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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIEL BENITEZ,

Defendant and Appellant.

B275478

(Los Angeles County
Super. Ct. No. BA439812)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Eliel Benitez (defendant) of (1) assault by means of force likely to produce great bodily injury and (2) carrying a dirk or dagger. The jury also found true allegations that defendant committed the assault for the benefit of, at the direction of, or in association with a criminal street gang and personally inflicted great bodily injury on the assault victim, Reynaldo Jacinto (Jacinto). We consider whether the gang allegation finding must be reversed because aspects of the gang expert's testimony constituted inadmissible, prejudicial hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), a case that had not yet been decided at the time of trial. We also consider whether the prosecution introduced substantial evidence supporting the jury's great bodily injury finding.

I. BACKGROUND

A. *The Offense Conduct, As Established by the Evidence at Trial*

At approximately 5:00 p.m. on August 27, 2015, Jacinto exited the MacArthur Park Metro station, located on Alvarado Street near Seventh Street. Jacinto had recently left a party at which he had consumed a few beers, and he was headed to a cell phone repair shop. As Jacinto walked down Alvarado Street, he walked past a group of five or six men hanging out on the sidewalk near a McDonald's.

Shortly after passing the group, Jacinto heard someone approach from behind him and say something like "Hey, you," and "Ese" or "Holmes." Jacinto identified defendant as the man who approached him. Defendant, who was wearing a gray tank top, asked Jacinto, "Hey, you, Holmes, where are you from?" Jacinto understood that defendant was asking if he (Jacinto) was

affiliated with a gang, and Jacinto responded that he was “not from anywhere.” One of the other men in defendant’s group, Aaron Gutierrez (Gutierrez), then joined the conversation, claiming that Jacinto had bumped into a kid back by the McDonald’s. Jacinto denied bumping into anyone and tried to “talk things out” with Gutierrez, but Jacinto eventually said something like “I don’t know what the fuck you’re talking about” and turned to walk away.

Defendant and Gutierrez blocked Jacinto from going anywhere, and Gutierrez punched Jacinto in his left eye. Defendant joined in, hitting Jacinto in the lower part of his face a couple of times. Both men proceeded to hit and kick Jacinto’s head, torso, and legs.

While the assault was underway, defendant and Gutierrez told Jacinto that he was “in their hood” and “in their territory.” Jacinto then saw the rest of the group defendant had been hanging out with coming towards him. The other individuals joined in hitting Jacinto, and after about two minutes, most of the group walked away; Gutierrez, however, stayed behind.

Jacinto was able to recover and kicked Gutierrez in his back, causing him to fall down. At that point, defendant and the others in his group rushed back toward Jacinto. Jacinto attempted to run, but one of the individuals in the group pushed Jacinto to the ground. Jacinto did not see who pushed him, but he thought it was Gutierrez because he had been the closest to Jacinto.

Jacinto cut his left eyebrow on the sidewalk when he fell, and the cut began to bleed profusely. The group started hitting and kicking Jacinto again, and Jacinto felt someone lift up his shirt. Defendant stomped on the back of Jacinto’s head. At some

point, the group of men stopped attacking Jacinto and he got up and went to the phone store he had intended to visit. Someone at the store called 911.

Two police officers responded to the 911 call. They immediately requested paramedics for Jacinto. After obtaining Jacinto's description of his attackers and ensuring he was receiving treatment, the officers headed to the scene of the incident to ascertain if any potential suspects were still in the area. The officers arrived at Seventh and Alvarado around 6 p.m. There were approximately ten to fifteen people in the area at the time. The officers observed defendant in front of the McDonald's near where the attack occurred, and the officers arrested him because he matched Jacinto's description. The officers searched defendant incident to his arrest, and found a five-inch spring-loaded knife in his pocket.

