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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO SANCHEZ, et al.,

Defendant and Appellant.

2d Crim. No. B227067  
(Super. Ct. No. TA108715)  
(Los Angeles County)

Armando Sanchez and Jose Luis Abelar appeal their convictions, by jury, of the first degree murder (Pen. Code, § 187, subdivision (a))<sup>1</sup> of Daniel Rodriguez and the attempted murder of Victor Garibay. (§§ 187, subd. (a), 664.) The jury further found that each appellant personally and intentionally used and discharged a firearm causing great bodily injury and death. (§§ 12022.53, subd. (b), (c), (d).) The trial court sentenced each appellant to a term in state prison of 75 years to life. Abelar contends prejudicial error occurred when the trial court allowed the prosecution's street gang expert to testify that Abelar is the only member of the 38th Street gang with the moniker, "Louie." Sanchez contends the trial court erred when it allowed the information to be amended to conform to proof by changing the identity of the attempted murder victim from Reginald

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

Ball to Victor Garibay. Sanchez further contends the trial court should have ordered that appellants' liability for direct victim restitution be joint and several. We affirm.

### *Facts*

At about 9:00 p.m. on July 23, 2009, Daniel Rodriguez, Victor Garibay, and a third man known as "Trusty," visited a neighborhood liquor store near the corner of 105th Street and Compton Avenue in Los Angeles. All three men were members of the Village Boys gang. The liquor store was within the Village Boys' "territory." Members of 38th Street, a different street gang, lived in a house on 105th Street, near the liquor store. Village Boys and 38th Street were rival gangs.

Trusty waited outside as Rodriguez and Garibay went in. Rodriguez bought a cigar. Garibay then walked outside, with Rodriguez just behind him. As they exited, Garibay saw two men walk toward them and start shooting. Garibay immediately ran down an alley to the south of the liquor store. Trusty ran in the opposite direction. Unfortunately, Rodriguez did not react quickly enough. He was shot 13 times and died that night from his wounds. A stray bullet also struck Reginald Ball, a non-gang member who had been standing on the sidewalk just south of the liquor store when the shooting began. Ball recovered but continues to experience pain relating to his wounds.

When interviewed by investigating police officers, Garibay identified Popeye and Silent as the shooters. Garibay told the officers the shooters were members of 38th Street and that they lived in the house on 105th Street. At trial, Garibay completely recanted the statements he had made to police. He claimed not to have made the statements at all and testified that he could not identify anyone involved in the shooting.

A friend of Rodriguez and Garibay's was just leaving the liquor store as they were entering it. As the friend was driving away, he heard shots and turned to see Rodriguez being shot by two men. The friend told investigating police officers that, before the shooting, he saw the same two men standing near the liquor store wearing black, hooded sweatshirts. One of the men was "Popeye," a member of 38th Street, who had a very prominent mustache. The friend identified appellant Abelar from a

photographic line up as Popeye, the person he saw shooting Rodriguez.<sup>2</sup> The friend described the second shooter as a skinny, Hispanic man who was about 5' 8" tall and had long hair. He told police that both men lived in a house on 105th Street with several other 38th Street members. He knew this because he walked his daughter to school down that street, and often saw them at the house. At trial, this witness also recanted the statements he had made to police and testified that he was unable to identify anyone involved in the shooting.

A woman who lives near the liquor store was sitting in her van, in the alley, when she heard the shooting start. She told the investigating officers that she ducked down at first, but then looked up to see appellant Abelar, whom she called "Luis," shooting Rodriguez. She knew "Luis" because at one time, she lived in the same house with him. The same witness confirmed where Abelar lived and told the investigating officers that Sanchez was occasionally a visitor at the house. Like the other eyewitnesses, this witness recanted her statements at trial. She testified that she did not identify a photograph of Abelar as one of the shooters. Instead, she picked that photograph out of the "six pack," because she thought the officers were asking her to point out people she recognized from her neighborhood, not from the shooting.

A witness who was inside the liquor store at the time of the shooting told police officers that the shooters were known as Popeye and Silent. They were older members of 38th Street who lived in a particular house on 105th Street.

Los Angeles Police Department Officer Tyson Hamaoka testified as an expert witness on criminal street gangs, and on the Village Boys gang in particular. Officer Hamaoka described the rivalry between Village Boys and 38th Street. He also testified that appellant Abelar is the only member of 38th Street who is known as "Louie." Hamaoka based that testimony on information given to him by another police officer who is an expert on 38th Street. Other evidence established that Abelar's first

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<sup>2</sup> "Popeye" is the moniker used by appellant Sanchez. Appellant Abelar, who has a prominent mustache, is known as "Louie," "Stranger," or "Silent."

name is "Luis," that he has the name "Louie" tattooed on his arm, and that he is bald and wears a large mustache.

