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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL OROZCO,

Defendant and Appellant.

B229209

(Los Angeles County
Super. Ct. No. BA325786)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Charlaine F. Olmedo, Judge. Affirmed.

Law Offices of Eber N. Bayona and Eber Nicholas Bayona for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Idan Ivri, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Gabriel Orozco (defendant) appeals from his convictions of murder and attempted murder. He challenges the sufficiency of the evidence to support that the crimes were premeditated or gang related. Defendant also contends that the gang expert's opinions were improper and unsupported by evidence of a gang motive or intent. Finally, defendant contends that there was insufficient evidence that he targeted the victim to support his conviction of attempted murder. We reject defendant's contentions and affirm the judgment.

BACKGROUND

1. Procedural Background

Defendant was charged with the first degree murder of Melissa Paul (Paul) (count 1), in violation of Penal Code section 187, subdivision (a),¹ and the attempted willful, deliberate, premeditated murder of Jorge Chamu (Chamu) (count 2), in violation of sections 664 and 187, subdivision (a). The information alleged as to both counts that defendant personally and intentionally discharged a handgun within the meaning of section 12022.53, subdivisions (c) and (d), and that defendant personally used a firearm, causing great bodily injury and death, within the meaning of section 12022.53, subdivision (d). The information also alleged that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members in violation of section 186.22, subdivision (b)(1).

A jury was unable to reach a verdict in defendant's first trial. The second jury convicted defendant of both counts as charged and found true all special allegations. On October 19, 2010, the trial court sentenced defendant to 90 years to life in prison, which included 25 years to life as to count 1, plus 25 years to life under section 12022.53, subdivision (d), and as to count 2, a consecutive 15 years to life, plus 25 years to life under section 12022.53, subdivision (d). The court also imposed mandatory fines and fees and ordered defendant pay restitution in the amount of \$4,713.03 to Paul's family,

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

and \$10,650 to the State Victim Compensation Board. The court awarded defendant custody credit for 278 days of actual custody and no conduct credit. Defendant filed a timely notice of appeal.

2. Prosecution Evidence

During the evening of February 6, 2007, defendant accompanied fellow members of the Cypress Park gang into the territory of their rival, the Avenues gang. They rode in a van driven by Adrian Martinez (Martinez). Defendant was in the front passenger seat, and in the back were Eduardo Aguilera (Aguilera),² Edward Arzate (Arzate), Jonathan Medina (Jonathan), and Robert Medina (Robert).

Chamu, a member of the Avenues gang, testified that he was walking with his friend Paul in the area of Verdugo Road, near Avenue 33, when the van slowly approached them and stopped alongside the couple. Chamu recognized the passenger as defendant, who attended the same school as Chamu and Paul. Defendant pointed a gun at them and asked about Chamu's gang affiliation. Someone in the van said, "Shoot him," or "Just shoot them," and defendant fired his gun three times as Chamu took cover behind a utility pole. Chamu pulled out his own gun and shot back once as the van moved away. Chamu then tossed his gun into the nearby bushes, and went to check on Paul.

Paul was struck by a .38 or .357-caliber bullet that pierced her lungs and aorta. She died as a result. Investigators determined that the fatal bullet had not been fired from Chamu's gun.

Aguilera testified that on the evening of the shooting he went "cruising" with the four other Cypress Park gang members. Martinez drove into Avenues territory to write graffiti. Once there, either Martinez or Jonathan said, "There's a noodle," meaning an Avenues gang member, an enemy of the Cypress Park gang. Martinez made a U-turn and approached Chamu and Paul. With his gun drawn, defendant asked Chamu, "Where are

² Aguilera testified at trial and his statement to the police was in evidence. Aguilera identified the occupants of the van mostly by their monikers, whose real names were identified in the course of the trial. Robert was known as "Happy"; Jonathan was known as "Lil' Boy"; Martinez was "Bouncer"; Azarte was "Whisper"; and defendant was known as "Oso."

you from?” Aguilera then heard three gunshots as Chamu moved quickly away. Aguilera heard another gunshot outside the van as they drove away.

Defendant, Chamu, and Paul had been students at Franklin High School where they had a class together. Chamu testified that once, before this shooting, after Chamu had heard that defendant was a Cypress Park gang member, he confronted defendant and asked defendant where he was from, meaning what was defendant’s gang affiliation. When defendant did not admit his membership in the Cypress Park gang, Chamu “dissed” him by saying “Fuck Cypress Park,” and then walked away. Chamu intended his words to be a challenge and understood that they could provoke a violent reaction. On a later occasion, defendant and another man approached Chamu at a market. Defendant signaled to Chamu that he had a gun tucked into his pants, but left with the other man when they saw that Chamu was with his adult guardian.

