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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE CERVANTES et al., Defendants and Appellants.	2d Crim. No. B275821 (Super. Ct. No. YA093018) (Los Angeles County)

Enrique Cervantes and Carlos Reyes appeal after a jury convicted them of conspiracy to commit an assault with a firearm (Pen. Code,[1] §§ 182, subd. (a)(1), 245, subd. (a)(2)). Cervantes was also convicted of being a felon in possession of a firearm (§ 29800, subd. (a)(1)). The jury found true allegations that appellants committed the crimes for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(A), (b)(1)(C)) and personally used a firearm in committing the conspiracy (§ 12022.5, subd. (a))

[1] All statutory references are to the Penal Code.

(hereafter § 12022.5(a)). The trial court sentenced Cervantes to 18 years in state prison, and Reyes to 15 years in state prison.

Appellants raise claims of insufficient evidence and contend that expert gang testimony was admitted in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In supplemental briefs, appellants further contend they are entitled to a remand to permit the trial court to exercise its discretion whether to strike their section 12022.5(a) enhancements in light of Senate Bill 620, which became effective on January 1, 2018. As to Reyes, the latter contention has merit and we shall order the matter remanded for resentencing. Otherwise, we affirm.

STATEMENT OF FACTS

A. *The Offenses*

Los Angeles County Sheriff's Deputies Juan Meza and Cecilio Felix were patrolling in South Los Angeles when they saw a speeding and swerving truck. A high-speed pursuit ensued. During the pursuit Deputy Meza recognized the truck's driver as Gregory Anaya, a member of the Lennox 13 gang.[2]

The pursuit ended when the truck crashed into a fence. Araya got out of the truck, pulled a black firearm out of his waistband, threw it in front of the truck, and ran away. The officers detained Cervantes, who was sitting in the truck's front passenger seat, and Reyes, who was in the back seat. Both men were injured as a result of the crash and Reyes also had a gunshot wound to his right shoulder.

Two expended .45-caliber shell casings were found on the front passenger seat. A black .380-caliber handgun was found

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[2] Araya, who was charged with the conspiracy to commit assault and other crimes, reached a plea bargain and is not a party to this appeal.

about 15 feet from the front of the truck, and a chrome .45-caliber handgun was found about 10 feet from the front of the truck. The unregistered .380-caliber handgun was loaded with seven live rounds of ammunition. The .45-caliber handgun, which had been reported as stolen, had an empty magazine with its slide open and locked in the rear position.

Appellants were arrested and transported to different hospitals. Cervantes and Reyes were separately interviewed while awaiting treatment and were separately interviewed two days later at the Men's Central Jail. Cervantes said he and his companions went to the area of 103rd Street and Prairie Avenue to get beer and were fired upon by two or more Hispanics. Cervantes returned fire, then ducked down and heard one of his companions say he had been shot. He admitted throwing a silver 45-caliber gun out of the truck after the crash and trying to throw a black gun.

Reyes said he picked up Araya and Cervantes that night and received a black firearm. He had been drinking, so he allowed Araya to drive. Araya drove them to 103rd Street and Prairie Avenue, which was a "hangout" for the Tepa 13 gang, in order to "start some trouble" with their rival gang members. They were fired upon when they arrived and Araya returned fire. Reyes, who was hit by the gunfire, attempted to fire his gun but it malfunctioned.

B. ***Gang Expert Testimony***

Los Angeles County Sheriff's Detective Imelda Bottomley testified as the prosecution's gang expert. Lennox 13's primary activities include graffiti vandalism, assault, robbery, possession and sales of narcotics, witness intimidation, and extortion. Reyes belonged to the gang's Winos clique.

Detective Bottomley was familiar with Araya through the case and by speaking with him. Araya had admitted during prior law enforcement contacts that he was a Lennox 13 member, and Detective Bottomley opined the same. A field identification (FI) card regarding a prior contact indicated he had identified himself as a Lennox 13 member, had gang tattoos, and had stated that his gang moniker was "Shrek."

