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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.

ANTHONY RIVAS,

Defendant and Appellant.

2d Crim. No. B269791  
(Super. Ct. No. BA425421-01)  
(Los Angeles County)

A jury found Anthony Rivas guilty of first degree murder of Ricardo Hernandez (count 1) (Pen. Code, § 187, subd. (a), 189), with attendant personal and principal discharge of a firearm (§ 12022.53, subds. (d) & (e)(1)) and criminal street gang findings (§ 186.22, subd. (b)(1)(C)). The jury also found Rivas guilty of assault with a semiautomatic firearm upon Americo Beltran (count 2) (§ 245, subd. (b)), with attendant personal infliction of great bodily injury (§ 12022.7, subd. (a)), personal use of a firearm (§ 12022.5, subd. (a)), and criminal street gang findings (§ 186.22, subd. (b)(1)(C)).

The trial court sentenced Rivas to 25 years to life for murder plus 25 years to life for the attendant firearm enhancements, plus a consecutive seven years four months for the assault and attendant enhancements.

We remand for the trial court to exercise its discretion on whether to dismiss the firearm enhancements in the interest of justice. In all other respects, we affirm.

#### FACTS

The Soto Liquor Store in East Los Angeles has two video security cameras outside the store, one aimed at the parking lot and one aimed at the adjacent sidewalk. There are also cameras inside the store. The camera system has a date and time stamp. Ramona Gardens Housing Development is about three blocks from the store. Ramona Gardens also has video security cameras.

On May 3, 2014, at about 11:30 p.m., videos showed Christian Almanza, wearing a light-colored shirt, walking near Ramona Gardens toward the store. About 40 to 50 seconds later, Rivas, wearing a dark shirt and light-colored shorts, followed.

Shortly thereafter Almanza entered the store and spoke briefly with Ricardo Hernandez. Almanza walked out of the store with Hernandez behind him. Almanza made a sharp left turn and Hernandez followed. Outside of camera range, Hernandez was fatally shot in the abdomen.

Just prior to Hernandez being shot, video shows Rivas walking around a dumpster toward the sidewalk next to the store. Rivas removes something from his pocket with his right hand, bringing his hands together with his right hand in a fist and making gestures with his hands similar to those of a person manipulating the slide on a semiautomatic handgun. Rivas was

wearing a black shirt and light-colored shorts. No video shows the actual shooting.

Gavina Soria was talking on a pay phone outside the liquor store. She heard shots and saw the shooter, who was wearing a black T-shirt.

Anthony Parra saw the shooting from a taco cart positioned diagonally across the street. He testified that the shooter was wearing dark clothing.

During the shooting, Americo Beltran was shot in the leg. Beltran went to elementary school with Rivas. They knew each others' families and had a good relationship. Beltran survived his wounds.

Four casings from a .380 caliber semiautomatic handgun were found at the scene.

#### *Gang Evidence*

Los Angeles Police Officers Jose Vasquez, Gabriel Blanco and Elias Garcia testified that they know Rivas and he has admitted to them that he is a member of the Big Hazard criminal street gang. Rivas has gang tattoos on his hands. Los Angeles Police Officer Brian Cook knows Almanza. Almanza admitted membership in the Big Hazard gang and has numerous gang tattoos.

Cook testified as the gang expert. He has been an officer in the gang unit from 2011 to 2015. Big Hazard has been his primary assignment and he has been in contact with more than 80 of its members. He has interacted with members on a daily basis.

Big Hazard's territory is the area around the Ramona Gardens Housing Development, including the Soto Liquor Store.

The primary activities of the gang include murder, attempted murder, robbery, assaults with firearms, and criminal threats.

Cook identified two predicate offenses committed by Big Hazard gang members. One was a conviction for two counts of premeditated attempted murder with a gang enhancement. Cook testified as the gang expert in that case. The other was a conviction for voluntary manslaughter with a gang enhancement. Cook's knowledge of the second case was derived from investigative reports and speaking with the prosecutor and the officer who testified as an expert.