The prosecution’s gang expert, Los Angeles Police Officer Juan Chavez, testified that he was very familiar with the three dominant gangs in the area surrounding the neighborhood where Paul was shot, including both the Cypress Park and the Avenues gangs. Officer Chavez spoke to members of both gangs daily and documented his contact with them. He testified that the territory of the Cypress Park gang was completely surrounded by Avenues territory and the two gangs did not get along. Each gang expressed its rivalry by committing acts of violence ranging from simple battery to murder. The gangs protected their respective territories, and would violently retaliate for any intrusion. Offenses committed by one gang against the other would usually result in retaliation ranging from “tagging”³ to shooting. Cypress Park members referred to Avenues members as “noodles” to express their lack of respect. Officer Chavez explained that the phrase “Where are you from?” was meant to enforce respect. If said to a gang member it was a challenge to commit violence. If said to an intended robbery victim, it was meant to create fear.

³ In his testimony, defendant explained that “tagging” meant writing graffiti.

Officer Chavez was of the opinion that the Cypress Park gang was a criminal street gang whose primary activities ranged from simple battery to murder, possession of narcotics for sale, and automobile theft. His opinion was supported by evidence of two predicate acts: Cypress Park member, Isaac Martinez, was convicted of a double murder in 2006, and another member, Alfredo Melendez, Jr., was convicted of assault on a police officer with a firearm and being a felon in possession of a firearm after Melendez fired a revolver in Officer Chavez's direction in 2005.

Officer Chavez had become acquainted with brothers Jonathan and Robert Medina during investigative contacts. In his opinion both brothers were members of the Cypress Park gang. Based upon the facts of the shooting in this case, Officer Chavez was of the opinion that Aguilera and defendant were also Cypress Park gang members. Officer Chavez had many personal contacts with Martinez, who admitted his membership in the Cypress Park gang.

In response to a hypothetical question, based on the facts in evidence in this case, Officer Chavez opined that the shooting was a classic gang crime against a rival gang member. The fact that five Cypress Park gang members went together into rival territory indicated that they expected to encounter an Avenues gang member. Also, the fact that senior gang members, who often went along on shootings as witnesses to verify the crime and provide backup in case they encountered several rival gang members, participated here. Finally, the use of a van which was not registered to a Cypress Park gang member was an indication that it was chosen for gang business because it would be more difficult to trace back to the gang members.

Although Paul was never identified as an Avenues gang member, Officer Chavez was of the opinion that it was unlikely that the Cypress Park members cared whether they hit an Avenues member or a "noodle lover." Cypress Park members were known to take pride in killing women who associated with Avenues members. Cypress Park members despised the people who associated with Avenues members as much as they despised the Avenues members themselves.

Officer Chavez testified that both individual respect and respect for the gang were very important to all gang members. Gaining respect for the gang was the process of creating an atmosphere of fear and intimidation in the community, which prevented citizens from reporting crimes, in order to help gang members to get away with the crimes they committed. Gangs gain respect by retaliating against anyone who gives information about the gang's crimes to the police, even a fellow gang member. Most crimes in both Cypress Park and the Avenues were committed by members who were 15 to 19 years old. The more violent and heinous the crimes, the more respect would be accorded the members who committed them.

Officer Chavez was of the opinion that this shooting benefitted the Cypress Park gang by promoting an atmosphere of fear and intimidation in the community. He explained that when residents of the neighborhood heard about the gang's crimes, fear would prevent them from speaking out even when they knew who committed the crimes. In addition, because the Cypress Park gang territory was surrounded by rival territory, it was important for that gang to show how bold and violent it could be in order to garner respect from rivals. Each gang member would also strive for respect within the gang by being the hardest gang member possible.

Officer Chavez testified that gangs often used an untraceable or "clean" gun, which they would discard afterward, and that gang members usually shared guns within the gang.

3. Defense evidence

Aguilera's police interview

The recording of Aguilera's police interview was played for the jury. Aguilera admitted that he was in the van on the night of the crime and identified the others as defendant, Martinez, Robert and Jonathan, and Arzate. Aguilera claimed that the other gang members intended to retaliate for a prior shooting by Avenues members and

demanded the use of his van;⁴ and he came along for the ride. Defendant was armed with a .38-caliber handgun.