Detective Bottomley also opined that Cervantes was a Lennox 13 member. Araya and Reyes were both admitted members of the gang and Cervantes was with them when the crimes were committed. Moreover, gang members would not take non-members to commit a revenge-shooting of rival gang members; rather, they would take a fellow gang member whom they trusted to "put in work" with them.

Detective Bottomley's review of prior police reports also contributed to her opinion that Cervantes was a Lennox 13 member.[3] In December 2010, Cervantes was detained during a vandalism investigation at Lennox Park. Lennox 13 graffiti was painted on a wall and Cervantes and at least five self-admitted Lennox 13 members were loitering nearby. Cervantes was arrested and found to be in possession of marijuana. In December 2013, Cervantes was arrested for transporting

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[3] During Detective Bottomley's testimony regarding the prior incidents, the court instructed the jury that "[t]hose prior incidents are only used for a limited purpose in this case. They're only used by Detective Bottomley to render the opinion that she has testified to and that she will testify to. You may not use that evidence for any other purpose. It may not be used to prove any other element in this case other than Detective Bottomley's opinion. It may not be used to show propensity or any other use other than what I've described."

marijuana for sale. At the time of his arrest he was with two other Lennox 13 members, one of whom was later murdered by members of the Tongan Crips Gang (TCG).

TCG and Tepa 13 are allies against Lennox 13. The intersection of 103rd Street and Prairie Avenue is located in TCG's territory. There were at least two incidents between Lennox 13 and TCG in the months preceding the charged crimes. In July 2015, a Lennox 13 member shot at a TCG member as he was tagging at an intersection within Lennox 13's territory. Just three days before the charged crimes, a Lennox 13 member was shot by someone who appeared to be a TCG member.

In response to a hypothetical tracking the facts of the case, Detective Bottomley opined that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in any criminal conduct by gang members. The incident was "almost textbook to what a gang-related shooting would be." It was an act of retaliation for the recent shooting of a Lennox 13 member and benefitted the gang by, among other things, maintaining its reputation for violence and creating an atmosphere of fear and intimidation among rival gang members and the community in general.

DISCUSSION

I.

Sufficiency of the Evidence

Reyes contends the evidence is insufficient to support his conspiracy conviction and the personal firearm use allegation. In reviewing these claims, we view the record in the light most favorable to the judgment and presume the existence of every fact the jury could reasonably deduce from the evidence in support of

the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not reweigh the evidence or reassess the credibility of the witnesses. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

A. *Conspiracy*

Reyes claims the evidence is insufficient to support his conspiracy conviction because the prosecution failed to prove the corpus delicti of the crime independent of his own statements. The People respond that this claim is forfeited and without merit.

We decline to reject the claim on grounds of forfeiture. Although two lower courts have held that such claims may be forfeited (*People v. Martinez* (1994) 26 Cal.App.4th 1098, 1103-1104; *People v. Sally* (1993) 12 Cal.App.4th 1621, 1628), our Supreme Court has strongly suggested otherwise (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1172, fn. 8).

The claim, however, lacks merit. "The corpus delicti of a crime consists of two elements, the fact of the injury, loss or harm, and the existence of a criminal agency as its cause. [Citation.] It must be proved independently of the extrajudicial statements of the defendant. [Citation.]" (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1175.) "Although it is true that the corpus delicti—here, an agreement to commit an assault with a firearm and an overt act in furtherance of that agreement [citation]—must be proved independently of the defendant's extrajudicial statements [citation], it is equally true that the required 'independent proof' may be by circumstantial evidence and that it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient and once this threshold is met, the defendant's admissions may be considered on all issues. [Citations.]" (*People v. Muniz* (1993) 16 Cal.App.4th 1083, 1087-

1088.) Expert opinion testimony is admissible to prove the corpus delicti of an offense. (See *Id.* at p. 1088.)