Cook testified that criminal street gangs have three levels of gang membership. At the lowest level are the soldiers. These are the youngest members who actively commit crimes. Above the soldiers are the original gangsters or "OG's." The OG's are older members who typically had served time in prison. An OG is not expected to actively engage in criminal activity, although he could if he wanted to. At the highest level are the shot-callers, who give directions to other gang members. Rivas is a soldier, and Almanza is an OG.

Cook said that gangs view fear and respect as the same. A gang that is feared can commit crimes with impunity because others will not report it.

Hernandez was a member of the Big Hazard gang. Gang members will sometimes kill members of the same gang. Cook testified that, based on his training and experience, a gang member would kill a member of his own gang only if ordered by a shot-caller.

A gang member who kills a member of his own gang benefits himself. He raises his status by showing loyalty to the

gang. It also benefits the gang by showing the gang will kill a disrespected gang member.

Given a hypothetical based on the evidence in the case, Cook testified that the shooting was done for the benefit of, at the direction of, or in association with the Big Hazard gang and with the specific intent to promote, further or assist criminal conduct by gang members.

### *Defense*

Robert Shomer, Ph.D., is an expert in memory perception and identification. Shomer testified that human perception is subjective and what one believes he saw is not necessarily an accurate account. Videos often add to the confusion unless the resolution is very good and the video takes in the whole scene.

## DISCUSSION

### I

Rivas contends the failure of the prosecution to provide him with Almanza's text messages constitutes reversible error under *Brady v. Maryland* (1963) 373 U.S. 83.

After the jury verdict, the prosecutor provided Rivas with 26 pages of text messages sent to and from Almanza's cell phone. A text message recorded at 1:02 a.m. on May 4, 2014, sent to Almanza from 323-202-[XXXX] said, "[H]ey, I need that toy." The parties stipulated that "toy" was slang for a firearm. The prosecutor represented that the message was sent by an unknown party. Other text messages to and from Almanza implicated Almanza in the shooting, but none stated he was the shooter. Thus, for example, Almanza texted, "I fudge up n wat can [I] do just hope everything goes good" [*sic*]; "I just hope they don't have me on camera"; and "Still here . . . Me [and Rivas], drinking, lol."

The trial court denied Rivas's *Brady* motion for lack of prejudice. The court found that although the texts inculpated Almanza, they did not exculpate Rivas. In fact, Almanza's text about drinking with Rivas tended to inculpate Rivas.

Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87; *Strickler v. Greene* (1999) 527 U.S. 263, 280.) Prejudice must have resulted from the suppression. (*Strickler*, at pp. 281-282.) Evidence is material if there is a reasonable probability that a different result would have occurred had the evidence been disclosed to the defense; that is, a probability sufficient to undermine confidence in the outcome of the proceedings. (*People v Jenkins* (2000) 22 Cal.4th 900, 954.)

Here Rivas places emphasis on the text asking Almanza for the "toy," meaning gun. But although the text might implicate Almanza, it does not exculpate Rivas. Nor do any of the other texts tend to exonerate Rivas or impeach any prosecution witness. In fact, Almanza's text sent shortly after the shooting stating that Almanza and Rivas were drinking together tends to implicate Rivas.

Rivas states that if he had the texts prior to trial he could have investigated the people texted and obtained additional support for his defense. But whether the investigation would have produced such information is a matter of speculation. There is nothing in the record to show there is a reasonable probability Rivas would have obtained a better result had the texts been disclosed in a timely manner. "The mere possibility that an item of undisclosed information might have helped the defense, or

might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense.” (*People v. Fauber* (1992) 2 Cal.4th 792, 829, quoting *United States v. Agurs* (1976) 427 U.S. 97, 109-110.)

The trial court properly denied Rivas’s *Brady* motion. There is nothing in the suppressed evidence that undermines confidence in the outcome of the trial.

## II

Rivas contends that the convictions must be reversed because they were premised on Officer Cook’s opinion that the crimes were gang related in violation of *People v. Sanchez* (2016) 63 Cal.4th 665.

