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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROGELIO OCHOA, Defendant and Appellant.	B270739 (Los Angeles County Super. Ct. No. BA431910)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed as modified.

Leslie Conrad, 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, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Rogelio Ochoa appeals from the judgment after his conviction for first degree murder. We correct a sentencing error but otherwise affirm.

FACTUAL BACKGROUND

On the afternoon of June 25, 2014, Steven Ruiz, age 48, was at the home of a friend, Juan Perez, on South Avenue 19 in Los Angeles. Both men had been members of the Clover gang, but were no longer active. Ruiz had a visible clover tattoo on the back of his leg.

At around 1:30 p.m., Ruiz received a phone call and went outside to take it. Shortly afterwards, a neighbor ran up Perez's driveway. He asked Perez if he had heard gunshots and said that Perez's "cousin" was on the ground. Perez went out to the street and saw Ruiz lying dead. Ruiz had been shot four times; one shot, to the head, had killed him instantly. The street was otherwise empty. The police found no eyewitnesses to the shooting.

The police began investigating appellant, who sometimes stayed at his sister Yolanda Montoya's home on the street where Ruiz was killed. They spoke with appellant's relatives and reviewed his Facebook accounts and cell phone records. When appellant was arrested on an unrelated charge in October 2014, police interviewed him but he denied having committed the killing or being part of a gang. When the police left the interview room, appellant could be seen on video tracing "ES 18" on the table with his finger, which a detective testified indicated "Eastside 18," a gang.[1]

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[1] The video camera was not visible in the interview room, and the police believed that appellant was unaware he was being recorded.

About a month later, while appellant was still in custody, police arranged for him to be placed in a jail cell with an informant. Unbeknownst to appellant, both the informant and the cell were equipped with audio recording devices. Appellant told the informant he was a member of the Eastside 18th Street gang, and was called "Trigger." Appellant said Avenue 19 was his "hood" and that his gang had taken over the area, which previously was claimed by the Clover gang. Appellant said he "lost a homie over that turf" and acknowledged that the "same fools," presumably a reference to the Clover gang, had done it.

The informant asked whether appellant had "caught a fool of Clover slipping" and "[s]moked 'em," to which appellant replied, "Fool, hollow to the dome," meaning he had shot someone in the head with a hollow point bullet.[2] Appellant said it happened "in broad daylight." He said the "[d]umb ass was walking. Ain't nobody telling you to walk in the wrong hood. [¶] . . . [¶] [H]e was walking down 19 like it was nothing." Appellant said he considered just walking past and not doing anything given that it was daytime, but "[t]hat little blue devil" told him to turn around. Appellant reenacted the shooting, indicating that he shot four times, and confirmed it took place in front of his sister's home. Appellant said the police had no case against him: he had gotten rid of the "burner" (gun), he had wiped the bullets clean of fingerprints, and any potential witnesses were "too scared to say anything."

At trial, the jury heard the audio recording of the jail cell conversation with the informant and watched the video of

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[2] The parties stipulated that the criminalist, if called, would testify that a hollow point bullet had been recovered from Ruiz's body.

appellant's interview with the police. The prosecution introduced cell phone records tracking a call from appellant's telephone to a cell tower near the crime scene at 2:28 p.m. the day of the killing, which the prosecution argued placed appellant at the scene.

The prosecution also introduced messages from appellant's Facebook account. A message from appellant on July 13, 2014, stated, "It's too hot on this side for me right now. Well, that's what I've been hearing. So I'm going to leave for a while." In a July 19, 2014 Facebook conversation, a man wrote to appellant and asked "How long you going to be gone, ese?" Appellant replied, "For life, homes." The other man responded, "Don't pump a nigga from the hood. Got to come back someday." Appellant replied, "Ha, ha, LOL [(laughing out loud)], yeah. That's true. The hood ain't gonna do shit while I'm gone, watch."

Appellant's sister Montoya testified that approximately a month before the killing, appellant's style of dress underwent a "[t]otal transformation," from name-brand clothing and "[p]retty boy haircuts" to baggy clothing and shaving his head bald. Montoya said that sometime after the killing appellant went to Mexico for "[a]bout a month."[3] At some point Montoya confronted appellant about the shooting in a Facebook message, and appellant stopped corresponding with her.

The prosecution introduced evidence of two instances of graffiti near the crime scene referring to "Trigger" and "Eastside 18" or "18."

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[3] Montoya testified that the trip to Mexico was planned before the killing happened, as she learned from speaking with her mother. The prosecution objected on the basis of speculation and hearsay, and the court sustained both objections.

The defense presented no evidence. In closing, the defense argued that appellant was innocent and falsely took credit for the killing in order to impress the informant, whom he feared. The defense also argued that appellant had virtually no involvement with the Eastside 18th Street gang until after he was in custody.

