committed the crimes both for the benefit of their gang and in association with their gang. (*Id.* at p. 51.)

As to the "in association with" prong of section 186.22, subdivision (b)(1)'s gang-related element, the *Albillar* court confirmed the Legislature intended it to limit the

enhancement's application to ““gang related”” conduct. (*Albillar, supra*, 51 Cal.4th at p. 60, quoting *Gardeley, supra*, 14 Cal.4th at p. 622.) The Court explained the mere fact that a crime involves more than one gang member does not invariably make the crime gang-related. (*Albillar, supra*, at p. 60 [“Not every crime committed by gang members is related to a gang”].)

The *Albillar* court held, however, there was substantial evidence to support application of the gang enhancement because—and this is key—the defendants’ conduct “exceeded that which was necessary to establish that the offenses were committed in concert.” (*Albillar, supra*, 51 Cal.4th at p. 61.) As *Albillar* explains, there were facts demonstrating “[d]efendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other’s cooperation in committing these crimes and that they would benefit from committing them together. They relied on the gang’s internal code to ensure that none of them would cooperate with the police, and on the gang’s reputation to ensure that the victim did not contact the police.” (*Id.* at pp. 61-62.) In other words, these facts allowed the Court to conclude the defendants “came together *as gang members* to attack [the victim]” (*id.* at p. 62) and “relied on their common gang membership and the apparatus of the gang” to commit the crimes (*id.* at p. 60). That reliance, in turn, was sufficient to establish the defendants committed the crime

not simply in association with each other, but with the criminal street gang itself.

As to the “for the benefit of” prong of section 186.22, subdivision (b), the *Albillar* court held gang expert testimony that a defendant’s crimes “enhanc[ed] [the gang’s] reputation for viciousness” could raise an inference the crime was committed for the benefit of a gang. (*Albillar, supra*, 51 Cal.4th at p. 63.) The prosecution’s gang expert in *Albillar* so testified, and the expert’s opinion was supported by a factual basis, i.e., the victim’s knowledge of the defendants’ status as gang members. (*Ibid.* [gang expert’s testimony that the victim’s knowledge that at least two of her assailants were members of the Southside Chiques gang meant that “[m]ore than likely this crime is reported as not three individual named [d]efendants conducting a rape, but members of [Southside] Chiques conducting a rape, and that goes out in the community by way of mainstream media or by way of word of mouth”].)

In addition, the *Albillar* court assessed the sufficiency of the proof adduced concerning the separate and distinct specific-intent element of section 186.22, subdivision (b)(1), namely, the requirement that a defendant commit the offense “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” The *Albillar* court explained this specific-intent prong did not require proof the defendants specifically intended to promote, further, or assist a gang-related crime. (*Albillar, supra*, 51 Cal.4th at p. 66.) That is, while the first element of section

186.22(b)(1) requires proof a crime is gang-related, the second element required only that the defendants specifically intended “to promote, further, or assist criminal conduct by *gang members*.” (*Id.* at p. 67.) Thus, for purposes of this specific-intent element, the *Albillar* court opined that “if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Id.* at p. 68.)

3

Post-*Albillar*, the Courts of Appeal have continued to find crimes were committed to benefit a gang based on evidence a defendant was acting to promote or protect the gang’s reputation, business, or territory. (See, e.g., *People v. Vega-Robles* (2017) 9 Cal.App.5th 382 [defendant helped gang members commit crimes in order to protect the gang members’ business, on which the defendant’s own business relied]; *People v. Ewing* (2016) 244 Cal.App.4th 359 [defendant assisted gang member in attempting to expand gang business into new territory] (*Ewing*); *People v. Gonzales* (2015) 232 Cal.App.4th 1449 [defendant transported armed gang members to gang location]; *People v. Mejia* (2012) 211 Cal.App.4th 586 [defendants attempted to kill or injure rival gang member after act of disrespect]; *People v. Jasso* (2012) 211 Cal.App.4th 1354 [defendant shot at person believed to

be rival gang member]; *People v. Galvez* (2011) 195 Cal.App.4th 1253 [defendant assaulted man who was attempting to report a prior crime by the defendant and fellow gang members] (*Galvez*).)

Courts have also continued to cite the early *Morales* decision in holding crimes were committed in association with criminal street gangs. (See, e.g., *People v. Hunt* (2011) 196 Cal.App.4th 811, 819 [observing that *Albillar* cited *Morales* and cases that relied upon *Morales*].) But many of the post-*Albillar* decisions recognize *Albillar*'s construction of the "in association with" prong requires something more than facts indicating multiple gang members participated in a given crime. (See, e.g., *People v. Garcia* (2017) 9 Cal.App.5th 364, 374, 379-380 [evidence defendant and associate came together as gang members to commit crime where defendant responded to associate's request to assist him in gang-related assault]; *People v. Weddington* (2016) 246 Cal.App.4th 468, 477-478, 484-485 [evidence defendants came together as gang members where they committed "signature" gang crime in which gang members would leave their territory to commit daytime burglaries in suburban communities]; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1368-1369 [evidence defendants "relied upon their gang membership" in committing multiple robberies together where the circumstances showed they could count on each other's assistance to commit the crimes and each other's silence if apprehended by the police]; *Galvez, supra*, 195 Cal.App.4th at p. 1261 [evidence defendant relied on

common gang membership and apparatus of gang in assaulting witness to prior crime committed by gang members].)