B. The Prosecution's Evidence of Jacinto's Injuries

Jacinto testified about the injuries he suffered from the assault, including from when defendant "was hitting like in the back of my head . . . [and] stomping like my skull." Jacinto had bruising and red marks on his face, including what Jacinto described as a shoe print from when "they were like stomping my face." The bruising and red marks were visible in photographs introduced into evidence during the prosecution's case-in-chief. Jacinto had swelling on the back of his head, as depicted in another of the photographs. He also "blanked out" for a period of time in the ambulance that transported him to the hospital after the attack. There, he received five or six stitches to close the cut on his eyebrow. Jacinto still had bruising on his face the day

after the attack, and he testified the swelling to the back of his head had also worsened by then.

We have reviewed the photographs introduced in evidence, which were taken on the day of the assault. They depict Jacinto's face, a profile perspective of the right side of his head, the back of his head, and a view of his entire upper body. The photographs demonstrate that Jacinto had noticeable swelling at the back of his head. Other photographs showed Jacinto was bleeding significantly from the cut on his eyebrow and had bruising and/or abrasions on other parts of his face.

Los Angeles Police Department (LAPD) Officers Cristian Valenzuela and Ernesto Carbajal, the two police officers who responded to the 911 call, testified regarding Jacinto's appearance after the attack. Officer Valenzuela testified that when he and his partner arrived at the cell phone store, Jacinto was "bleeding profusely" and "needed medical attention immediately" because he had "a lot of blood and possible bruising to his face." Officer Carbajal testified that he could tell that Jacinto was in "a lot of pain" because he "looked like he was grimacing and he was grabbing and holding on to his face while he sat down on the chair, bleeding."

C. The Gang Expert Testimony

LAPD Officer Tomas Perez, assigned to the Rampart Division's Gang Enforcement Detail, testified as the prosecution's gang expert. Officer Perez was specifically assigned to investigate crimes committed by two criminal street gangs, including one going by the name "Crazy Riders."

Officer Perez described the boundaries of the Crazy Riders' territory, which included the area where defendant, Gutierrez,

and the other men assaulted Jacinto. Officer Perez explained that the stretch of Alvarado Street between James Wood Boulevard and Wilshire Boulevard (the Alvarado Corridor), was a very busy thoroughfare within the Crazy Riders' stronghold and was a large money maker for the gang.

Officer Perez testified the Crazy Riders made money in several ways, including "taxing" street vendors in their territory and engaging in extortion, drug sales, and "strong-arm bodily force type" street robberies. Officer Perez also testified the Crazy Riders were known to commit group assaults on rival gang members, or people they suspect are gang members. He explained the Crazy Riders commit these group assaults in order to maintain control over their territory. By attacking possible rivals or people who have not paid their extortion fees to the gang, they intimidate the community, and that makes it easier for the gang to operate because they receive less resistance from other gang members, community members, and victims.

Officer Perez testified there were approximately 100 members of the Crazy Riders gang. He described the symbols and monikers used by Crazy Riders to identify themselves—including the initials "CRS."

Addressing the particulars of this case, Officer Perez opined defendant was a Crazy Riders gang member. Officer Perez testified he believed defendant was a member of the gang because he had previously spoken to defendant, who had admitted to being a Crazy Riders member and to using the moniker "G." "[T]hrough other sources of information," however, Officer Perez believed defendant's real moniker was "Sapo." Officer Perez told the jury that his opinion concerning defendant's gang membership was also based on Officer Perez's

knowledge that defendant had been known to hang out with other Crazy Riders gang members and had three “CRS” tattoos—one each on both of his arms and another on his abdomen.

Significantly for our purposes on appeal, Officer Perez also opined Gutierrez was a member of the Crazy Riders gang. Officer Perez testified he spoke to Gutierrez in the course of “many contacts” with him in the past. During those conversations, according to Officer Perez, Gutierrez admitted to being a gang member using the moniker “Scar.” Officer Perez told the jury that his opinion concerning Gutierrez’s gang membership was “based off [his] interactions with [Gutierrez], people he has been hanging out with, [and] things like that.” Defendant did not object on hearsay grounds to Officer Perez’s testimony concerning Gutierrez’s gang membership.