### *Discussion*

#### *Gang Expert's Reliance on Hearsay*

Abelar contends the trial court erred when it permitted Officer Hamaoka to testify that he is the only member of 38th Street who is known by the moniker, "Louie." Although he acknowledges that an expert witness is permitted to rely on hearsay as the basis for his opinions, Abelar contends the testimony concerning his moniker is a statement of fact, not opinion. Because the source of this statement of fact -- the LAPD's expert on 38th Street -- did not testify, Abelar contends Officer Hamaoka should not have been permitted to testify to it. We are not persuaded.

First, we note that appellant's confrontation clause claim has been forfeited because he did not raise it at trial. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1024, 1028, fn. 19.) Nor did the testimony amount to inadmissible hearsay. As Abelar acknowledges, the testimony of an expert witness may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field . . . ." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) This includes hearsay "of a type reasonably relied upon by professionals in the field." (*People v. Nazary* (2010) 191 Cal.App.4th 727, 749.) Thus, when an expert witness on street gangs opines that a person is a member of a gang or committed a crime for the benefit of a gang, the witness may also " 'relate the information and sources upon which [the witness relies] in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion.' " (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427, quoting *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) Because it is not used to establish the truth of the matter asserted, "the hearsay is not 'testimonial' under *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158

L.Ed.2d 177, and it is permissible for the jury to consider the truth of the hearsay in evaluating the expert's opinion." (*Id.* at p. 1424.)

Officer Hamaoka's testimony was admissible for the non-hearsay purpose of supporting his opinion that appellant Abelar is a member of 38th Street. During the same line of questioning, Officer Hamaoka testified that he was personally familiar with Abelar, having contacted him about five times. Abelar told Hamaoka that his nickname was "Stranger." Others, including LAPD experts on 38th Street, told Hamaoka that Abelar is also known as "Louie" and "Silent." Abelar has gang tattoos, including the name "Louie" on his arm and the number "38" on his abdomen and hand. Hamaoka testified that it would be very dangerous for anyone to have these tattoos if they were not a member of 38th Street. He had also personally seen Abelar hanging out at the house on 105th Street. Hamaoka based his opinion that Abelar is a member of the 38th Street gang on these facts.<sup>3</sup> The testimony did not, therefore, violate the hearsay rule. (*People v. Ramirez, supra*, 153 Cal.App.4th at p. 1427.)

Had error been committed, we would conclude it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Geier* (2007) 41 Cal.4th 555, 608.) In addition to Hamaoka, three witnesses who were personally acquainted with Abelar told police that he was a member of 38th Street who was known as "Louie" or "Silent." The same witnesses identified appellant as one of the shooters. Because they knew appellant by appearance as well as by name, there is no reason to believe their identifications were based on a neighborhood rumor that a 38th Street member named "Louie" was one of the shooters. As a consequence, the question of whether appellant was the only 38th Street member to use that name is of little relevance. It is clear to us beyond a reasonable doubt that a rational jury would have

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<sup>3</sup> Hamaoka gave similar testimony with respect to appellant Sanchez. He testified that he was personally familiar with Sanchez, who told Hamaoka that he is a member of 38th Street and is the only member known as "Popeye." Sanchez also has many gang tattoos. Hamaoka testified it was his opinion that appellant Sanchez is a member of 38th Street.

found appellant Abelar guilty absent Hamaoka's statement that he is the only 38th Street member known as "Louie." (*People v. Geier, supra*, 41 Cal.4th at p. 608.)

*Amendment to Conform to Proof*

The information charged appellants with the murder of Rodriguez and the attempted murder of Reginald Ball. Ball was standing outside near the liquor store when he was shot, apparently by a stray bullet. Victor Garibay told the police that appellants shot at him and Rodriguez as they walked out of the liquor store. This evidence was presented at the preliminary hearing and at trial. At the close of the prosecution's case at trial, the prosecutor moved to amend the information to conform to the evidence that Garibay, rather than Ball, was the intended victim of the attempted murder.

