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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE RAMON LERMA,

Defendant and Appellant.

B268523

(Los Angeles County
Super. Ct. No. BA427088)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Judgment affirmed; sentence vacated and remanded with directions.

Mark Yanis, 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, Senior Assistant Attorney General, Scott A. Taryle and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Jose Ramon Lerma appeals from a judgment after a jury convicted him of assault with a firearm. The jury also found true allegations he committed the crime for the benefit of a criminal street gang and had suffered a prior conviction for a serious or violent felony. Lerma challenges imposition of the gang enhancement, arguing the prosecutor improperly used the names of Lerma and his fellow gang members in hypothetical questions posed to the People's gang expert and the gang expert improperly testified about Lerma's specific intent. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crime*

On the evening of July 11, 2014 a car pulled up to the gas pump at a gas station with a convenience store. The driver was Cesar Solis. Lerma, an unidentified woman, and a minor, Martin Z., were passengers in the car. Solis walked into the convenience store and returned to the car to converse with the other passengers. Lerma, Solis, and Martin Z. then went to the back of the car and removed something from the trunk.

When the victim emerged from the convenience store, Lerma and Martin Z. rushed toward him, and Lerma said, "Where are you from?" The victim fled through the gas station. Lerma pointed a gun at him and shot twice. Lerma chased the victim across the street, until the victim disappeared into an apartment complex.

A witness called 911. The police arrived, drove around the area, and found the car with Lerma, Solis, Martin Z., and the woman still in it. The officers followed the car, and saw someone

toss what looked like a gun out of the passenger side window, at which point they attempted to pull the car over. The car did not stop, ran several stop signs, and crashed into a parked car. Martin Z. ran from the crash. The officers arrested Lerma, Solis, and the woman passenger at the scene, and later detained Martin Z.

B. *The Charges and Allegations*

The People charged Lerma with assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2).¹ The People alleged that Lerma personally used a firearm (in this case, a handgun) within the meaning of section 12022.5, and committed the crime for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by the gang, within the meaning of section 186.22, subdivision (b)(1)(C). The People also alleged Lerma had suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12).

During trial the prosecution called Detective Jesse Joseph Lucero, gang investigator for the Los Angeles County Sheriff's Department, to testify as an expert witness on criminal street gangs. The prosecutor asked Detective Lucero to answer a hypothetical question based on facts mirroring the facts in this case regarding whether the conduct described by witnesses was carried out "at the direction of, for the benefit of, or in association with the Marianna Maravilla street gang." Some of the prosecutor's hypothetical questions to the gang expert included the names of Lerma and several of the individuals actually involved in the incident at the gas station. Counsel for Lerma

¹ Undesignated statutory references are to the Penal Code.

objected to these questions, and the trial court sustained many of the objections. These questions and the gang expert's responses are the basis of Lerma's appeal.

C. *The Verdict and Sentence*

The jury found Lerma guilty of assault with a firearm and found true the allegations that Lerma personally used a firearm and committed the crime for the benefit of a criminal street gang. The trial court sentenced Lerma to 26 years in state prison. Lerma timely appealed.

DISCUSSION

Lerma argues his rights to due process and a jury trial “were violated when the prosecutor repeatedly used [Lerma’s] full name in his ‘hypothetical’ to [the prosecution’s] gang expert,” and when the gang expert gave an opinion that Lerma “‘planned’ an attack on the victim for the benefit of his gang.” Although Lerma does not argue the prosecutor committed misconduct, he argues the prosecutor’s use of the names of the actual participants in the gas station incident may have led “the jury to believe that the expert witness [was] expressing his opinions on the specific actors’ intent rather than the expectations of gang members in general when confronted with specific action.” Lerma also argues the expert’s opinion was improper because it “went directly to [Lerma’s] specific intent . . . to plan and commit an assault with a firearm to benefit the gang,” which was “nothing more than an expression of his . . . belief on how [the] case should be decided.”

A. *The Prosecutor's Questions to the Gang Expert Did Not Violate Lerma's Rights to Due Process and a Jury Trial*

“[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” will be punished by an additional term of 10 years if the felony is a violent felony. (§ 186.22, subd. (b)(1); see *People v. Albillar* (2010) 51 Cal.4th 47, 59.) “There are two ‘prongs’ to the gang enhancement under section 186.22, subdivision (b)(1), both of which must be established by the evidence.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.) The People introduced Lucero’s testimony to prove both prongs.