Toward the end of Officer Perez’s testimony, the prosecution asked him to offer an opinion on a detailed hypothetical scenario designed to track the facts of the assault on Jacinto. The prosecutor asked Officer Perez to assume, among other things, that there is a group of four to five Hispanic men that includes at least two members of the Crazy Riders gang, one who had CRS tattoos and another who “is self-admitted” and engaged in activity consistent with being a gang member; the CRS-tattooed gang member asks an unrelated Hispanic man walking along the Alvarado Corridor where he is from; the individual responds that he is not from anywhere; the Crazy Riders group accuses the individual of bumping into someone; the “one with the tattoos and the one that’s self-admitted” begin to punch the victim in the face and head, and the rest of their group joins in on the fight; the fight briefly ends, and then resumes with the same parties; during the second assault, the victim’s shirt is

lifted up; the assault ends, the victim flees, and the police are called; when the police arrive to investigate the incident, local citizens walk away from the police and do not provide any information; the police arrest the tattooed individual in the same area the assault took place; and the man arrested is later found to have a spring-loaded knife on him. The prosecutor asked Officer Perez whether the hypothetical assault was committed for the benefit of, or in association with, a criminal street gang, and Officer Perez opined that both were true.

In Officer Perez's experience, a gang member asking an individual "where they are from" is a confrontation or challenge asking the individual what gang he or she is from. Officer Perez explained his opinion that the crime was committed in association with a criminal street gang was based on "two documented self-admitted Crazy Rider gang members completing a crime together." Officer Perez believed the hypothetically described crime was also committed for the benefit of the gang because "it appears that they're protecting their stronghold from the possible rival gang member or somebody they at least believe to be." Officer Perez elaborated: "[B]ased on the scenario you provided that could be shown by lifting up his shirt to possibly in my opinion look for gang tattoos and identify him as a gang member, and then by blatantly beating him twice at . . . approximately 5:00 o'clock or 6:00 o'clock in the Alvarado Corridor, in a busy area. That just shows how blatant Crazy Riders are towards the community. They will commit violence no matter who is around, whether it's a public street or not, and that creates a deterrence, making an example, and that in turn helps their stronghold and not letting people talk to the police and

resisting gang members. That itself is a huge benefit . . . [to] the gang.”

The prosecutor then added to the hypothetical, asking if it would be uncommon for the individual with the tattoos to stay behind at the scene of the attack while the others left. Officer Perez testified that, in his experience, it is very common for an assailant to stay in the area after commission of a crime in order to deter witnesses and victims from reporting what happened and to monitor whether any subsequent investigation is going to be an issue for the gang. When asked why the hypothetical crowd would disperse when the police approached the area, Officer Perez explained such behavior was common because no one wants to be perceived as opposing a gang and dealing with the police, for fear of retribution.

D. The Prosecution’s Closing Argument and the Pertinent Jury Instruction

The prosecution discussed the charged gang enhancement during closing argument and acknowledged it must prove “the defendant commit[ed] the crimes for the benefit of, or in association with[,] the criminal street gang[.]” The prosecutor said, “when I talk about that, I talk about what we’re going after are multiple gang members committing crimes together. And that’s a fancy word phrasing, ‘in association with.’” The prosecutor also explained the “for the benefit of” concept embodied in the charged gang enhancement, telling the jury that a “benefit” to a gang “can be tangential or intangible,” but a gang member who beat up his wife merely because she cheated on him could not be found to have committed such a crime for the benefit of the gang. The prosecutor then cited the testimony offered to

prove defendant was a Crazy Riders gang member and argued as follows: “I don’t believe there is any dispute that this crime was committed for the benefit of, or in association with[,] the criminal street gang either, and that’s because we know Aaron Gutierrez, the other member who was there, who beat up Jacinto, was a member of the Crazy Riders, and you can stop there. If you can find that two gang members commit a crime together, then they are guilty of a gang allegation. What is in dispute? Who is responsible? That’s what the defense is saying. ‘Yeah, this guy got beat up. Yeah, it’s kind of gang-related, but you got the wrong guy. He was there, but he didn’t really do it.’”¹

After closing argument, the trial court instructed the jury on the elements of the alleged gang enhancement. The instruction stated: “To prove this allegation, the People must prove that: 1. The defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members.”