B

As just detailed, section 186.22, subdivision (b)(1) requires evidence a crime was committed to provide the gang some advantage, in reliance on some attribute of the gang, or that the perpetrators of the crime came together as gang members and not for some other reason or out of mere happenstance. The evidence that is “reasonable, credible, and of solid value” (*Albillar, supra*, 51 Cal.4th at p. 60) in this case does not suffice to show any of this to be true.

In Officer Cabriales’s opinion, given in response to the prosecutor’s hypothetical question, a shooting in circumstances like those in this case benefitted 41st Street by protecting and enhancing the gang’s reputation and territory. After being presented with the prosecutor’s hypothetical question intended to track the facts of this case, the officer testified the evidence showed a “confrontation” arose in an area where 41st Street graffiti had been crossed out. According to Officer Cabriales, a gang member like defendant would perceive “the individual who was arguing with him” as a sign of extreme disrespect, and shooting at that individual benefitted the gang by showing “that even a verbal confrontation against the 41st Street gang” could get someone “potentially killed.”

Officer Cabrialess opinion that the shooting was gang-related had no foundation in the evidence presented, nor in reasonable inferences from the evidence. The intended victim or victims were never identified. The site of the shooting did not border rival gang territory, and it was far from the only area of 41st Street territory containing graffiti. Nobody reported hearing the content of any argument that preceded the shooting, and nobody reported seeing the intended shooting victims defacing 41st Street graffiti. Indeed, the “X” that was spray painted on top of the 41st Street graffiti was “dry” and “had been there” when officers inspected it—including by touching it—“within two hours of the shooting.” On the facts presented, any inference that defendant shot at the people near the Altima for defacing 41st Street graffiti or for somehow challenging the gang was not an inference at all—it was pure speculation and insufficient proof of gang-relatedness. (See, e.g., *Albarran*, *supra*, 149 Cal.App.4th at p. 227 & fn. 9 [“The facts that more than one shooter was involved and the crime occurred in a gang area in Palmdale do not demonstrate one way or another that the crime was gang motivated”]; compare *Olguin*, *supra*, 31 Cal.App.4th at pp. 1366-1367 [victim repeatedly called out name of gang whose logo had been spray painted near defaced graffiti of defendants’ gang].)

Focusing specifically on the “in association with” requirement, Officer Cabrialess did not clearly explain in

what way he believed defendant committed the assault in association with 41st Street. But there was evidence that White was defendant's gang confederate and Officer Cabriales did posit that White could serve as "a lookout," spot a "threat" to the gang, or confirm and publicize defendant's conduct to other members of 41st Street after the shooting. The testimony concerning White, though, does not suffice to show he and defendant "came together *as gang members*" or "relied on their common gang membership and the apparatus of the gang" to commit the assault in this case. (*Albillar, supra*, 51 Cal.4th at pp. 60, 62.) There was no evidence in this case that White actually acted as a lookout, identified the victim as a threat to the gang, or spread word of defendant's conduct after the shooting; in the video surveillance footage, there is no second man accompanying the shooter even visible. Nor was there other testimony that White's involvement in the crime conformed to a particular attribute, structure, or mode of operation of 41st Street. (Compare *id.* at p. 62 [defendants relied on gang's "internal code" and "reputation," of which the victim was aware, to hinder apprehension]; *Ewing, supra*, 244 Cal.App.4th at pp. 367, 377-378 [defendant's assistance to Norteno gang member conformed to "regimental rules" under which Norteno members were expected to operate].) Thus, there was no evidence that White and defendant's "conduct exceeded that which was necessary" to commit the assault together. (*Albillar, supra*, at p. 61.)

The majority opinion reaches a contrary conclusion for the same reason given by the Attorney General—he asserts that “when several gang members commit a crime together, it is reasonable for a jury to infer they are committing the crime in association with the gang.”³ This misunderstands *Albillar* and blurs the separate proof requirements of the gang-related and specific-intent elements of section 186.22, subdivision (b). To be sure, defendant and White’s participation in the commission of the charged firearm assault would be sufficient to satisfy the statute’s specific-intent element (*Albillar, supra*, 51 Cal.4th at p. 68), but mere joint participation does not automatically establish the crime was committed in association with a criminal street gang. Rather, *Albillar* and subsequent Court of Appeal decisions recognize some evidence beyond mere “active[] assist[ance]” among fellow gang members is required for there to be proof on which a reasonable jury could find a defendant came together with others *as gang members* or “relied on their common gang membership and the

³ Echoing *Morales*, the majority opinion also repeatedly asserts there was no evidence that defendant and White were on a detour or frolic unrelated to 41st Street. If these assertions imply defendant had the burden at trial to come forward with such evidence, I believe the majority opinion is mistaken.

apparatus of the gang in committing” the crime.⁴ (*Albillar, supra*, at pp. 60, 62.) That proof was lacking here.