The jury deliberated for less than two hours before returning a guilty verdict.

PROCEDURE

The jury convicted appellant of first degree murder (Pen. Code, § 187, subd. (a))[4] and found true the allegations regarding gang and firearms enhancements (§§ 186.22, subd. (b), 12022.53, subd. (d)). The court imposed a sentence of 25 years to life for the murder, another 25 years to life for the firearms enhancement, and stayed the gang enhancement. The court also imposed various fines and awarded credits.

DISCUSSION

1. Testimonial Hearsay

Appellant argues that the prosecution introduced case-specific, testimonial hearsay statements prohibited by our Supreme Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). For the reasons below, we find no reversible error.[5]

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[4] All further statutory references are to the Penal Code unless otherwise indicated.

[5] Respondent argues appellant forfeited this issue by failing to object on confrontation clause grounds in the trial court. Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert "basis" evidence is admissible and does not violate the confrontation

a. Relevant Proceedings Below

At trial, Montoya testified that her brother was friends with a member of the 18th Street gang named Drama, now deceased. Defense counsel objected repeatedly to the testimony regarding Drama's gang membership on grounds of foundation and hearsay, and the court sustained those objections.

Later, Officer Juan Cobian of the Los Angeles Police Department testified as a gang expert. The prosecution asked him about one of appellant's tattoos reading "EIP" and "Drama." Cobian explained that Drama was a member of the Eastside 18th Street gang who had died two years before Steven Ruiz was killed. Cobian testified that Drama had been killed by a rival Clover gang member in an area over which the two gangs were fighting. "EIP" signified "18 in peace," and was equivalent to "rest in peace."

Defense counsel objected throughout this testimony, first on relevance grounds, then on foundation and hearsay grounds. The court sustained the objections regarding foundation and asked the prosecution to lay one before proceeding. Cobian explained that he had obtained the information regarding Drama's death from the investigating detectives. The court permitted the prosecution to continue its questions and overruled defense counsel's further objection.

The prosecution briefly mentioned Drama during its closing argument, reminding the jury of Montoya's testimony that Drama was a gang member and friend of her brother's killed by a member of the Clover gang. The prosecution noted "[i]t's not a

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clause. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1128-1131.) We therefore will address the merits of this claim.

big part of the case." Nothing was said about Cobian's testimony regarding Drama. Defense counsel did not mention Drama in his closing argument, nor did the prosecution mention him in rebuttal.

b. Analysis

In *Sanchez*, our high court considered the extent to which *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) limits an expert witness from relating case-specific hearsay in explaining the basis for an opinion, and it clarified the application of state hearsay rules to that kind of expert testimony. It held the case-specific, out-of-court statements conveyed by the prosecution's gang expert constituted inadmissible hearsay under state law and, to the extent they were testimonial, ran afoul of the confrontation clause of the federal Constitution as interpreted in *Crawford*. (*Sanchez, supra*, 63 Cal.4th at pp. 670-671.) Canvassing confrontation clause cases, the court concluded hearsay statements are testimonial if they are made "primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id.* at p. 689.)

Appellant argues that Cobian's testimony regarding Drama "related case-specific out-of[-]court statements, about which Cobian had no personal knowledge" and was hearsay. He further claims the hearsay was testimonial "because it consisted of memorialized facts relating to past criminal activity." Appellant asserts that the admission of this evidence prejudiced him because it provided a motive for killing Ruiz, helped establish that appellant committed the crime to benefit a gang, and

"undercut the defense theory that appellant joined the gang in order to protect himself in jail."

We need not decide whether Cobian's testimony should have been excluded under *Crawford* and *Sanchez* because, contrary to appellant's assertion, any error in admitting it was harmless beyond a reasonable doubt. (See *People v. Capistrano* (2014) 59 Cal.4th 830, 874.) The information regarding Drama was a minor point in the case. The testimony on the issue was not extensive. The prosecution's discussion of Drama consists of just one paragraph in the reporter's transcript out of over 29 pages of closing argument and 14 pages of rebuttal.[6] Defense counsel did not mention Drama at all in closing.[7] We think it highly unlikely the jury was focused on Cobian's testimony regarding Drama during deliberations.

The points that appellant claims were established by Cobian's testimony regarding Drama—motive and gang affiliation—were established far more compellingly by other evidence. Most obvious was the audio recording from the jail cell in which appellant, in addition to admitting to killing Ruiz, acknowledged his gang membership, his enmity towards Clover gang members, and the fact that he lost a "homie" over the turf war with the Clover gang. One could reasonably infer that this evidence alone led the jury to reach a guilty verdict in under two

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[6] Moreover, that discussion pertained only to *Montoya's* testimony regarding Drama, not Cobian's.