Reyes's conspiracy conviction required proof that he and Cervantes and/or Araya "'had the specific intent to agree or conspire to commit an [assault with a firearm], as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.' [Citations.]" (*People v. Johnson* (2013) 57 Cal.4th 250, 257.) To prove such an agreement, "'it is not necessary to establish the parties met and expressly agreed; rather, "a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." [Citation.]' [Citation.]" (*Id*. at p. 264, italics omitted.) The requisite inference "can arise from the actions of the parties, as they bear on the common design, before, during and after the alleged conspiracy. [Citation.]" (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999.)

The evidence independent of Reyes's admissions is sufficient to establish the corpus delicti of the conspiracy offense. Reyes and fellow Lennox 13 members drove into a rival gang's territory and were involved in a shootout in which Reyes was hit. When they were apprehended, two firearms were found near their vehicle and expended shell casings of the same caliber as one of the firearms were found inside the vehicle. Cervantes admitted he had fired one of the guns and thrown it out of the vehicle. Moreover, Detective Bottomley opined that the incident was an "almost textbook" example of "what a gang-related shooting would be." "These facts lead logically to the conclusion that there was a conspiracy between [Reyes] and his cohorts to

commit an assault with a firearm (and do not reasonably suggest they were working on their marksmanship merit badges for their scout troop or any other innocent conclusion). No more was required." (*People v. Muniz*, *supra*, 16 Cal.App.4th at p. 1088.)

B. *Personal Firearm Use Enhancement Allegation*

Reyes asserts that the true finding on the personal firearm use allegation must be reversed for insufficient evidence. He argues that "[s]ince in a conspiracy it is the *agreement itself* which is the crime and which is punishable and not any overt act, the personal use of a firearm in the commission of a conspiracy would necessarily have to occur during the formation of the agreement itself – for example, to bully someone into joining the conspiracy. There was no personal use of a firearm in the formation of the agreement here."

Reyes misconstrues the law. "[A]n agreement to commit a crime, by itself, does not complete the crime of conspiracy. The commission of an overt act in furtherance of the agreement is also required." (*People v. Johnson*, *supra*, 57 Cal.4th at p. 259.) "[Conspiracy] is the classic example of a continuing offense because by its nature it lasts until the final overt act is complete." (*People v. Becker* (2000) 83 Cal.App.4th 294, 297-298.) "[A] conspiracy to commit a particular crime concludes no earlier than the legal completion of the intended offense itself." (*People v. Garewal* (1985) 173 Cal.App.3d 285, 296.)

Reyes admitted to the police that he got a gun, went into rival gang territory to "put in work" for his own gang, and attempted to fire the gun. His attempt to fire the gun was an overt act in furtherance of the conspiracy to commit assault with a firearm. Contrary to Reyes's claim, it is of no moment that for purposes of conspiracy "it is the agreement, not the overt act,

which is punishable." (*People v. George* (1968) 257 Cal.App.2d 805, 808, italics omitted.) He personally used a firearm while the conspiracy was ongoing, so a personal firearm use enhancement was properly imposed. (*People v. Becker*, *supra*, 83 Cal.App.4th at pp. 297-298.)

II.
Sanchez

Cervantes contends the court prejudicially erred in allowing Detective Bottomley to relate case-specific testimonial hearsay in violation of state hearsay rules and his confrontation rights, as provided in *Sanchez*, *supra*, 63 Cal.4th 665. We agree that some of Detective Bottomley's testimony was admitted in violation of *Sanchez*, but conclude the error was harmless.[4]

In *Sanchez*, *supra*, 63 Cal.4th at page 686, our Supreme Court held that a gang expert witness may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." Thus, an expert "is generally not permitted . . . to supply case-specific facts about which he has no personal knowledge." (*Id.* 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." (*Ibid.*)

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[4] We reject the People's assertion that Cervantes's *Sanchez* claim is forfeited. Appellants' trial was held before *Sanchez* was decided and "[a]ny 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." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 (*Meraz*), review granted Mar. 22, 2017, S239442, on other grounds but Court of Appeal opinion ordered to remain precedential (Cal. Rules of Court, rule 8.1115(e)(3).)