A person with “special knowledge, skill, experience, training, or education” in a particular field may qualify as an expert witness. (Evid. Code, § 720; see *People v. Townsel* (2016) 63 Cal.4th 25, 45.) An expert may give an opinion provided it is related to a subject that is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact” and it is based on “matter . . . of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” (Evid. Code, § 801; see *People v. Rodriguez* (2014) 58 Cal.4th 587, 639 [“[a]lthough an expert’s opinion testimony is limited ‘to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact’ [citation], the jury does not have to be wholly ignorant of the opinion’s subject matter for it to be admissible”].) We review a challenge to the admissibility of expert testimony for abuse of discretion. (*People v. Mendoza* (2000) 24 Cal.4th 130, 177; see *Townsel*, at p. 45 [“[a] trial court’s decision that a proposed witness qualifies as an expert under

Evidence Code section 720 is a matter within the court's broad discretion and will not be disturbed on appeal unless the defendant demonstrates a manifest abuse of that discretion"]; *People v. Brown* (2014) 59 Cal.4th 86, 101 ["[t]he trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion"].) We review the constitutionality of the admission of evidence de novo. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

Lerma's argument that the prosecutor's use of names in his hypothetical questions to Detective Lucero violated Lerma's constitutional rights fails because the trial court sustained objections to those questions and Detective Lucero never provided an opinion in response to hypothetical questions containing any names. The line of questioning to which Lerma objects began when the prosecutor asked Detective Lucero, on the issue of the first element of the gang enhancement, to respond to a hypothetical question that included the assumption that the witness who called 911 "actually notices a person has been identified as Cesar Solis as the driver, Mr. Lerma, who is present in court today as one of the passengers, the minor who you just described wearing the belt buckle, Martin [Z.] as one of the other passengers, and a female Hispanic as the final passenger." The prosecutor then continued to recite facts mirroring the facts of the case, repeatedly referring to Lerma by name. At the end of the hypothetical, the prosecutor asked Detective Lucero, "Assuming all of those facts and what you have already testified to as to Mr. Solis, Mr. Lerma, and [Martin Z.], do you have an opinion as to whether or not the crime of assault with a firearm was committed at the direction of, for the benefit of, or in association with the Marianna Maravilla street gang?" Detective

Lucero replied, “Yes, sir, I do,” although he did not say what his opinion was.

The prosecutor then moved on to the second prong of the gang enhancement: “And do you have an opinion as to whether or not the—Mr. Lerma in this hypothetical who fired the gun did so with the specific intent to further, promote or assist in criminal activity by members of the Marianna Marvilla criminal street gang?” Counsel for Lerma objected: “No personal knowledge. No foundation. Inappropriate question, specifically.” The court sustained the objection. During a discussion outside the presence of the jury, the prosecutor explained his belief that his use of Lerma’s name in the hypothetical question was proper. The court stated, however, “I understand what you’re trying to get at but the way you phrased it, in the way the jurors could easily interpret that he is giving an opinion about the guilt of the defendant.” After this discussion, the prosecutor never again used names in his hypothetical questions regarding the gang allegation.

Once again before the jury, the prosecutor said, “Please disregard my second question, if you still remember it.” Referring back to the hypothetical but complying with the court’s ruling by using “the shooter” rather than Lerma’s name, the prosecutor then asked Detective Lucero, “Do you also have an opinion as to whether the individual in the hypothetical, the shooter in the hypothetical situation that I just gave you committed the crime of assault with a firearm with the specific intent to further, assist, or promote criminal activity by gang members?” Detective Lucero replied that he did have an opinion on the matter, but again he did not yet disclose his opinion.

The prosecution then returned to the first element of the enhancement: “With regard to the first question, whether it was committed at the direction in association with or for the benefit of

the Marianna Maravilla criminal street gang, what is the basis of your opinion?” The witness replied: “Factoring everything that I spoke about and the incident, you have a group of individuals from one gang. You have them in a vehicle just outside of the boundaries of their gang. You have them armed times two. In other words, two firearms in the vehicle. For gang members, a firearm is a tool, and it can be used in two different ways. It is a defensive tool or an offensive tool. It can be used to defend those gang members that possess it from attacks from rival gang, or it can be used as an offensive tool to be utilized against other gang members to knowingly going against them to assault them. There is actually a third usage for it as a tool. It can be used in a robbery. In this situation, you have two individuals, both armed with firearms. Three individuals from the gang in a vehicle at a very high profile place, a public place with surveillance cameras and everything. These individuals then take the time to form some type of plan and then assault a rival gang member who then flees. This rival gang member never tries to speak.”² The detective also testified that such an attack in such a public place would be “an immense benefit for the gang.”

Returning to the second element of the gang enhancement, the prosecutor asked Detective Lucero, “With regard to the shooter in the hypothetical, what is the basis for your opinion about their specific intent to commit this crime to further, assist or promote criminal activity by gang members?” The court, however, sustained Lerma’s objection to this question. In response, the prosecutor turned to questions about how and why the crime would benefit a criminal street gang. Detective Lucero

² The trial court sustained counsel for Lerma’s objection to the reference to a rival gang member because there was no evidence of a rival gang member.

testified that committing an act of violence with a firearm outside a gang's territory would make it easier for the gang to commit crimes outside its territory, to extort members of the community within its territory, to commit armed and unarmed robberies, and to commit crimes against the community in general.

