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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. ANDRE DAVON COVARRUBIAS, Defendant and Appellant.	B268098 (Los Angeles County Super. Ct. No. KA108253)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Jr., Judge. Affirmed as modified.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Andre Davon Covarrubias of attempted murder. (Pen. Code, §§ 664/187.)[1] The jury found that the crime was willful, deliberate and premeditated, and further found that appellant committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)), had personally used a deadly weapon (a knife) (§ 12022, subd. (b)(1)), and had inflicted great bodily injury (§ 12022.7). Appellant admitted suffering a prior serious or violent felony conviction.

Appellant was sentenced to a total of 34 years to life in state prison, consisting of a life term with a minimum parole eligibility of 15 years pursuant to section 186.22, subdivision (b)(5), doubled pursuant to section 667, subdivisions (b)-(i), plus three years for inflicting great bodily injury (§ 12022.7), plus one year for personally using a deadly weapon (§ 12022, subd. (b)(1)). The trial court awarded 363 days of actual presentence custody credit.

Appellant contends (1) the gang enhancement must be reversed because there was insufficient evidence to establish the element of the gang's primary activities, (2) the gang enhancement must be reduced to 10 years, and (3) he is entitled to one additional day of presentence custody credit. We agree with the last contention, but otherwise affirm the judgment.

FACTS

The Attempted Murder

Sometime between 2007 and 2009, the victim K.F. testified for the People in the murder prosecution of a Varrio Trece gang member named "Wicked." The victim lived in the gang's neighborhood and was frequently

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

harassed by its members because of her testimony. She had seen appellant around the neighborhood with various Varrio Trece gang members.

At about 1:00 p.m. on October 31, 2014, the victim, who was homeless at the time, was collecting cans in the neighborhood when she saw appellant drive by in a car. About 20 minutes later appellant walked up to her and she asked him "what the fuck" he wanted. They had a verbal altercation and appellant said he was "going to call [his] people." She told appellant he was not going to call anyone and rode away on her bike to a nearby park.

Appellant followed the victim until she stopped her bike at a bench. Appellant sat down on the ground and then asked her to go to the baseball field area of the park. When she said no, appellant stood up and started stabbing at her with a small kitchen knife. She tried to block appellant and was cut four times on her right side under her armpit and around her rib area. She was also cut on the arm. After the attack, appellant threw the knife down, ran from the park, and yelled "Varrio Trece."

Sherriff's deputies responded to a 911 call, searched the nearby area, located appellant, and arrested him after a short foot chase. A witness saw appellant running from the park and identified him in a patrol car field show-up. During the show-up, appellant yelled "Varrio Trece" at the patrol car.

The victim remained in the hospital for nine days. While in the hospital, she identified appellant in a six-pack photographic lineup.

The Gang Evidence

Detective Liliana Jara of the Los Angeles County Sheriff's Department testified as the prosecution's gang expert. She had been a peace officer for 11 years and had been assigned to the gang unit for four years. She was familiar with the Varrio Trece gang, described the structure and culture of the gang, its territorial borders, and the cliques and signs within the gang.

She explained the meaning of appellant's gang tattoos, including on his face, and described her encounters with him. The gang had 69 documented members, including appellant.

Detective Jara testified to two different convictions suffered by other Varrio Trece members. Specifically, Detective Jara testified that a Varrio Trece gang member had been convicted in 2012 of being a felon in possession of a firearm and another Varrio Trece gang member was convicted in 2013 of making terrorist threats. Detective Jara was familiar with both cases; she discussed one of the cases with the investigating detective, and the detective on the other case was one of her partners.[2] Detective Jara also testified about the 2009 murder conviction of Varrio Trece gang member "Wicked."

During Detective Jara's testimony two jail calls placed by appellant were played for the jury. On the calls appellant indicated that he would be "doing life" for "Big Wicked" and that he would get a gang enhancement for yelling out the gang's name. Appellant asked if everyone was proud of him for what he did and he explained that he had been impatient despite the advice of other gang members to wait. Detective Jara explained who were the many gang members being discussed in the calls and the gang terminology used in the calls.