E. Verdicts and Sentence

The jury convicted defendant on the charge of assault by means of force likely to produce great bodily injury in violation of Penal Code section 245 subdivision (a)(4),² and found true the gang enhancement alleged in connection with that count

¹ Defense counsel did not discuss the gang enhancement during his closing argument.

² Undesignated statutory references that follow are to the Penal Code.

(§ 186.22, subd. (b)(1)). The jury also found defendant guilty on the second charged count: carrying a dirk or dagger in violation of section 21310.

The trial court sentenced defendant to a total of thirteen years and eight months in state prison, consisting of the mid-term of three years for the assault charge, plus ten years for the section 186.22, subdivision (b)(1)(C) gang enhancement, plus an additional eight months (one-third of the mid-term, consecutive) for the carrying a dirk or dagger conviction.

II. DISCUSSION

Defendant presents two arguments for reversal: (1) that elements of the gang expert's testimony constituted case-specific hearsay under *Sanchez, supra*, 63 Cal.4th 665, and were erroneously admitted; and (2) the trial court erred in denying defendant's motion for judgment of acquittal on the great bodily injury allegation at the close of the prosecution's case-in-chief.

As to the first claim, we hold the gang expert related case-specific hearsay in opining Gutierrez was a member of the Crazy Riders, and the admission of that hearsay testimony was error. However, examining the record as if the expert had not offered an opinion that Gutierrez was a gang member and the prosecution had not relied on that opinion, there is still strong evidence that defendant committed the assault for the benefit of the Crazy Riders. We therefore conclude there is no prejudice warranting reversal, as it is not reasonably probable that defendant would have obtained a more favorable verdict if the expert's hearsay testimony had not been admitted.

As to the second claim, we hold the record at the close of the prosecution's case-in-chief contains substantial evidence from which a reasonable trier of fact could find defendant personally

inflicted great bodily injury on Jacinto. Defendant personally hit and kicked Jacinto and “stomped” on Jacinto’s skull, and the attack by defendant and others in his group left Jacinto with footprint marks on his face, caused significant swelling at the back of his head, and resulted in Jacinto’s brief loss of consciousness in an ambulance after the attack.

A. *Officer Perez’s Testimony That Gutierrez Was a Member of the Crazy Riders Was Inadmissible Hearsay, but Harmless*
1. *Forfeiture*

At trial, defense counsel did not object to any of the evidence he now challenges on hearsay grounds. While this would normally constitute a forfeiture of those objections (e.g., *People v. Dykes* (2009) 46 Cal.4th 731, 756), defendant contends his claim has not been forfeited because any objection would have been futile under the law as it existed prior to *Sanchez*.

“Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence.” (*People v. Welch* (1993) 5 Cal.4th 228, 237; accord, *People v. Black* (2007) 41 Cal.4th 799, 810 (“The circumstance that some attorneys may have had the foresight to raise [an] issue [prior to a significant change in the law] does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated the [change].”))

Prior to *Sanchez*, though experts “ha[d] traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge,” expert witnesses were permitted to testify about out-of-court statements upon which they had

relied in forming their opinions—even where the statements were otherwise inadmissible hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 676.) The theory was that such evidence was offered not for its truth, but only to identify and support the basis for the expert’s testimony. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-620, disapproved in part by *Sanchez, supra*, at p. 686, fn. 13.)