Appellant Sanchez objected to the amendment on the ground that it was not supported by the evidence because Garibay identified Abelar, not Sanchez, as the person who shot at him. Appellant Abelar objected that the motion to amend was untimely because the prosecution had already rested its case. Neither appellant complained that the proposed amendment would prejudice their ability to present a defense, and neither appellant requested additional time to respond to the amended charges. In granting the motion to amend, the trial court rejected Sanchez's claim that there was no substantial evidence he fired at Garibay. The trial court noted that Garibay told police both men were shooting at him and at Rodriguez.

Sanchez contends the trial court violated his due process right to notice of the charges against him when it allowed the amendment because the prosecutor tried the case on the theory that Ball was the victim of the attempted murder and sought to change the identity of the victim only after resting its case. There was no error.

We review the trial court's decision to permit the amendment for abuse of discretion. (*People v. Birks* (1998) 19 Cal.4th 108, 129.) Section 1009 provides that the trial court "may order or permit an amendment of an . . . information, . . . for any defect or insufficiency, at any stage of the proceedings, . . . An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination . . . ." This

statute gives the trial court "discretion to permit an amendment of the information to charge any offense shown by evidence taken at the preliminary examination, at any time during trial, provided the defendant's substantial rights are not prejudiced thereby." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 903.) The defendant's substantial rights include the " 'preeminent' due process principle is that one accused of a crime must be "informed of the nature and cause of the accusation." [Citation.] Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' (*People v. Jones* (1990) 51 Cal.3d 294, 317.)" (*People v. Seaton* (2001) 26 Cal.4th 598, 640-641; see also *People v. Knox* (1999) 74 Cal.App.4th 757, 764.)

Appellant Sanchez contends those rights were violated here because he was not notified in advance of trial of the name of the person he allegedly attempted to murder. But the evidence presented at the preliminary hearing was identical to the evidence at trial. Sanchez had adequate notice of the prosecution's contention that he and Abelar targeted Rodriguez and Garibay because of their gang affiliation. Ball was always recognized as an innocent bystander who was struck by a stray bullet. Amending the information to allege that Garibay was the victim of the attempted murder did not alter the evidence presented, introduce new facts or the impact the defense theory of the case. The amendment did not prejudice the appellants' substantial rights and, as a result, was properly allowed.

*People v. Christian* (1894) 101 Cal.471, is not to the contrary. There, the defendant was called before a magistrate to answer a complaint alleging that he committed assault with a deadly weapon on George Magin. He was later tried and convicted of having assaulted George Massino with a deadly weapon. The opinion does not describe the facts of the assault itself, but it does note that Christian had no notice prior to trial that he was charged with having assaulted Massino. Our Supreme Court reversed the conviction because, "The name of the party assaulted is a material element of the offense, and common justice to the defendant demands that he be notified of the

particular offense for which he stands committed. In the present case he had no such notice." (*Id.* at p. 473.)

*People v. Christian, supra*, does not mandate the naming of a specific victim in every felony complaint or information, nor does it prohibit the amendment of an information to change the name of the victim. As the court noted in *People v. Griggs* (1989) 216 Cal.App.3d 734, "[T]he language of *People v. Christian, supra*, 101 Cal.471, that the name of the party assaulted is a material element of the offense, was set forth in a due process context requiring notification of the particular offense for which one is being tried and committed." (*Id.* at p. 743.) Due process is satisfied where the defendant receives adequate notice of the facts constituting the alleged crimes so there is "no question which of defendant's acts was the basis for" the conviction. (*Id.*)

Here, both the appellants were well aware of the identities of Victor Garibay and Reginald Ball. The facts and evidence relied upon by the prosecution did not change between the time of the preliminary hearing and the trial. Unlike the appellant in *Christian, supra*, the appellants here were clearly "notified of the particular offense for which [they stood] committed." (*Id.*) There was no confusion of what act appellants were tried and convicted. As a consequence, there was no due process violation.

#### *Join and Several Liability for Restitution*

The trial court ordered appellants to pay direct victim restitution, but did not mention whether their liability for this amount was joint and several. While the minute order from the sentencing hearing specifies joint and several liability, the abstract of judgment does not. Appellant Sanchez urges us to amend the abstract of judgment to "correctly reflect" that appellants have joint and several liability for the direct victim restitution.

A trial court has discretion to order that co-defendants share joint and several liability for direct victim restitution. (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.) The trial court here, however, entered no such order during its oral pronouncement of judgment. "When there is a discrepancy between the minute order and



the oral pronouncement of judgment, the oral pronouncement controls." (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.)

*Disposition*

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.\*

\* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Jerry E. Johnson, Judge  
Superior Court County of Los Angeles

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