Detective Jara was asked about the gang's primary activities as follows: "And as part of your overall study of Varrio Trece, can you tell the jurors what are their primary activities? What activities do you commonly see them doing, what crimes do you commonly see them doing?" She responded,

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[2] The convictions were proven not just with Detective Jara's testimony, but also by the admission of certified minute orders in the People's exhibits 17 and 18. The certified records of the convictions of other gang members are not testimonial under *Crawford v. Washington* (2004) 541 U.S. 36. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1176, fn. 10.)

"We've seen Varrio Trece commit crimes such as assault with a deadly weapon, narcotics sales, murder, witness intimidation and graffiti."

The jury was later instructed that to conclude Varrio Trece was a criminal street gang it had to find that the group had one or more of the following primary activities—attempted murder, murder, felon in possession of a firearm, or criminal threats.

During closing argument, the prosecutor stated: "[Varrio Trece] are engaged in an ongoing pattern of criminal activity, which we've proved by both the predicates, those actual documents I had to turn in to the court, showing that Varrio Trece members have, in the past, committed crimes, and the fact that the detective was able to testify to all of the crimes that they are out there committing."

DISCUSSION

I. Primary Activities

Appellant contends that the gang enhancement must be reversed because there was insufficient evidence to establish that Varrio Trece engaged in primary activities sufficient to qualify as a criminal street gang.

The law governing appellant's contention is well settled. An organization constitutes a criminal street gang if it contains "three or more persons" who have as one of their "primary activities the commission of" certain enumerated criminal acts; who share "a common name or common identifying sign or symbol"; and "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f); *People v. Prunty* (2015) 62 Cal.4th 59, 75.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude

the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

"In determining whether the evidence is sufficient to support a conviction or an enhancement, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

While acknowledging that a gang expert's opinion can establish a gang's primary activities (see *People v. Gardeley* (1996) 14 Cal.4th 605, 611, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13), appellant argues that there was no foundation for Detective Jara's opinion as to the Varrio Trece's primary activities. He asserts that she provided "no background or explanation on the source of her opinion," and did not explain who the "we" was in her opinion testimony. He also complains that with the exception of murder, the list of primary activities identified by Detective Jara did not correspond to the list of primary activities identified in the jury instructions.

Appellant's challenge, however, ignores the entirety of the evidence presented to the jury. Viewing the evidence in the light most favorable to the prosecution, the jury was entitled to conclude: In 2009, a Varrio Trece member committed murder; in 2012, a Varrio Trece member committed the crime of felon in possession of a firearm; in 2013, a Varrio Trece member committed the crime of criminal threats; and in 2014, a Varrio Trece member—appellant—committed the crime of attempted murder. "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the

group's primary activities." (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 323.) All of these crimes were included in the list of primary activities identified in the jury instructions. The evidence of these crimes reasonably supported the conclusion that Varrio Trece members existed primarily to commit crimes. Indeed, the circumstances of the present case—where a woman was stabbed in retaliation for her testimony against a Varrio Trece member—made such a conclusion almost unavoidable.

While appellant argues that the terms "primary activities" and "predicate offenses" were conflated by the parties at trial, the evidence used to establish these two elements of the gang enhancement can be the same. (*People v. Galvan* (1998) 68 Cal.App.4th 1135, 1142.) Accordingly, the jury was properly instructed that any crime committed by appellant in the current case could also be used as evidence regarding Varrio Trece's primary activities.

Appellant argues that Detective Jara's testimony was "unmistakably akin" to that found insufficient in *In re Alexander L.* (2007) 149 Cal.App.4th 605. *In re Alexander L.* does not compel reversal. There, when asked about the primary activities of the gang at issue, the expert replied: "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) On cross-examination, the expert testified that the vast majority of the cases connected to the gang that he had run across were graffiti-related. (*Id.* at p. 612.)

Here, by contrast, there was context and foundation for Detective Jara's opinion testimony. She testified that her gang unit spoke to gang members weekly or daily to gather information about the gangs they covered.

She had interviewed hundreds of gang members. She had personally spoken to appellant and other members of Varrio Trece. Moreover, she was not just asked what were the primary activities of Varrio Trece. Rather, she was asked: "And *as part of your overall study of Varrio Trece*, can you tell the jurors what are their primary activities? What *activities do you commonly see them doing*, *what crimes do you commonly see them doing*?" (Italics added.) The questions themselves helped provide foundation. And her response to such questions, that "[w]e've seen Varrio Trece commit crimes such as . . . . ," reveals that she had direct knowledge of the gang's primary activities. It is clear that the "we" refers to her gang unit and partners.