The prosecutor then asked Detective Lucero, "Would an individual who is 34 years old, has a Marianna Maravilla tattoo on their chest, is associating with a minor 16 year[s] old, who is a member of the street gang and another individual who is 32 and a member of this criminal street gang, that is Marianna Maravilla, has a handgun, goes slightly outside of the Marianna Maravilla's territory, and calls out to the victim of an assault with a firearm, 'Where are you from' understand that these actions would help benefit the gang?" Detective Lucero answered, "Yes, sir." Finally, the prosecutor asked the detective, again using facts mirroring the facts of the case (and without using any names), "Based on your background, training, and experience, in conversations with gang members both in Marianna Maravilla and other gangs, Hispanic and Black and other ethnicities, would it be unusual for an individual of that age, with that commitment, with those associations of old gang members and a young minor gang member with guns committing a crime where they call—where they're essentially challenging another—victim to claim a gang, would it be unusual for someone doing all of that with those commitments to not know that what they're doing would benefit a gang?" The detective replied, "It would be extremely unusual, sir."

Thus, the transcript reveals that Detective Lucero never responded to a question that contained the name of anyone involved in the incident, nor did Detective Lucero use any names

in his answers.³ The court sustained objections to questions that contained Lerma's name and to the prosecutor's attempt to have the detective provide a direct opinion as to the hypothetical shooter's specific intent. The prosecutor's questions and Detective Lucero's answers left it for the jury to determine whether Lerma acted to benefit a criminal street gang and with the specific intent to promote, further, or assist in criminal conduct by gang members. (See *People v. Franklin* (2016) 248 Cal.App.4th 938, 949 ["[a]s for the specific intent prong [of section 186.22], "[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense"""]; *People v. Rios* (2013) 222 Cal.App.4th 542, 568 ["[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction"]; *People v. Miranda* (2011) 192 Cal.App.4th 398, 411 [courts "routinely draw inferences about intent from the predictable results of action"].)

Finally, the trial court instructed the jury with CALCRIM No. 104, which provides: "During the trial, the attorneys may

³ As noted, after the trial court sustained the objections to the prosecutor's hypothetical questions that included names, the prosecutor stated, "With regard to the first question, whether it was committed at the direction [of], in association with, or for the benefit of the Marianna Maravilla criminal street gang, what is the basis of your opinion?" It is clear from the context and chronology of the questioning, and the prosecutor's use of the subsidiary clause "whether it was committed at the direction [of], in association with, or for the benefit of the Marianna Maravilla criminal street gang," that the prosecutor was referring to the first question the jury had to answer to determine whether the gang allegation was true (i.e., the first prong of section 186.22, subdivision (b)(1)), not the first question the prosecutor had asked the witness that contained names.

have objected to questions or moved to strike answers given by the witnesses. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and not consider that testimony for any purpose.” We presume the jury understood and followed these instructions and disregarded questions and answers to which the court sustained counsel for Lerma’s objections. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 887; *People v. Jackson* (2016) 1 Cal.5th 269, 352; *People v. Clark* (2016) 63 Cal.4th 522, 589.)

B. *The Gang Expert’s Testimony That Lerma Planned the Assault Did Not Violate Lerma’s Rights to Due Process and a Jury Trial*

Lerma also contends Detective Lucero “made flagrantly improper statements that [Lerma] and [Martin Z.] intended to ‘plan’ the charged crime, which amounted to ‘being out on patrol’ then flee back to their neighborhood, and that they did this for the benefit of the gang.” As noted, the prosecutor did ask the detective if he had an opinion whether “the individual in the hypothetical, the shooter in the hypothetical situation that I just gave you committed the crime of assault with a firearm with the specific intent to further, assist, or promote criminal activity by gang members.” Counsel for Lerma objected to the question, but the court overruled the objection, and Detective Lucero replied that he did have an opinion.

Detective Lucero testified: “Yes, sir, sticking straight to two gang members armed, three members total from one gang, in a high profile case, assault an individual, that individual flees, they then drive back to their known neighborhood area, are pursued by the police, flee, and try to evade capture by law

enforcement. I spoke earlier about how gang members will go out of their boundaries to assault other gang members. Again, for the facts that are in evidence on this incident, there was an assault, it was outside of the boundaries of the gang, however, the gang member did return to their own neighborhood, to their own hood. Who the other person was, unknown, but there was an assault, it was in concert, there was a plan formulated. We call this as a gang investigator being out on patrol, conducting a mission. That is, gang members will actively put together a plan, where they will go out, arm themselves, look for other persons or rival gang member, assault them, and then flee back to their neighborhood.”