In *Sanchez*, our Supreme Court discussed the role of hearsay in gang expert testimony. *Sanchez* held that a gang expert may rely on hearsay in forming an opinion within his field of expertise. (*People v. Sanchez, supra*, 63 Cal.4th at p. 676.) But an expert cannot relate “case-specific facts” about which he has no independent knowledge unless they are independently proven by competent evidence or are covered by a hearsay exception. (*Ibid.*) “Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Ibid.*)

Rivas argues that Cook’s opinion that he is a gang member is based on case-specific hearsay. Cook testified he formed his opinion by talking with other officers and reviewing arrest records. But Officers Vasquez, Blanco and Garcia testified they know Rivas, he has admitted his gang membership to them, he has gang tattoos, and his gang moniker is “Flaco.” Cook’s opinion that Rivas is a gang member is simply superfluous.

Rivas argues Cook's testimony that he is a younger gang member and that younger members are expected to "put in work" is based on hearsay. But Rivas is sitting in the courtroom. Cook's testimony that Rivas is a younger gang member is based on Cook's personal observation. Cook's testimony that younger gang members are expected to "put in work" is a statement about gangs in general and is not case-specific.

Rivas argues Cook testified that "[Rivas] was the shooter because the OG, Almanza, told [Rivas] to shoot in order to elevate his status within the gang and to give the gang 'free reign' to commit crimes." But that was not Cook's testimony. In the portion of the record Rivas cites in support of his argument, Cook did not testify that Rivas was the shooter or that Almanza told Rivas to shoot. Cook was responding to a hypothetical based on the evidence in the case. A gang expert may give an opinion based on a hypothetical, including case-specific facts that are properly proven. (*People v. Sanchez, supra*, 63 Cal.4th at p. 685.)

Rivas argues Cook testified that this crime would have elevated Rivas's status even if he had handed the gun to Almanza and that shooting Beltran is gang-related because shooting a friend instills greater fear in the community. But again Cook was not testifying about Rivas or Beltran specifically. Cook's testimony was a proper response to a hypothetical.

Rivas challenges Cook's testimony about the predicate offenses. Cook testified that in the trial of the first predicate offense, he was an expert witness. Thus, he has personal knowledge. It is true that Cook's testimony about the second predicate offense relied exclusively on hearsay. But the error was harmless. The current offenses can constitute the predicate offenses. (*People v. Loeun* (1997) 17 Cal.4th 1, 10.) In fact, the



predicate offenses can be committed by two or more persons on the same occasion. (§ 186.22, subd. (e).) Thus, here the current offenses alone can constitute the predicate offenses. (*Id.*, subd. (e)(1) & (3).)

Rivas argues that hearsay-based testimony on the pattern of criminal gang activity element of a gang enhancement is improper. He relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605. In *Alexander L.*, the court concluded that a gang officer's testimony about a gang's primary activities was insufficient, but not because a gang officer's testimony was based on hearsay. (*Id.* at p. 614.) The court agreed with the Attorney General that a gang's primary activities are properly the subject of expert opinion involving hearsay. (*Id.* at p. 613.) Instead, the court's conclusion was based on a lack of foundation for the officer's testimony. (*Id.* at p. 612.)

Here there is more than an adequate foundation for Cook's expert opinion. Cook testified he has been an officer in the gang unit from 2011 to 2015. Big Hazard has been his primary assignment. He has been in contact with more than 80 of its members and was in contact with its members on a daily basis.

### III

Rivas contends the trial court abused its discretion in denying his motion to bifurcate trial on the gang enhancement.

Rivas's pretrial motion to bifurcate was based on the premise that identity, motive and intent are not at issue. But Rivas's defense was that he was not involved in the shooting. Identity, motive and intent were all at issue.

In *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050, our Supreme Court stated: "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is

potentially prejudicial and should not be admitted if its probative value is minimal. . . . But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. . . . To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (Citations omitted.)