The van stopped on Division Street for Arzate to write some graffiti, and then the group continued on, looking for Avenues members. When they came across an Avenues member (Chamu) on Verdugo Road, the van stopped alongside him, and defendant pointed the gun at him and asked, “Where you from?” Defendant fired his gun as Chamu dove out of the way and shot back. The girl next to the Avenues member (Paul) was hit. Aguilera surmised that Chamu must have killed Paul because he thought she had set him up. Martinez admonished defendant that he should have gotten out of the van to shoot Chamu on foot rather than doing a drive-by.

After the shooting stopped, Aguilera demanded to be let out of the van, and the group dropped him off at his home. Aguilera identified photographs of defendant for police.

Defendant’s testimony

Defendant acknowledged that on the day of the shooting he had been a Cypress Park gang member for two years. He became a member of the gang because his uncle was a member. He knew Robert and Jonathan, who were also members of the gang at that time, and he had known Aguilera just over a year prior to the shooting, having been introduced by Martinez, a senior Cypress Park gang member. At first, Aguilera introduced himself as “Weapon” from the White Fence gang, even though he was not a member of White Fence. Martinez had given him permission to claim membership in Cypress Park. Defendant testified that falsely claiming membership in a gang would make someone a “fake” and a “nobody.” Defendant disliked Aguilera because of his false White Fence claim and because of another incident in which Aguilera left defendant without a ride home.

Aguilera had not yet been “jumped into” Cypress Park at the time of the shooting, and was going to be initiated by means of a beating the following weekend. Defendant

⁴ Though Aguilera claimed ownership of the van it was not registered to him.

was going to attend the event but not take part, because he was no match for Aguilera, who was older and stockier. Aguilera would be beaten by older gang members.

The night of the shooting, defendant was “hanging out” with Robert when Martinez and Aguilera arrived and suggested they go tagging. Defendant was reluctant to go with them both because he did not like Aguilera and he needed to make a drug sale. Defendant acquiesced when they promised to drive him home first. Defendant admitted that he had a .38-caliber revolver with him and explained that he had carried the gun for three or four months for protection against rival gang members, a necessity for a gang member who sold methamphetamine.

Aguilera drove the van; defendant, Martinez, and Robert were passengers. Jonathan was not with them. Instead of driving toward defendant’s home, Aguilera drove in the opposite direction, explaining that they were going to “write” near Division Street. Defendant was aware that Avenues was a rival of Cypress Park, and knew the territorial boundaries of the two gangs. Division Street was the border between the territories of the two gangs. Robert asked defendant for the gun so that he act as lookout for Martinez, and defendant gave it to him. When Martinez and Robert returned to the van after having written on a wall, Aguilera drove to a market near Division Street and Avenue 32. Martinez told Robert to give Aguilera the gun, and when he complied, Martinez and Aguilera wrote on the side of the store.

When they returned to the van, Aguilera got into the front passenger seat and Martinez drove to Verdugo Road and 31st Avenue, where Aguilera pointed out a pedestrian who was wearing a brand of shoe worn by Avenues gang members. He was walking with his girlfriend. When Martinez said that he intended to “hit him up,” meaning to “bang on him” or ask where he was from, defendant claimed that he was concerned that doing so while the man was with his girlfriend would make the gang look bad. Defendant was also worried because one of his best friends was recently convicted of killing a girl on the street. Defendant asked why he would do this, and Martinez replied, “Who gives a fuck? She’s a noodle lover. She gets what she has got coming . . . whatever happens.”

As Martinez made a U-turn and drove slowly alongside the couple, defendant tried to talk him out of it, but Martinez threatened to discipline defendant later. Defendant told Martinez to keep going or he would get out, and then opened the sliding door about 15 inches, looked out, but realized that Martinez knew that defendant would not get out in enemy territory without a gun. Defendant claimed that it was Aguilera who asked, “Where are you from?” Defendant said that Chamu looked frozen, as though he did not know what to do, and then began fumbling with his shirt, reaching for something as he went to take cover behind a car. Martinez said to Aguilera, “Just shoot,” and Aguilera fired. Defendant heard three shots but did not see what happened to the couple.