[7] We acknowledge that defense counsel not mentioning Drama during closing may have been a strategic decision rather than an indication that the defense did not consider the evidence to be important. But regardless of defense counsel's motivation, the jury heard very little about Drama during the closings.

hours, including the finding that appellant had committed the crime for the benefit of a criminal street gang.

While Cobian's testimony regarding Drama arguably corroborated parts of the jail cell admission, there was other evidence that did so as well. This includes the cell phone evidence suggesting appellant was at the scene of the crime, the Facebook messages indicating his intent to flee, his sister's testimony regarding his dramatic change in appearance shortly before the killing, graffiti near the crime scene connecting his gang moniker "Trigger" to the Eastside 18th Street gang, and the video of appellant tracing a gang name with his finger in the police interview room. Given this evidence along with the jail cell admission, we think it unlikely beyond a reasonable doubt that the jury would have reached a different verdict had the court excluded Cobian's testimony regarding Drama. Absent any prejudice, there is no reversible error, even were we to accept appellant's argument that Cobian's testimony was testimonial hearsay under *Sanchez* and *Crawford*.

2. Insufficient Evidence of Gang Enhancement

Appellant argues there was insufficient evidence to support the jury's true finding on the gang enhancement. Specifically, he asserts that Cobian's testimony failed to establish that the "primary activities" of the Eastside 18th Street gang included commission of one or more enumerated felonies, as required under section 186.22, subdivision (f). We reject this argument.

a. Applicable Law and Proceedings Below

"On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt. [Citations.] ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' " (*People v. Snow* (2003) 30 Cal.4th 43, 66.) This standard applies whether direct or circumstantial evidence is involved. (*Ibid.*)

Section 186.22, subdivision (f) states, in relevant part: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the [enumerated] criminal acts . . . ." The enumerated acts include, among others, felony vandalism, grand theft of a vehicle, robbery, assault with a deadly weapon, and possession of narcotics for sale. (§ 186.22, subd. (e).) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony . . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, citation omitted (*Sengpadychith*).)

Here, Cobian began his testimony by establishing his qualifications as a gang expert. He stated that he had served five years in the gang enforcement unit. As part of his duties, he focused on gang crimes and gang activities, and in particular monitored the criminal activities of four gangs, including Clover and Eastside 18th Street. He explained that he obtained information about gangs by talking to other gang officers, meeting with community groups, and interviewing gang members themselves. He said he had contact with members of the 18th

Street gang on a daily basis and had arrested some of them. He had been involved in many gang crime investigations, including investigations of Eastside 18th Street.

Later in his testimony, Cobian stated that the primary activities of the Eastside 18th Street gang included "[f]elony vandalism, grand theft auto, robberies, [assault with a deadly weapon] shootings, [and] possession of narcotics and firearms."

b. Analysis

Appellant acknowledges that a prosecutor may establish the "primary activities" element through expert testimony, but argues that Cobian's testimony was not based on a satisfactory factual foundation, and was therefore insufficient to support the jury's finding. Appellant compares Cobian's testimony to that of the gang expert in *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*). But *Alexander L.* is distinguishable. In that case, a deputy sheriff testified as a gang expert regarding the Varrio Viejo gang. (*Id.* at p. 611.) Speaking of the gang's primary activities, the deputy said, " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Ibid.*) On cross-examination, the deputy testified that the vast majority of cases he knew of involving Varrio Viejo were graffiti-related. (*Id.* at p. 612.) The Court of Appeal noted that the deputy did not discuss "the circumstances of these crimes, or where, when, or how [the deputy] had obtained the information." (*Ibid.*)

The court also found the deputy's testimony lacked foundation, because "information establishing reliability was never elicited from him at trial." (*Alexander L., supra*, 149

Cal.App.4th at p. 612.) The court contrasted the deputy's testimony with that of the gang expert in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), disapproved of on other grounds by *Sanchez, supra*, 63 Cal.4th at page 686, footnote 13. (*Alexander L., supra*, at p. 613.) In *Gardeley*, the *Alexander L.* court noted, "a proper foundation was laid for the expert witness's testimony" regarding primary activities, because the opinion was based on " 'conversations with the defendants and with other [gang] members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies.' " (*Alexander L., supra*, at p. 613, quoting *Gardeley, supra*, at p. 620.)