Sanchez also held that the trier of fact must necessarily consider the basis of expert testimony for its truth in order to evaluate the expert's opinion, which in turn implicates the defendant's confrontation rights. (*Sanchez*, *supra*, 63 Cal.4th at p. 684.) The admission of a testimonial hearsay statement by a declarant who is not available at trial violates the confrontation clause of the Sixth Amendment unless the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, at p. 686, fn. omitted.)

Cervantes claims the opinions Detective Bottomley offered to establish that Lennox 13 is a criminal street gang "all turn on case-specific hearsay, which was testimonial." The evidence, however, was not case-specific. "Under *Sanchez*, facts are only case specific when they relate 'to the particular events and participants alleged to have been involved in the case being tried,' which in *Sanchez* were the defendant's personal contacts with police reflected in the hearsay police reports, STEP notice, and FI card. [Citation.]" (*Meraz*, *supra*, 6 Cal.App.5th at pp. 1174–1175, italics omitted.) A gang expert may testify about general background matters such as the gang's operations, primary activities, pattern of criminal activities, predicate

offenses, and rivalries even if it is based on hearsay sources. (*Id.* at p. 1175.)

As to the predicate offenses, Detective Bottomley also offered certified records. Those records are not testimonial hearsay. (*Meraz*, *supra*, 6 Cal.App.5th at p. 1176, fn. 10; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225.) Other aspects of the detective's testimony were properly based upon her personal knowledge. (*Sanchez*, *supra*, 63 Cal.4th at p. 685 [gang experts "can rely on information within their personal knowledge"].)

Cervantes also challenges Detective Bottomley's opinions that Araya was a Lennox 13 member and that his gang moniker was "Shrek." The detective stated that she reached those opinions based on Araya's prior contacts with law enforcement, which included an FI card that documented a November 2010 "bike stop" of Araya. The FI card, which was admitted into evidence, stated that Araya had acknowledged he was a Lennox 13 member and that his moniker was "Shrek."

Although Detective Bottomley had no personal knowledge of the information contained in the FI card, that information had already been conveyed to the jury by Deputy Meza, who testified before the detective. Deputy Meza testified from personal knowledge that Araya was a Lennox 13 member and that his moniker was "Shrek." Reyes also told the police that Araya was a Lennox 13 member. Accordingly, any error arising from Detective Bottomley's testimony regarding the FI card was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at p. 698; *Meraz*, *supra*, 6 Cal.App.5th at pp. 1176-1177.)

Cervantes also contends Detective Bottomley ran afoul of *Sanchez* by testifying to the facts of two prior police incidents involving Cervantes and opining that his moniker was "Wanted."

The People correctly concede the error. The detective acknowledged that she derived the facts regarding the prior incidents from police reports, and that her opinion regarding Cervantes's moniker was based on "some of the intelligence [she] gathered." Because the evidence was case-specific testimonial hearsay and did not fall within any exception to the hearsay rule, it should have been excluded.

The error, however, does not undermine the verdict. Detective Bottomley's opinion that Cervantes was a Lennox 13 member was not based solely on case-specific hearsay. In any event, the prosecution did not have to prove Cervantes was a member of the gang in order to establish that the crime was gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 67-68.)

Moreover, the evidence independent of Detective Bottomley's improper testimony—which included Reyes's admissions that he, Cervantes, and Araya went into a rival gang's territory that night to "put in work" for Lennox 13, and Cervantes's own admission that he participated in the ensuing shootout—was overwhelmingly sufficient to prove the crime was committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Accordingly, the error in allowing Detective Bottomley to testify in violation of *Sanchez* was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at p. 698; *Meraz*, *supra*, 6 Cal.App.5th at pp. 1176-1177.)

III.

Senate Bill 620

After the briefs were filed, appellants filed supplemental briefs contending they are entitled to resentencing pursuant to

Senate Bill 620, which the Governor signed on October 11, 2017. As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.5(a)[5] is amended to permit the trial court to strike an enhancement for personally using a firearm. The new provision states that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 1(c), p. 5106.)