2

With regard to section 186.22, subdivision (b)’s “for the benefit of” prong, Officer Cabriales believed the shooting benefited 41st Street by intimidating the community. That testimony lacked a proper factual basis, however, because no evidence was presented showing how a member of the community would know or believe the person who fired the shots in the afternoon on January 11, 2015, was a member of 41st Street.

⁴ Even pre-*Albillar* cases that relied on *Morales* to find sufficient evidence a defendant acted “in association with” a gang pointed to additional gang-related evidence beyond what “was necessary to establish that the offenses were committed in concert” (*Albillar, supra*, 51 Cal.4th at p. 61). (See, e.g., *Williams, supra*, 170 Cal.App.4th at pp. 597, 601, 625 [defendant sought to shield fellow gang member from police apprehension, possessed drugs to sell for the gang, and possessed guns and ammunition accessible to fellow gang members]; *Leon, supra*, 161 Cal.App.4th at p. 163 [defendant committed crimes with fellow gang member at apartment complex in rival gang territory where rival gang members lived]; *Martinez, supra*, 158 Cal.App.4th at p. 1333 [defendant and fellow gang member had gang tattoos that were “clearly visible” to robbery victim].)

Defendant's 41st Street tattoos were obscured by his clothing, he and White were not wearing colors or insignia associated with any particular gang, and there is no evidence either man made any gang hand signs or called out the gang's name or their personal monikers during the incident. (See, e.g., *Albarran*, *supra*, 149 Cal.App.4th at p. 220 [defendant and associate displayed no gang signs, made no gang announcements, and engaged in no gang graffiti during shooting]; *Ochoa*, *supra*, 179 Cal.App.4th at p. 662 [no evidence defendant "call[ed] out a gang name, display[ed] gang signs, [wore] gang clothing, or engage[d] in gang graffiti"; no evidence defendant later boasted about the crime; and no testimony victim saw defendant's gang tattoos]; compare, e.g., *Albillar*, *supra*, 51 Cal.4th at pp. 53, 61, 63 [victim knew defendants were gang members and defendants' friends threatened her "with her life" if she contacted police]; *Ewing*, *supra*, 244 Cal.App.4th at p. 369 [defendant had visible gang tattoo on his neck and drove a car with gang insignia on it to commit the crime]; *People v. Miranda* (2011) 192 Cal.App.4th 398, 404 [defendant part of a group that issued gang challenge and boasted gang association prior to committing crime]; *Mendez*, *supra*, 188 Cal.App.4th at p. 51 [same].)

In essence, Officer Cabriaes testified a crime would benefit a gang so long as it was subjectively perceived to be gang-related. That does not square with the text of section 186.22, subdivision (b)(1) nor the case law interpreting it. The statute requires evidence the crime be "committed for

the benefit of” a gang, which requires proof of some degree of purposeful action—on the facts here, that a purpose of defendant’s shooting was to benefit the gang, not merely that there might be some incidental benefit to the gang from a shooting done for some non-gang-related reason.

Furthermore, the idea that White’s presence at the scene of the shooting somehow provides proof of a benefit to the criminal street gang is unsupported by even Officer Cabrialess’s far-reaching expert testimony. He testified that having a second gang member present permits that member to “relay[] that whole incident to other gang members and verif[y] that the crime actually did occur,” but this establishes only that there was a “benefit [to] the individual gang member” by increasing his status among other members, not the gang overall.

C

In the end, looking to the hypothetical question the prosecution posed to its gang expert is really all that is necessary to demonstrate the evidence supporting the gang enhancement was insufficient. The only salient facts included in that question (quoted earlier) were these: one gang member, accompanied by another, was seen one afternoon near an area where his gang’s graffiti had been crossed out; “some yelling” may have occurred between the two gang members and one or more unidentified individuals who arrived by car in the same area; and one of the gang members fired a handgun at the other individuals. If that is

enough to satisfy section 186.22, subdivision (b)(1)'s gang-related element, just about any qualifying crime committed by more than one gang member in a graffiti-plagued neighborhood will be automatically subject to enhancement. I believe section 186.22, subdivision (b)(1) demands more: proof of gang-relatedness, not gang-accompaniment or gang-proximity. That proof was absent here, and the true finding on the section 186.22, subdivision (b)(1) enhancement should accordingly be reversed.

BAKER, J.