In *Sanchez*, our Supreme Court rejected this line of reasoning, explaining that “[w]hen an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true.” (*Sanchez, supra*, 63 Cal.4th at p. 684.) Instead, *Sanchez* holds that “[w]hen 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. It cannot logically be maintained that the statements are not being admitted for their truth.” (*Id.* at p. 686.)

Defendant’s trial took place before our Supreme Court decided *Sanchez*. On the state of the law as it existed at the time of trial, it would have been futile to object to the portions of Officer Perez’s testimony in which he related out-of-court statements as the basis for his opinion concerning Gutierrez’s gang membership. (See *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7, review granted Mar. 22, 2017, S239442.) We accordingly hold defendant did not forfeit the hearsay error he now asserts on appeal.

2. *Officer Perez’s testimony regarding Gutierrez’s gang membership was inadmissible under state hearsay rules*

Defendant contends Officer Perez’s testimony concerning Gutierrez’s gang membership, particularly his testimony that Gutierrez was a Crazy Riders gang member because Gutierrez “ha[d] self-admitted” his gang membership, was inadmissible, case-specific hearsay.³

We agree this aspect of Officer Perez’s testimony, which pertained to one of the participants in the charged assault at issue, is a “case-specific” fact and not general background testimony. (*Sanchez, supra*, 63 Cal.4th 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”]; compare *id.* at p. 685 [expert witnesses “can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly

³ Defendant briefly argues Officer Perez related inadmissible hearsay testimony when opining on *defendant’s* gang membership, but the argument fails. Defendant’s admissions to Officer Perez fall within a hearsay exception, and Officer Perez’s testimony concerning defendant’s “Sapo” moniker was insignificant and would not have influenced the jury’s true finding on the gang enhancement. (See, e.g., Evid. Code, § 1220 [“Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . .”]; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 [expert’s testimony that included inadmissible hearsay did not prejudice the defendant where other, admissible evidence supported the jury’s findings] (*Ochoa*).)

admitted under a statutory hearsay exception”].) The testimony concerning Gutierrez’s gang membership was also hearsay, and no exception to the hearsay rule applies.⁴ (*Sanchez, supra*, 63 Cal.4th at pp. 676-677; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 415 [“Under *Sanchez*, it appears that testimony about a nonparty’s out-of-court admission that he or she is a gang member, offered to prove he or she *is* a gang member, is hearsay”]; *Ochoa, supra*, 7 Cal.App.5th at p. 583 [“Under *Sanchez* . . . admissions [of gang membership] were out-of-court statements admitted for the truth of the matters asserted, and thus hearsay”]).)

3. *It is not reasonably probable the jury would have reached a different result absent the hearsay testimony*

Defendant contends only that Officer Perez’s testimony included inadmissible hearsay; he expressly disclaims any argument that the introduction of the hearsay testimony resulted in a violation of his constitutional right to confront the witnesses

⁴ The Attorney General suggests Gutierrez’s out-of-court statement that he was a gang member could qualify as a statement against penal interest under Evidence Code section 1230. The Attorney General also acknowledges, however, that the statement against interest exception to the hearsay ban requires a showing that the declarant was unavailable to testify at trial and the record on appeal is “limited” as to whether Gutierrez was unavailable. Of course, “limited” is putting it mildly—there is no basis on which we can conclude Gutierrez was unavailable, and there is accordingly no justification for applying the Evidence Code section 1230 hearsay exception.

against him. Because we find no merit in defendant's assertion that the admission of the hearsay violated due process by resulting in a fundamentally unfair trial,⁵ we assess whether the introduction of the hearsay resulted in prejudice to defendant under the *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) standard. (*People v. Stamps* (2016) 3 Cal.App.5th 988, 997.)