After the shooting the others dropped defendant and Robert off at a friend’s home. They tried to give the gun back to defendant, but he refused it as it was “burned” and thus not “clean.” Defendant claimed that Martinez had given Aguilera the gun so that Aguilera could prove himself as part of his initiation into the gang. Defendant said that it was not necessary for him to prove himself because he had been a member of the gang for two years. Defendant knew that entering rival gang territory could result in a shooting.

On cross-examination defendant was asked to explain the concept of earning respect in gang culture. Defendant denied that members were required to continuously “put in work” or go on missions for the gang, but admitted that “punking out” or “chickening out” would make a gang member look weak, and could result in a loss of respect. Defendant denied that Martinez was the leader or “shot caller” of the gang. He explained that members who feared Martinez or “ran with him” would obey him, but defendant denied that his expressing reluctance to what Martinez wanted had made him appear weak. Defendant acknowledged that Cypress Park members were expected to back up their “homeboys,” but denied that refusing an order to “back this guy up” would be seen as “punking out.” Martinez was the most senior member in the van, next in seniority was defendant, and then Robert, although he was older, and finally Aguilera.

Defendant knew Chamu and Paul from school, because they had a class together, and defendant knew that Chamu was an Avenues gang member. Defendant

acknowledged that the Avenues gang was a rival of Cypress Park, and that Cypress Park members referred to Avenues members as “noodles” and to their female friends as “noodle lovers.”

One of defendant’s best friends had been convicted of killing a noodle lover. He identified a photograph of his friend making small “a” with one hand and holding a gun in the other to signify, “kill Avenues” Defendant acknowledged that was the intent of the Cypress Park gang to kill Avenues members. Asked whether that would be his intent as well, defendant replied, “If I have to yeah.” Another man was depicted in the photograph (which included Martinez) pointing his middle finger at a small “a” which meant, “Fuck Avenues.” Defendant admitted agreeing with that sentiment.

Defendant testified that the prior incident with Chamu at the market occurred when defendant saw Chamu there and then told Jonathan there was a noodle in Cypress Park territory. The two then went back to the market intending to instigate a confrontation. Defendant did not know that Chamu’s mother was with him and when he saw her he turned away.

After Chamu “hit him up” at school, defendant dropped out of school to avoid placing his sister in danger.

Defendant admitted that he had traded \$200 worth of methamphetamine for the gun he carried. He was ready to use his gun if necessary.

DISCUSSION

I. Substantial evidence of premeditation

Defendant contends that the evidence was insufficient to support a finding of premeditation beyond a reasonable doubt.

When a criminal conviction is challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We must presume

in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*Ibid.*) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Reversal on a substantial evidence ground “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support the [conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The same standard applies to a challenge to the sufficiency of the evidence to support a finding of premeditation and deliberation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Premeditation means “thought over in advance.” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) Deliberation means “careful weighing of considerations in forming a course of action.” (*Ibid.*) “[T]he process of premeditation and deliberation does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly’ [Citations.]” [Citation.]” (*People v. Bolin, supra*, 18 Cal.4th at p. 332.) “Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief. [Citation.]” (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) “Evidence of premeditation and deliberation typically shows not only the manner of killing, but also ‘planning’ activity and ‘motive.’ [Citation.]” (*People v. Rodriguez* (1986) 42 Cal.3d 730, 758, quoting *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Although defendant acknowledges that the evidence must be reviewed on appeal in the light most favorable to the judgment, he has presented just the opposite, and then draws from his summary only those inferences that favor his contention. For example, defendant begins with the argument that there was no evidence that the occupants of the van were seeking out rival gang members to kill. He argues that he and his companions “were simply out tagging” and just happened upon Paul and Chamu by chance. Contrary

evidence, in the form of Aguilera's statement to the police that they went out into the Avenues territory to "tag" and also went looking for Avenues members intending to retaliate for a prior shooting by Avenues members, was also presented. When viewed in the light most favorable to the judgment, this evidence alone supports a finding of premeditation.

Planning may be reasonably inferred from evidence that the defendant armed himself before the shooting. (See, e.g., *People v. Caro* (1988) 46 Cal.3d 1035, 1050.) Aiming at people believed to be rival gang members or their associates provides evidence of premeditation and deliberation. Motive is reasonably inferred from the hatred of rival gang members. (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001-1002.) When a gang member fires multiple shots at a group of people in rival gang territory it is reasonable to infer that he deliberated. (See *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192.)