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, Lerma argues that the admission of Detective Lucero’s testimony violated Lerma’s constitutional rights because it was testimony regarding his subjective intent. In *Killebrew* the court held that a gang expert could not testify about “the subjective *knowledge and intent*” of the defendant. (*Id.* at p. 658). The Supreme Court, however, has since disapproved *Killebrew* and “explained *Killebrew*’s limited significance.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1047). The Supreme Court explained that *Killebrew* “overlooked the critical difference between an expert’s expressing an opinion in response to a hypothetical question and the expert’s expressing an opinion about the defendants themselves. *Killebrew* stated that the expert in that case ‘simply informed the jury of his belief of the suspects’ knowledge and intent on the night in question, issues properly reserved to the trier of fact.’ [Citation.] But, to the extent the testimony responds to hypothetical questions, as in this case (and, it appears, in *Killebrew* itself), such testimony does no such thing.” (*Vang*, at p. 1049).

Detective Lucero's testimony was proper under *Vang*. In response to hypothetical questions using "shooters" and "gang members" rather than names, he described what gang members do. His testimony helped the jury understand why the conduct in this case was gang-related: Gang members go out on patrol armed with weapons, commit assaults, try to avoid or escape law enforcement, and return to their territory. Detective Lucero explained that such collective conduct is prearranged, not haphazard. He referenced how he had previously testified that "gang members will go out of their boundaries to assault other gang members," and he explained that gang investigators call such conduct "being out on patrol, conducting a mission." Thus, Detective Lucero gave admissible expert testimony about the meaning of facts shown by the evidence. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 676 ["parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts," and then an "expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts" and "give an opinion about what those facts may mean"].) As Lerma concedes, Detective Lucero did not testify about Lerma's subjective intent and "did not directly state, 'Lerma . . . specifically intended to plan the crime for the benefit of their gang.'" (Cf. *People v. Ewing* (2016) 244 Cal.App.4th 359, 381 ["certain questions posed to [the gang expert] improperly asked him to opine on defendant specifically, rather than on a hypothetical actor"].)

Finally, contrary to Lerma's contention, there was an evidentiary basis for Detective Lucero's testimony regarding the planned nature of the attack. Both Lerma and Solis were admitted gang members. The two of them went outside the

gang's territory, made a gang challenge,⁴ assaulted the victim, and then returned to their gang's territory. There was also evidence that Lerma and his companions brought guns with them. These facts, along with the expert's factual knowledge of how criminal street gangs operate, supported Detective Lucero's opinion the individuals in the hypothetical questions acted pursuant to a plan. (See, e.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 772 ["[e]vidence concerning defendant's role in the gang as well as the motivations and common practices of gang members tended to corroborate [an] eyewitness account and aided the jury in understanding what might have otherwise seemed like a personal grievance or random attack"]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208 [evidence that gang members armed themselves before traveling with "gang companions . . . demonstrated planning and a preconceived willingness to take immediate lethal action" and supported gang expert's opinion].)

C. *Remand Is Required To Correct an Unauthorized Sentence*

As noted, the trial court imposed an aggregate prison sentence of 26 years. This sentence consisted of the middle term of three years for assault with a firearm, doubled under the three strikes law, plus 10 years for the gang enhancement, three years for the firearm use enhancement, five years for the prior serious felony conviction, and two years for committing an offense while released from custody on bail or on his own recognizance under

⁴ "Where are you from" is a commonly recognized gang challenge. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913, 917; *People v. Miranda*, *supra*, 192 Cal.App.4th at p. 412; *People v. Reyes* (2009) 172 Cal.App.4th 671, 681; *People v. Felix* (2008) 160 Cal.App.4th 849.)

section 12022.1, subdivision (b).⁵ As the People concede, however, the court imposed an unauthorized sentence by imposing both the firearm enhancement under section 12022.5 and the 10-year elevated gang enhancement under section 186.22, subdivision (b)(1)(C). (See *People v. Le* (2015) 61 Cal.4th 416, 419; *People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509). Therefore, we remand the matter for resentencing. (See *Rodriguez*, at p. 509 [“proper remedy” is to “remand the matter for resentencing” because it “will give the trial court an opportunity to restructure its sentencing choices”]; *People v. Woods* (2010) 191 Cal.App.4th 269, 273 [“[w]hen an illegal sentence “is discovered while defendant’s appeal is pending, the appellate court should affirm the conviction and remand the case for a proper sentence””]; *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311 [remand is appropriate where imposition of enhancement results in an unauthorized sentence].)

DISPOSITION

The matter is remanded with directions to resentence Lerma. In all other respects, the judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

KEENY, J.*

⁵ Although the People did not allege in the information an enhancement under section 12022.1, Lerma in his opening brief does not challenge imposition of the enhancement on appeal. (See § 12022.1, subd. (c).)

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