There may be cases in which the risk of undue prejudice outweighs the probative value of gang evidence, but this is not one. Here the gang evidence is highly probative of identity, motive and intent.

#### IV

Rivas contends the gang enhancement attendant to count 2, assault on Beltran, should be reversed for lack of sufficient evidence.

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) We have no power on appeal to reweigh the evidence or judge the credibility of witnesses. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We must affirm if we determine that any rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*Johnson*, at p. 578.)

Section 186.22, subdivision (b)(1) provides in part: “[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, shall, upon conviction of that felony, [be subject to a sentence enhancement].”

Rivas’s contention is premised on the theory that Beltran was shot accidentally. Thus, Rivas argues Beltran was not shot for the benefit of a criminal street gang. Nor did Rivas have the specific intent to promote, further or assist in criminal conduct by gang members. But assuming the jury found Beltran was shot by accident, there is still substantial evidence to support the gang enhancement.

The jury could reasonably conclude that Beltran was hit by a bullet Rivas intended for Hernandez. There is ample evidence that Rivas was shooting at Hernandez for the benefit of, at the direction of, or in association with a criminal street gang. It follows that Rivas’s assault on Beltran was committed, if not for the benefit of, at least in association with, a criminal street gang. It also follows that when Rivas shot Beltran, Rivas had the specific intent to promote, further or assist in criminal conduct by gang members, that is, the murder of Hernandez.

## V

Rivas contends the trial court erred in admitting Detective Dante Palacio’s testimony describing what he saw in the video.

Palacio testified that the video shows Rivas walking around a dumpster. Palacio said, “It appeared like [Rivas] removed something or had something in his right hand that he brought out from his right pocket. There was some kind of motion near

his right leg.” Rivas objected that the video speaks for itself. The trial court overruled the objection.

Palacio stated without objection, “It seemed like [Rivas] appeared to be drinking something, and [there was] also something shiny maybe in the right hand.”

Finally, Palacio testified the hand gesture he saw in the video looked “maybe like manipulating a firearm.” The trial court sustained Rivas’s objection.

A lay witness may testify to an opinion if it is rationally based on the witness’s perception and if it is helpful to a clear understanding of his testimony. (Evid. Code, § 800; *People v. Farnam* (2002) 28 Cal.4th 107, 153.) But a witness cannot express an opinion on the innocence or guilt of the defendant. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.) Here Palacio did not express an opinion on Rivas’s guilt or innocence. He only testified to what he saw in the video.

Rivas’s reliance on *People v. Killebrew* (2002) 103 Cal.App.4th 644 is misplaced. There the court held that a gang expert’s testimony on the subjective knowledge and intent of each person in a vehicle was inadmissible. (*Id.* at p. 658.) Here Palacio did not testify about Rivas’s subjective intent. He only testified about what the video showed of Rivas’s objective actions.

In addition, the trial court instructed the jury that they are the ultimate deciders of what is or is not on the video.

## VI

Rivas contends we must remand so that the trial court may exercise its discretion on whether to strike the firearms enhancements in the interest of justice.

Here the trial court sentenced Rivas to 25 years to life for discharge of a firearm in violation of section 12022.53,

subdivisions (d) and (e)(1), and one year four months for personal use of a firearm in violation of section 12022.5, subdivision (a). At the time of sentencing, the firearm sentence enhancements were mandatory. Effective January 1, 2018, both sections were amended to give the trial court discretion to dismiss the enhancements in the interest of justice. (Stats. 2017, ch. 682, § 1 [§ 12022.5, subd. (c)], § 2 [§ 12022.53, subd. (h)].)

When a statute mitigating punishment becomes effective after the commission of the offense, but before final judgment, the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the Legislature. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; *People v. McDaniels* (2018) 22 Cal.App.5th 420.) The Legislature has made no such statement.

We remand the matter to the trial court to exercise its discretion on whether to dismiss the enhancements imposed by sections 12022.5 and 12022.53. In all other respects, we affirm.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Terry A. Bork, Judge

Superior Court County of Los Angeles

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