We conclude the evidence was sufficient to support the requisite gang enhancement element concerning Varrio Trece's primary activities.

II. Reduction of Gang Enhancement

Appellant contends that his gang enhancement must be reduced from 15 years to 10 years because the enhancement allegation was pled under section 186.22, subdivision (b)(1)(C), but the jury found the allegation true only under the generic section 186.22, subdivision (b)(1).

The information alleged that appellant committed his crime "pursuant to Penal Code section 186.22(b)(1)(C) . . . 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." This subdivision provides that an additional 10 years be added to a sentence for a violent felony. The jury found true the allegation that appellant's crime "was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22(B)(1)." According to appellant, because "the jury made no specific

finding as to which of the gang enhancements applied," only the additional 10 years under section 186.22, subdivision (b)(1)(C) can be imposed and not the additional 15 years under section 186.22, subdivision (b)(5) that was actually imposed. Appellant is incorrect.

Section 186.22, subdivision (b)(5) provides that "any person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served." (Italics added.) Appellant was convicted of attempted willful, deliberate and premeditated murder. Section 664, subdivision (a) provides that "if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." Accordingly, the trial court properly sentenced appellant under section 186.22, subdivision (b)(5). (See *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239; *People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

We agree with the People that the language used in the information does not require any modification to appellant's sentence. Appellant is correct that he is entitled to "fair notice of the allegations that will be invoked to increase the punishment for his . . . crimes." (*People v. Houston* (2012) 54 Cal.4th 1186, 1227.) To the extent appellant suggests that the information failed to give him adequate notice of the allegations made against him, he has forfeited any such objection by failing to demur on that ground in the trial court. (*People v. Holt* (1997) 15 Cal.4th 619, 672.) But even addressing the issue, we find no merit.

"[T]he purpose of the charging document is to provide the defendant with notice of the offense charged. (§ 952.) The charges thus must contain in

substance a statement that the accused has committed some public offense, and may be phrased in the words of the enactment describing the offense or in any other words sufficient to afford notice to the accused of the offense charged, so that he or she may have a reasonable opportunity to prepare and present a defense." (*People v. Bright* (1996) 12 Cal.4th 652, 670, overruled on another point in *People v. Seel* (2004) 34 Cal.4th 535.) Appellant has not explained how the information filed against him failed to meet this notice standard. Nor has he explained what he might have done differently at trial had the prosecution specified a different subdivision in the information. After all, the elements of a gang enhancement do not change merely because the ultimate sentence effect of the enhancement varies.

Contrary to appellant's suggestion, *People v. Le* (2015) 61 Cal.4th 416, 424 (*Le*) does not assist him because our Supreme Court did not reach the issue appellant attempts to present here. Indeed, the *Le* court specifically noted that "the parties claim that such [generic] pleading [of section 186.22, subdivision (b)(1)] is permissible because the state cannot know until the jury's verdict whether defendant will be convicted of other charged crimes, enhancements, or lesser offenses that may dictate which subparagraph of subdivision (b)(1) is applicable. Because the parties do not contest matters of notice and the sufficiency of the pleading, we express no opinion on these issues." (*Le, supra*, at p. 424, fn. 5.)

III. Additional Presentence Custody Credit

Appellant contends, and the People agree, that he is entitled to an extra day of presentence custody credit. The parties are correct.

Appellant was arrested on October 31, 2014. He was sentenced on October 29, 2015. At that time, he was awarded credit for 363 actual days in presentence custody.

"A defendant is entitled to credit for the date of his arrest and the date of sentencing." (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469; see also *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48 ["Calculation of custody credit begins on the day of arrest and continues through the day of sentencing"].) As appellant notes, when the date of his arrest is included, appellant is entitled to 364 days of actual presentence custody, not 363. The abstract of judgment shall be modified accordingly.

DISPOSITION

The abstract of judgment shall be modified to reflect one additional day of presentence custody credit for a total of 364 actual days. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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