Defendant acknowledged the enmity his gang harbored for Avenues gang members and he embraced with that sentiment. Defendant knew that Chamu was an Avenues member, and had unsuccessfully tried to initiate a confrontation with Chamu on a prior occasion, after Chamu had challenged defendant at school. Aguilera told the police and testified in court that defendant was armed and drew his gun before asking Chamu, "Where are you from?" Defendant admitted that he had a .38-caliber revolver with him in the van. Defendant testified that he knew that entering rival gang territory could result in a shooting, and that he was ready to use his gun. Defendant fired his weapon three times while the van was alongside the victims.

Defendant contends that carrying his gun into rival gang territory cannot prove planning because he testified that he was always armed for protection. The jury was not required to believe defendant's stated reason for arming himself. (*People v. Harris* (1971) 20 Cal.App.3d 534, 537.) Indeed, the jury "may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. [Citations.]" (*People v. Thomas* (1951) 103 Cal.App.2d 669, 672.)

Defendant also argues that the shooting was a “brainless, non-thinking, ‘knee-jerk’ reaction to a loud, aggressive command” by one of the van’s occupants to shoot. He surmises that the shooter fired off a few rounds solely to frighten Chamu, because if he “really wanted to kill Chamu, the person with the gun would have exited the vehicle and chased him down.” Defendant then concludes that a stray bullet must have hit Paul. “An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 396.) “““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) Moreover, defendant’s inferences are not reasonable, but speculative. The more reasonable inference is that the shooting was premeditated, not rash or “brainless,” and arose from the fact that defendant took a gun into enemy gang territory, searched for “noodles,” pointed the gun, challenged Chamu, who had previously challenged defendant, and fired multiple times. We conclude that substantial evidence supports the jury’s finding.

II. Gang enhancement

Defendant challenges the sufficiency of the evidence to support the jury’s true finding on the gang allegation.

A sentence enhancement is imposed upon “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” (§ 186.22, subd. (b)(1).) A gang finding is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) We thus review the evidence in the light most favorable to the judgment to ensure the evidence is reasonable, credible, and of solid value, presuming in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence, and giving deference to the jury’s resolution of

conflicts and credibility findings. (*People v. Kraft, supra*, 23 Cal.4th at p. 1053; *People v. Johnson, supra*, 26 Cal.3d at p. 578.)

A gang finding under section 186.22, subdivision (b)(1), has two prongs, both of which the prosecution must prove: (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see *People v. Albillar* (2010) 51 Cal.4th 47, 67-68.)

The jury may reasonably infer the association element of the first prong from the very fact that defendant committed the charged crime with another gang member, unless there is evidence that the gang members are “on a frolic and detour unrelated to the gang.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) We discern no evidence of any action unrelated to gang activity, and defendant points to none. According to Aguilera, there were at least four Cypress Park gang members in the van when Martinez drove into Avenues gang territory intending to write graffiti and retaliate against Avenues gang members. Martinez was a documented Cypress Park gang member. Defendant admitted that he was a member of the gang, and acknowledged that Martinez, Robert, Jonathan, and Aguilera were also Cypress Park gang members. The first prong was thus satisfied. (See *People v. Morales*, at p. 1198.)

Defendant makes light of his “Where you from?” challenge to Chamu just before firing in his direction, suggesting that it was the only evidence of a gang-related motive. However, the fact remains that defendant took a gun into enemy territory, was accompanied by his gang’s leader and several fellow gang members, and after issuing the challenge, assaulted the rival gang member with a gun. Defendant’s commission of a crime in concert with known gang members supports the inference that the defendant acted with the specific intent required to establish the second prong of 186.22, subdivision (b)(1), as well as the first. (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 321; *People v. Morales, supra*, 112 Cal.App.4th at p. 1198.)

Comparing this case to *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), defendant argues that the expert's opinion that the shooting was gang related was unsupported by any evidence because no one in the van yelled out a gang name or took credit for the shooting. In *Albarran*, the prosecution conceded that it had no evidence to support an expert's opinion that the crime was gang related, such as gang signs or graffiti, but had relied solely on defendant's gang membership and the fact that the crime was committed in gang territory. (*Id.* at pp. 219-221.) Nothing in *Albarran*, however, suggests that evidence of yelling out a gang name or taking credit for a shooting is prerequisite to finding an offense to be gang related.