The People concede that Senate Bill 620 applies retroactively to defendants, like appellants, whose judgments were not final as of January 1, 2018. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75-78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) The People claim, however, that a remand for resentencing is unnecessary here because the record establishes the trial court would not have exercised its discretion to strike appellants' enhancements. They rely on the principle that remand is not required in these circumstances if "the record shows that the sentencing court

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[5] Section 12022.5(a) provides as relevant here that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*) [addressing whether remand was necessary pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)].)[6]

We agree that the record shows the trial court would not have exercised its discretion to strike Cervantes's section 12022.5(a) enhancement. The court sentenced Cervantes to the upper term of four years on the conspiracy count and the middle term of four years on the section 12022.5(a) enhancement. In recounting the factors in aggravation, the court noted among other things that Cervantes had a lengthy criminal history, that his prior conduct on parole or probation was unsatisfactory, and that his crimes were of increasing seriousness and dangerousness. Because the court imposed the maximum term on the conspiracy count and declined to impose the lowest possible term on the section 12022.5(a) enhancement, it is clear the court would not have exercised its discretion to strike the latter enhancement. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) "Under the circumstances, no purpose would be served in remanding for reconsideration." (*Ibid.*)

As to Reyes, however, the record is not so clear. The trial court sentenced him to the low term on both the conspiracy count and the section 12022.5(a) enhancement. In doing so, the court rejected the prosecutor's recommendation that Reyes be

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[6] In their supplemental brief, the People also contended that appellants' claims were not yet ripe and that "this court should not consider the claim until [after] January [1], 2018." Because that date has now passed, the claims are ripe for our review.

sentenced to the middle term on the enhancement. Although the court stated that Reyes "knew the purpose of what they were doing" and had "minimize[d] his conduct and involvement in this case," the court also noted as factors in mitigation that Reyes had a minimal criminal history and had been honest and cooperated with law enforcement after the crime. In light of these circumstances, it cannot be said the court would not have exercised its discretion to strike the enhancement and remand is thus required. (Compare *Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896 [no remand for resentencing under *Romero* was required where the trial court imposed the maximum possible sentence and expressly stated "'there really isn't any good cause to strike'" defendant's prior strike convictions].)

The People assert that Reyes is not entitled to a remand because he "already received leniency from the trial court" by being sentenced to the lowest possible term on both the conspiracy count and the section 12022.5(a) enhancement. On this point they rely on the proposition that a remand for the trial court to exercise its discretion to strike a special circumstance allegation under section 1385 is not required where the record demonstrates that "[n]o reason for any further leniency than that already given to the defendant by the jury is justified, or would be justified *in furtherance of justice*." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 414.) The People, however, offer nothing to indicate that striking appellant's section 12022.5(a) enhancement would necessarily amount to an abuse of discretion. A remand is thus both necessary and appropriate.

In remanding for resentencing as to Reyes, we express no opinion as to how the trial court should exercise its newly granted discretion under section 12022.5(c). We conclude only

that it is the trial court's function to exercise this discretion in the first instance.[7]

DISPOSITION

As to Reyes, the matter is remanded for resentencing. On remand, the court shall determine whether to exercise its discretion to strike Reyes's section 12022.5(a) enhancement. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

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[7] In determining whether striking a prior felony strike allegation or a non-mandatory sentencing enhancement is "in furtherance of justice," the trial court must consider "both . . . the constitutional rights of the defendant, and the interests of society represented by the People." (*Romero*, *supra*, 13 Cal.4th at p. 530, italics omitted.) "[T]he court should consider the nature and circumstances of the defendant's current crimes, the defendant's prior convictions, and the particulars of his or her background, character, and prospects." (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.) This same standard will guide the trial court's decision whether to strike Reyes's section 12022.5(a) enhancement.

Alan B. Honeycutt, Judge

Superior Court County of Los Angeles

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