The information filed against defendant included gang enhancement allegations under section 186.22, subdivision (b)(1). That statute mandates an enhanced sentence for "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" As is apparent from the statutory language, section 186.22, subdivision (b)(1) "describes what the prosecution must prove in the disjunctive, i.e., that the crime must be 'committed for the benefit of, at the direction of, or in association with any criminal street gang.'" (*People v. Garcia* (2017) 9 Cal.App.5th 364, 379.) The jury thus could have found

⁵ Only a fundamentally unfair trial can give rise to a due process violation under the United States constitution. (*People v. Partida* (2005) 37 Cal.4th 428, 439 ["[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"; accord, *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 20.) The admission of the challenged hearsay testimony here falls far short of demonstrating fundamental unfairness. (Compare *People v. Albarran* (2007) 149 Cal.App.4th 214, 230-232 [admission of gang evidence that had "no legitimate purpose" in the trial "present[ed] one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair"].)

the gang enhancement true on the basis of either an “in association with” theory or a “for the benefit of” theory.

It is not reasonably probable that the jury would have reached a result more favorable to defendant if the trial court had precluded Officer Perez from opining Gutierrez was a member of the Crazy Riders. In conducting the counterfactual analysis required by *Watson*, we cast aside the gang expert’s opinion that Gutierrez was a Crazy Riders gang member and the evidence and argument at trial that relied on that opinion, including the portion of Officer Perez’s answer to the prosecution’s hypothetical question that directly relied on the assumption that the hypothetical crime upon which he was opining was committed by two gang members.⁶ Setting all that aside, the strength of the evidence that defendant committed the crime for the benefit of the Crazy Riders leaves us convinced the jury still would have returned the same true finding on the alleged gang enhancement.

Defendant was an admitted Crazy Riders member with prominent gang tattoos on his arms. Both of those tattoos were exposed on the day of the assault because defendant was wearing a sleeveless shirt. Defendant asked Jacinto “where are you from,” which the expert explained was a gang challenge. Defendant and several of his companions attacked Jacinto during the daytime in the Alvarado Corridor, a crowded, public location

⁶ We do consider, however, the expert’s responses to the portions of the hypothetical regarding the tattooed gang member’s decision to stay behind after the crime, and the crowd’s reaction to the appearance of police officers, as neither of those opinions were premised on the assumption that one of the other attackers was a self-admitted gang member.

that the expert explained is in Crazy Riders territory and is a significant money maker for the Crazy Riders. The expert also testified that the Crazy Riders are known to commit group assaults on individuals known or suspected to be rival gang members in order to maintain their stronghold. Defendant remained at (or returned to) the scene of the attack after Jacinto fled, which the expert testified is common gang behavior aimed at discouraging people from talking to the police.

Importantly, defendant and at least one of his confederates also told Jacinto that he was “in their hood and . . . in their territory.” Thus, not only did defendant commit a crime that is one of the Crazy Riders’ primary activities in Crazy Riders’ territory while displaying gang tattoos and after issuing a gang challenge, but he also proclaimed the area was “their territory” while the assault was actually underway. All these facts are strong evidence that the assault was committed for the benefit of the Crazy Riders gang.

Notwithstanding the strength of the evidence, defendant argues the hearsay error was prejudicial because the prosecution in closing argument placed substantial emphasis on the “in association with” prong of section 186.22, which in the prosecution’s view, turned on Gutierrez’s gang membership. The prosecutor, however, also explained section 186.22’s “for the benefit of” prong to the jury (an independent basis for finding the gang enhancement true),⁷ and the evidence in support of a “for

⁷ The trial court correctly instructed the jury that the first element of the section 186.22 was satisfied if the “defendant committed the crime for the benefit of, at the direction of, *or* in association with a criminal street gang.” (Emphasis added.)

the benefit” finding was far less dependent—if dependent at all—on the opinion that Gutierrez was a Crazy Riders member. In light of the strong non-hearsay evidence that the crime was committed for the benefit of the Crazy Riders, we are confident the jury would have found the enhancement true regardless of whether it heard Officer Perez’s hearsay testimony and the prosecution’s reliance on it.⁸ (See, e.g., *People v. Harris* (2005) 37 Cal.4th 310, 336 [applying *Watson* standard and concluding no reasonable probability that error in admitting hearsay evidence affected trial outcome]; *People v. Miller* (1990) 50 Cal.3d 954, 984-986 [error harmless because not reasonably probable a result more favorable to defendant would have occurred if inadmissible testimony had not been admitted]; *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1535-1536 [error harmless (even under the more demanding *Chapman v. California* (1967) 386 U.S. 18 standard that does not apply here) because evidence of guilt was so strong that the jury would have reached the same verdict regardless of the error].)