Evidence of gang membership, recent conflict with a rival gang, and the commission of one of the gang's primary crimes in gang territory, provides substantial evidence to support an expert's opinion that the crime was committed in association with the gang or benefitted the gang. (See *People v. Carr* (2010) 190 Cal.App.4th 475, 488-490.) Such facts were in evidence here. Officer Chavez's opinion that the Cypress Park gang's primary criminal activities included murder and assault with a firearm was supported with previous convictions of other Cypress Park gang members. Also, defendant testified that "Dopey," a close friend shown in a photograph to be a Cypress Park associate or member, had been convicted of killing a "noodle lover." Defendant admitted that he had a recent conflict with Avenues member Chamu; that he and his gang hated Avenues members, and that defendant knew he was in Avenues territory with other Cypress Park members at the time of the shooting. We conclude that substantial evidence supports the gang allegation.

III. Expert opinion

Defendant contends that the gang expert gave improper opinion testimony. He argues that Officer Chavez was giving a personal opinion about defendant's guilt, when he testified: "[A] gang will not accept somebody who is not in the gang to go out on a mission of this severity, to go out and kill a rival gang member"; and "[T]his is one of the most serious crimes that a gang can actually commit. For him to be part of it, from my personal experience, he would have been a gang member, not just an associate that would

be doing this.” Defendant also contends that Officer Chavez gave a personal opinion regarding defendant’s guilt when he testified: “[N]ot only did he do it by himself, he had four other Cypress Park gang members to be witnesses to the crime.”

Defendant has taken the testimony out of context. As respondent points out, the testimony was given in response to two fact-specific hypothetical questions which called for Officer Chavez’s expert opinion, not his personal opinion about the facts of this case.⁵ Officer Chavez was asked to assume, for purposes of giving his opinion, a set of facts that closely mirrored those in evidence. Expert opinions are proper in gang cases to assist the jury in deciding whether a crime was committed for the benefit of or in association with a criminal street gang. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620.) The use of hypothetical questions to elicit such opinions is proper so long as they are “‘rooted in facts shown by the evidence’ [Citations.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1045, quoting *People v. Gardeley, supra*, at p. 618.)

Defendant does not claim that the hypothetical questions were not rooted in facts shown by the evidence. Indeed, he fails to set forth the facts of the hypothetical question in his brief, or even acknowledge that the opinions were given in response to hypothetical questions. Instead, defendant states, without further analysis, that Officer Chavez’s opinion was improper because, other than defendant’s gang affiliation, the expert’s opinion was unsupported by any evidence suggesting a gang motive or intent based upon a desire to gain respect.

Defendant’s contention is puzzling, as neither of the hypothetical questions nor Officer Chavez’s responses involved issues of motive or intent. The first related solely to Aguilera and was designed to bring out the expert’s opinion whether Aguilera was a member or associate of the Cypress Park gang.⁶ The second hypothetical question was

⁵ Respondent refers to the hypothetical questions as “One,” “Two,” and “Three,” although the first two were, in fact, one question that had begun in the morning, left unfinished, and restated after the lunch recess.

⁶ Although respect was involved in the expert’s answer, it did not relate to motive or intent. The prosecutor included the same facts of Aguilera’s involvement that Aguilera

designed to elicit the expert's opinion whether defendant was a member or associate of the Cypress Park gang. Nothing was said by either the prosecutor or Officer Chavez regarding respect, motive, or intent.⁷

Respondent contends that since he did not object below, defendant has failed to preserve a challenge to the expert's opinions. We agree. A challenge to the admissibility of evidence is generally not cognizable on appeal in the absence of a specific and timely objection in the trial court on the ground urged on appeal. (Evid. Code, § 353.)

Defendant did not object to the first hypothetical question or response. With regard to the hypothetical question posed to elicit the expert opinion on defendant's gang membership, defendant objected only to the statement, "He did it himself."⁸ Defendant did not state a ground for the objection, and it was overruled.

himself had described in his testimony, together with the items found in Aguilera's home, and then asked whether, in Officer Chavez's opinion, Aguilera was a gang member. One of the items, a notepad with upside down A's written on it, indicated to Officer Chavez a lack of respect for the Avenues gang, which in turn suggested that Aguilera was a member or associate of the Cypress Park gang.