Cobian's testimony is distinguishable from the expert testimony rejected in *Alexander L.* The deputy in that case listed a number of crimes without any indication as to whether they constituted "primary activities," and admitted on cross-examination that most of the crimes he knew about were grafitti-related crimes. (See *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107 [noting that the deputy in *Alexander L.* "equivocated on direct examination and contradicted himself on cross-examination"].) Cobian, in contrast, stated unequivocally that the primary activities of the Eastside 18th Street gang included committing felonies listed under the gang enhancement statute. Such testimony is legally sufficient to establish the "primary activities" element. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330 [finding adequate a gang expert's testimony that certain felonies were a gang's "primary activities," and distinguishing *Alexander L.* because the expert in that case

" 'did not directly testify that criminal activities constituted [the gang's] primary activities' "].)

Also, like the expert in *Gardeley*, and unlike the expert in *Alexander L.*, Cobian laid a foundation for his opinion when he testified extensively to his qualifications and experience, such that the trial court could assess the reliability of his testimony. Indeed, Cobian's knowledge stemmed from several of the same sources as that of the expert in *Gardeley*, including investigations of numerous gang crimes, conversations with members of the relevant gang, and discussions with colleagues. The concerns that led the *Alexander L.* court to reject the deputy's testimony are absent here.

Sanchez, *supra*, 63 Cal.4th 665, reinforces our conclusion that Cobian's testimony had adequate foundation. *Sanchez* disapproved *Gardeley* "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez, supra*, at p. 686, fn. 13.) But *Sanchez* held that an expert may provide "background testimony about general gang behavior or descriptions of [gang] conduct and . . . territory" when such testimony is "based on well-recognized sources in [the expert's] area of expertise." (*Id.* at p. 698.) On this basis, the court found an expert's testimony regarding a "gang's history and general operations" to be relevant and admissible, even if not based on personal knowledge. (*Ibid.*)

We infer that "history and general operations" includes a gang's primary activities—indeed, the expert in *Sanchez* specifically testified regarding the primary activities of the gang, and the court took no issue with that portion of his testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 672.) The qualifications of the

expert in *Sanchez* were similar to those of Cobian and the expert in *Gardeley*, including a long tenure as a gang suppression officer, involvement in hundreds of gang-related investigations, and interactions with gang members and community members. (*Id*. at p. 671.)

Appellant argues that Cobian's experience with gang investigations and his conversations with other officers may qualify him as a gang expert, but that "qualification as an expert does not constitute substantial evidence in support of his opinion." Under *Sanchez* we must reject this argument. As with the expert in that case, Cobian's experience and training, including his participation in gang investigations and his interactions with colleagues, gang members, and community members, constitute the "well-recognized sources" upon which experts may rely in providing general background testimony regarding gangs. (*Sanchez, supra*, 63 Cal.4th at p. 698.)

Appellant also argues that Cobian's testimony failed to prove the Eastside 18th Street gang "consistently and repeatedly" committed the crimes Cobian identified as primary activities, as required under *Sengpadychith*, *supra*, 26 Cal.4th at page 324. (Italics omitted.) This argument lacks merit. *Sengpadychith* noted that the "primary activities" element can be proven *either* by evidence that the gang consistently and repeatedly committed the enumerated felonies *or* by expert testimony. (*Ibid.*) Here, the prosecution chose the latter course.

Thus, we conclude that Cobian's testimony was sufficient to establish the Eastside 18th Street gang's primary activities included the commission of felonies enumerated under section 186.22, subdivision (e).

3. Sentencing Error

The parties have identified a sentencing error that must be corrected. The abstract of judgment reflects that an enhancement under section 186.22, subdivision (b)(1)(C), was imposed and stayed. This enhancement adds 10 years to a sentence for a violent felony committed for the benefit of a criminal street gang.

This enhancement should not have been imposed, even if stayed. Appellant was sentenced to 25 years to life for first degree murder committed for the benefit of a criminal street gang, with an additional 25 years to life imposed for his use of a firearm. Because he was sentenced for a crime punishable by life imprisonment, he is not subject to a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C)—instead, he is subject to a 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5).[8] (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

DISPOSITION

The judgment is modified to delete the 10–year gang enhancement imposed under section 186.22, subdivision (b)(1)(C)

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[8] We note that appellant's sentence for first degree murder with a firearm enhancement fixes a parole eligibility date greater than 15 years, and therefore the 15-year minimum term set by section 186.22, subdivision (b)(5) has no direct effect on his parole eligibility date. (See *People v. Lopez, supra*, 34 Cal.4th at pp. 1008-1009.) Nevertheless, "[t]he true finding under section 186.22(b)(5) . . . 'is a factor that may be considered by the [Board of Parole Hearings] when determining a defendant's release date, even if it does not extend the minimum parole date per se.' " (*Id.* at p. 1009, quoting *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1238.)

and to replace it with the 15–year minimum term for parole eligibility required by section 186.22, subdivision (b)(5). The trial court is directed to forward a modified abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.