⁸ Defendant does not argue that the complained-of hearsay error impacted the jury’s finding as to the second of section 186.22’s elements, i.e., that the crime was committed “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) We therefore forgo a prejudice analysis as to that element.

*B. The Trial Court Properly Denied of Defendant's
Motion for Judgment of Acquittal at the Close of the
Prosecution's Case*

1. Standard of review

“An appellate court reviews the denial of a [Penal Code] section 1118.1 motion under the standard employed in reviewing the sufficiency of the evidence to support a conviction. [Citation.] ‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.’ [Citation.] Review of the denial of a section 1118.1 motion made at the close of a prosecutor’s case-in-chief focuses on the state of the evidence as it stood at that point. [Citation.]” (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

2. *The prosecution introduced substantial evidence defendant caused Jacinto great bodily injury*

Defendant concedes that, at the close of the prosecution's case-in-chief, there was sufficient evidence that Jacinto had suffered great bodily injury as defined by Penal Code section 12022.7. But defendant believes the only such injury Jacinto suffered was the cut to his left eyebrow that required stitches, and defendant asserts the record is clear that Gutierrez—not defendant—caused that injury. However, even if we accept defendant's reading of the record, there is still substantial evidence that defendant personally caused Jacinto great bodily injury. The injuries to Jacinto's head, which resulted in swelling and precipitated Jacinto's "blank[ing] out" constitute great bodily injury inflicted by defendant.

Jacinto testified that defendant kicked him while he was on the ground and, at certain points during the attack, "was hitting like in the back of [Jacinto's] head. . . . [and] stomping like [Jacinto's] skull." Jacinto stated that after the attack he had bruising and red marks on his face, including a shoe print and swelling at the back of his head. Jacinto further testified, when asked whether he lost consciousness as a result of the attack, that he "blanked out, like, inside the ambulance." The prosecution also introduced photographs of the injuries to Jacinto's head, and the swelling at the back of his skull (which later got worse) is apparent. Considered in the aggregate, this is sufficient evidence for the jury to conclude Jacinto's head injuries constituted great bodily injury. (See, e.g., *People v. Saez* (2015) 237 Cal.App.4th 1177, 1188-1189 [finding it "significant that many of the victim's injuries were to her head, an obviously vulnerable area"]; *People v. Washington* (2012) 210 Cal.App.4th

1042, 1047 [“An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of ‘great bodily injury’”]; see also § 243, subd. (f)(4) [defining “serious bodily injury” to include “loss of consciousness”]; *People v. Burroughs* (1984) 35 Cal.3d 824, 831 [“[W]e acknowledge that “[s]erious bodily injury” and “great bodily injury” are essentially equivalent elements”], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

Jacinto identified defendant as the person who kicked him on the ground and hit him in the back of his head by “stomping . . . my skull.” To the extent Jacinto was unable to pinpoint whether defendant or others in the group attacking him were responsible for his other head injuries (apart from the cut on his eyebrow), the inability is irrelevant for our purposes. Controlling authority holds that a defendant can be found to have personally inflicted great bodily injury where the defendant physically joins a group attack and directly applies force to a victim that is sufficient to inflict, or to contribute to the infliction of, great bodily harm. (*People v. Modiri* (2006) 39 Cal.4th 481, 486.) That is precisely the circumstance here, and the trial court did not err in denying the motion for judgment of acquittal.⁹

⁹ Because we hold the trial court did not err in denying the motion, we do not address defendant’s argument that the denial of the motion violated his Fourteenth Amendment due process rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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