⁷ The prosecutor asked: "Now, if you heard that that phone list that was shown to you containing the names 'Whisper,' 'Happy,' and 'Lil' Boy' was written down from the last dialed calls on February 7th of 2007 in a phone that was being carried by [defendant], and if you heard that the Cypress Park gang graffiti that was on the underside of that mattress or board of box springs that was shown to you in the photograph was found in [defendant's] bedroom that he shared with his 12-year-old brother at the time, and if you heard that [defendant] was in a car also containing 'Bouncer,' 'Happy,' and 'Lil' Boy,' and Eduardo Aguilera; that that car went into Avenues gang territory, made a U-turn, and someone made a comment about there's a noodle and [defendant] shouted 'Where you from?' before firing several shots towards the Avenues gang member, would you be able to form an opinion as to whether or not [defendant] is in fact a Cypress Park gang member?"

⁸ That statement was not in the hypothetical question, although a similar statement was in the response. Officer Chavez testified, "Not only did he do it by himself, he had four other Cypress Park gang members to be witnesses to the crime." The trial court overruled defendant's objection, but admonished the jury: "[T]he question was 'Do you have an opinion?' So this is simply this witness's opinion."

In a footnote, defendant contends that if a failure to object results in forfeiture, defense counsel rendered ineffective assistance. Defendant cites *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*), but makes no further legal argument regarding effective assistance of counsel. Under *Strickland*, a defendant who claims ineffective assistance of counsel must show not only that counsel's performance was deficient, but also that the defendant suffered prejudice as a result. (*Id.* at p. 694; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Defendant has not explained on what ground his trial counsel should have objected. Any objection due to the absence of evidence of motive, intent, or respect, would have been overruled because, as we have observed, the hypothetical questions did not involve those issues. Counsel's failure to make futile objections does not render his assistance ineffective. (*People v. Price* (1991) 1 Cal.4th 324, 386-387.) Moreover, defendant does not contend that he was prejudiced by the expert's opinion; he simply concludes that the judgment should be reversed. As defendant has not shown either deficient performance or prejudice, his ineffective assistance claim fails. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1126.)

IV. Attempted murder

Defendant contends that because there was no evidence demonstrating that Chamu was the intended target when the gun was fired, the evidence was insufficient to support his conviction of attempted murder. We conclude that ample circumstantial evidence supported defendant's conviction.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Direct evidence of an intent to kill is rare, as "one who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) The absence of direct evidence, however, does not defeat the judgment, as defendant suggests, as intent may be shown by circumstantial evidence. (*Id.* at p. 946.) "Circumstantial evidence may be sufficient to connect a defendant with the

crime and to prove his guilt beyond a reasonable doubt.’ [Citation.]” (*People v. Bean* (1988) 46 Cal.3d 919, 933.)

Defendant contends that pointing a gun in the direction of both Chamu and Paul is insufficient proof that he targeted Chamu, particularly where the evidence does not establish that any of the multiple bullets he fired landed in the area where Chamu ran to hide: “Just because someone is in the area, this does not mean this person is the intended target.” Defendant further argues that, considering how well Chamu hid after defendant pointed the gun at him, “[a]nything short of a bazooka or hand grenade could not touch him.” Thus, defendant concludes, the evidence shows that he must not have been targeting Chamu.

Chamu was not just “in the area.” He was standing next to Paul when defendant pointed the gun in their direction. Defendant pointed his gun at Chamu, issued a challenge, and fired his weapon three times. The shots were fired right after Martinez said, “Shoot him” or “Just shoot them.” It is unlikely that Paul was the target and Chamu was not, as Martinez did not tell defendant to shoot *her*, and defendant claimed that he had not wanted to challenge Chamu then, specifically because his girlfriend was present. Chamu’s hiding place was just a couple feet away from where defendant pointed the gun, and Chamu heard the shots as he was running and ducking. Aguilera testified that everything happened very fast. Thus, Chamu being missed by a bullet was more likely the result of Chamu’s quickness or of defendant’s bad aim than a lack of intent to kill Chamu. As such circumstances reasonably justified the jury’s finding of intent, reversal may not be predicated on defendant’s argument that they might also be reasonably reconciled with a contrary finding. (See *People v. Reilly, supra*, 3 Cal.3d at p. 425.)

Moreover, other circumstances supported a reasonable inference that defendant intended to kill Chamu. Defendant hated Avenues gang members, knew that Chamu was an Avenues member, and defendant had previously been challenged by Chamu. Defendant armed himself before entering rival gang territory and went there with his Cypress Park companions, who were seeking retaliation against the Avenues gang. The van made a U-turn before coming to a stop alongside the victims right after one of them

said, “There’s a noodle,” meaning an Avenues gang member. We conclude that defendant’s conviction of attempted murder of Chamu was supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD