

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCIAL GARCIA et al.,

Defendant and Appellant.

2d Crim. No. B261267
(Super. Ct. No. 1423851)
(Santa Barbara County)

Marcial Garcia appeals a judgment following conviction of second degree robbery, false imprisonment by violence, and street terrorism, with findings that he committed the criminal offenses for the benefit of a criminal street gang, suffered one prior serious felony strike conviction, suffered three prior serious felony convictions, served three prior prison terms, and committed the offenses while on bail for pending criminal charges. (Pen. Code, §§ 211, 236, 186.22, subds. (a) & (b), 667, subd. (b)-(i), 1170.12, subds. (a)-(d), 667, subd. (a)(1), 667.5,

subds. (a) & (b), 12022.1, subd. (b).)¹ We modify the judgment to strike one of the three five-year sentence enhancements imposed pursuant to section 667, subdivision (a), but otherwise affirm.

Christian Botello appeals a judgment following conviction of second degree robbery, false imprisonment by violence, and street terrorism, with findings that he committed the criminal offenses for the benefit of a criminal street gang, suffered one prior serious felony conviction, and served one prior prison term. (§§ 211, 236, 186.22, subds. (a) & (b), 667, subd. (a)(1), 667.5, subd. (b).) We affirm.

FACTUAL AND PROCEDURAL HISTORY

On August 26, 2012, Gabriel Salgado accompanied his cousin, Alejandro Alvarez, to a Santa Barbara market to purchase beer. Alvarez went inside the market and Salgado waited in Alvarez's vehicle. Four men then approached the vehicle, including Garcia and Botello. One man knocked on the window and asked if Salgado was with Alvarez. When Salgado responded affirmatively, another man opened the door and asked "where [Salgado] was from." Salgado was not a member of a criminal street gang, and therefore replied that he was not "from anywhere." He testified that he was caught "off guard" and was fearful of a "beatdown" from the men.

Garcia then demanded Salgado's wallet. Frightened, Salgado surrendered his wallet containing cash, identification, and a debit card. Garcia also reached into the vehicle and took Salgado's cell phone. When Salgado attempted to leave, Garcia closed the vehicle door and held it shut. During or after the incident, one robber shouted, "Westside."

¹ All statutory references are to the Penal Code unless stated otherwise.

After Alvarez returned to his vehicle, Salgado used Alvarez's cell phone to report the robbery. Salgado knew that Alvarez belonged to the "Eastside" criminal street gang, a rival gang to the "Westside" gang. Alvarez had a large tattoo on his upper back signifying his Eastside affiliation.

During the robbery, Salgado noticed that Garcia had a tattoo on his face. Salgado later identified Garcia from a photograph lineup as one of the robbers. A fingerprint on the trunk of Alvarez's vehicle matched Garcia's left thumbprint.

Following the robbery, Santa Barbara Police Officer Kyle Lowry interviewed Salgado and Alvarez. Salgado was frightened and trembled during the interview. During a second police interview, Salgado stated that Garcia threatened to "stick" him. Lowry also obtained the market's surveillance video-recording that captured the robbery from many camera angles. At trial, the prosecutor played the surveillance recording.

Santa Barbara Police Sergeant Michael Brown reviewed the surveillance recording and recognized Juan Carlos Gomez and Luis Jaimes as two of the robbers. After viewing photographs of Garcia and Botello taken from Botello's cell phone in a previous police encounter, Brown recognized Garcia in the recording. Brown also reviewed a photograph of a tattoo of a nude woman on Botello's forearm, and concluded that a forearm depicted in the recording was Botello's arm. Brown, a longtime Santa Barbara gang investigator, knew Garcia and Botello.

Santa Barbara Police Sergeant Kenneth Kushner reviewed the surveillance recording and immediately recognized Botello and Gomez. He also recognized Garcia and Jaimes, but did not recall their names until he reviewed the photographs taken from Botello's cell phone.

Kushner described a 2005 gang-related incident that he witnessed involving Garcia. Kushner saw Garcia make a Westside gang hand-sign and the gang sign “TLS” (Tiny Locos) during a field-lineup. Garcia also pointed to a tattoo on his head signifying Westside affiliation.

Santa Barbara Police Detective Ben Ahrens reviewed the photographs obtained from Botello’s cell phone. He opined that a photograph of Botello’s forearm tattoo was similar to the forearm tattoo captured in the surveillance recording. He also reviewed a photograph of Garcia, Gomez, and Jaimes that was taken approximately one hour before the Salgado robbery. In the photograph, Garcia made gang signs with his hands, including “T” and “L,” signifying Tiny Locos.

Expert Witness Gang Testimony

Ahrens testified as an expert witness regarding criminal street gangs in Santa Barbara, including the Eastside and Westside gangs, and their subsets. He stated that he had investigated crimes committed by gang members claiming membership in Eastside or Westside. Ahrens opined that a gang-related tattoo indicated a commitment to a particular gang and also represented “an intimidation factor” in the commission of crimes.

Ahrens described predicate criminal convictions suffered by Westside gang members, including attempted murder, robbery, murder, and second degree robbery, all with gang enhancements. The predicate criminal convictions were described in certified court documents admitted into evidence. Ahrens was familiar with some of the defendants convicted in the predicate offenses and knew them to be Westside gang members.

Ahrens also was involved in investigating the attempted murder prosecution.

In response to a hypothetical based upon the factual circumstances of this prosecution, Ahrens opined that the robbery was committed for the benefit of the Westside gang. He relied in part upon the circumstances that Alvarez was an Eastside gang member with a visible Eastside tattoo and the robbery occurred in the rival Eastside area.

Ahrens opined that Garcia was an active Westside gang member at the time of the commission of the present offenses. Ahrens based his opinion upon Garcia's admissions on 11 occasions that he claimed Westside membership; "documentation" from 2001 through the time of trial (2014) indicating Garcia's association with known Westside gang members; Garcia's gang-related tattoos; and Garcia's 2006 conviction by plea to robbery and street terrorism.

Ahrens also opined that Botello was an active Westside gang member at the time of the commission of the present offenses. Ahrens based his opinion upon Botello's admissions on 13 occasions that he claimed Westside membership, "documentation" describing Botello's involvement in gang-related crimes, Botello's possession of gang-related writings and clothing; Botello's gang-related tattoos; and Botello's 2001 conviction by plea to street terrorism.

Conviction, Sentencing, and Appeal

The jury convicted Garcia and Botello of second degree robbery, false imprisonment by violence, and street terrorism, and found that they committed the robbery and false imprisonment offenses for the benefit of a criminal street gang.

(§§ 211, 236, 186.22, subds. (a) & (b)(1)(C).) The jury also found that Botello suffered a prior conviction for street terrorism.

In a separate proceeding, the trial court found that Garcia and Botello suffered the prior serious felony and strike convictions, and served the prior prison terms, as charged. (§§ 667, subd. (b)-(i), 1170.12, subds. (a)-(d), 667, subd. (a)(1), 667.5, subds. (a) & (b).) The court also found that Garcia committed the present offenses while on bail for pending charges. (§ 12022.1, subd. (b).) The court later struck one of Garcia's two strike convictions and Botello's sole strike conviction, in part pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.

The trial court sentenced Garcia to 35 years in prison, consisting of a doubled five-year term for the second degree robbery conviction, plus 10 years for the criminal street gang enhancement, and 15 years for the three prior serious felony convictions. The court imposed but stayed sentence for the remaining counts and sentence enhancements pursuant to section 654. The court also imposed an \$8,450 restitution fine, an \$8,450 parole revocation restitution fine (suspended), a \$40 court security assessment, a \$45 crime prevention program fine, and a \$30 criminal conviction assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a), 1202.5; Gov. Code, § 70373.) It awarded Garcia 924 days of presentence custody credit.

The trial court sentenced Botello to 21 years in prison, consisting of an upper five-year term for the second degree robbery conviction, plus 10 years for the criminal street gang enhancement, five years for the prior serious felony conviction, and one year for the prior prison term. The court imposed a \$3,040 restitution fine, a \$3,040 parole revocation

restitution fine (suspended), a \$40 court security assessment, a \$45 crime prevention program fine, and a \$30 criminal conviction assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a), 1202.5; Gov. Code, § 70373.) It awarded Botello 854 days of presentence custody credit.

Garcia appeals and contends that the trial court erred by imposing two separate five-year enhancements pursuant to section 667, subdivision (a), for two convictions arising from the same proceeding (Case No. 1189743). By a supplemental letter brief, he joins the arguments advanced by Botello to the extent they benefit him.

Botello appeals and contends that: 1) the trial court erred by admitting evidence of his jail booking statements in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and *People v. Elizalde* (2015) 61 Cal.4th 523, 541 (*Elizalde*); 2) the trial court erred by permitting opinion evidence regarding the similarity of tattoos depicted in a photograph and the surveillance video-recording; 3) the trial court erred by admitting gang-related hearsay evidence in violation of his constitutional right to confront witnesses; 4) the trial court erred by permitting evidence of his previous gang-related acts, in violation of Evidence Code sections 352 and 1101; and, 5) there is insufficient evidence that the predicate criminal offenses were committed by Westside gang members.

DISCUSSION

Garcia's Contention

Garcia contends that the trial court erred by imposing one separate five-year sentence enhancement for each of the three prior serious felony convictions. (§ 667, subd. (a).) He points out that two convictions arose from the same

proceeding and were not “formally distinct, from filing to adjudication of guilt.” (*In re Harris* (1989) 49 Cal.3d 131, 136.) The Attorney General concedes.

Section 667, subdivision (a) provides: “[A]ny person convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately.” (*People v. Jones* (2015) 236 Cal.App.4th 1411, 1415 [“brought and tried separately” requires that the underlying proceedings be formally distinct from filing of charges through adjudication of guilt].)

Here Garcia’s second and third serious felony convictions arose in 2006 from Case No. 1189743. The charges were filed and the convictions were adjudicated (by plea) in the same proceeding. Only one five-year sentence enhancement may be applied to the two convictions in Case No. 1189743. (*In re Harris, supra*, 49 Cal.3d 131, 136-137.) For this reason, we strike one of the two five-year sentence enhancements arising from Case No. 1189743. (§ 667, subd. (a).)

Botello’s Contentions

I.

Botello argues that the trial court erred by admitting evidence of his gang-affiliation admissions made during 13 jail booking and housing interviews conducted between 1999 and 2012.² He points out that he objected to this evidence pursuant

² Detective Aherns confirmed that he based his opinion that Botello was a member of the Westside criminal street gang in part upon Botello’s admissions “on over 13 occasions to law enforcement.” Aherns did not disclose to the jury that the occasions involved jail booking and housing interviews.

to *Miranda*. Botello also relies upon *Elizalde, supra*, 61 Cal.4th 523, 541 [absent *Miranda* advisements, responses made during booking interviews concerning gang affiliation are inadmissible in the prosecutor's case-in-chief].)

In *Elizalde*, our Supreme Court considered whether routine questions regarding gang affiliation, posed to a defendant during the booking process, fell within *Miranda*'s well-recognized booking exception. (*Elizalde, supra*, 61 Cal.4th 523, 527.) The court held that gang-affiliation questions did not fall within the narrow exception for biographical data necessary for booking or pretrial services. (*Id.* at p. 538.) Instead, the booking questions must be measured under a test defining "interrogation" as questioning that law enforcement should know is reasonably likely to elicit an incriminating response. (*Ibid.*) The gang-affiliation questions posed to murder suspect Elizalde were held likely to elicit an incriminating response and thus required *Miranda* advisements. (*Elizalde*, at p. 540.)

Botello was arrested and charged with gang-related charges pursuant to section 186.22, subdivisions (a) and (b), among other charges. As such, his gang-affiliation statements are inadmissible in the prosecutor's case-in-chief absent evidence of *Miranda* advisements.

Nevertheless, the error is harmless beyond a reasonable doubt. (*Elizalde, supra*, 61 Cal.4th 523, 542 [standard of review for prejudice].) Botello's Westside gang membership was convincingly established by photographic evidence, introduced without objection, of the Westside tattoo on his head and the TLS tattoo below his right ear. Ahrens testified that tattoos are important indicators of gang membership. Moreover, during or immediately after the Salgado robbery, one of the four

men shouted “Westside.” Pursuant to the harmless-error test set forth in *Elizalde*, Botello suffered no prejudice.

II.

Botello contends that the trial court improperly permitted Detective Ahrens and Sergeant Brown to testify regarding the similarity of the forearm tattoos depicted in the cell phone photograph and the surveillance recording. He asserts that the testimony usurped the jury’s exclusive factfinding function. Botello claims that the error denied him due process of law and a fair trial pursuant to the federal and California Constitutions.

At trial, the prosecutor introduced evidence of a tattoo of a nude female on Botello’s forearm as depicted in a photograph and on an unidentified forearm captured in the surveillance recording. Brown opined that the two images “looked like a match to [him].” Also, Ahrens testified that he saw “distinct similarities” between the two images. The trial court overruled Botello’s objections and denied his motions to strike Brown’s and Ahern’s opinions regarding the similarity of the tattoos. The prosecutor introduced the photograph and the surveillance recording into evidence at trial.

A lay witness may testify to an opinion if it is rationally based on the witness’s perception and helpful to an understanding of his testimony. (Evid. Code, § 800; *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1608 [police officer compared photographs of shoeprints to tread on defendant’s shoes].) To be distinguished is the situation where the lay witness opines regarding guilt. (*Maglaya*, at p. 1609.)

The trial court did not abuse its discretion by permitting this testimony. (*People v. Maglaya*, *supra*, 112

Cal.App.4th 1604, 1609 [standard of review].) Neither officer testified as an expert witness regarding tattoos nor opined that based on the tattoo Botello was the person in the surveillance recording. As such, the witnesses did not usurp the jury's factfinding function. In addition, the court instructed with CALCRIM No. 333, "Opinion Testimony of Lay Witness": "Witnesses, who were not testifying as experts, gave their opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence." There was no error in permitting the witnesses to compare the tattoo images based upon their visual perceptions and to direct the jury's attention to this evidence.

III.

Garcia and Botello argue that the trial court erred by admitting gang-related testimonial hearsay evidence in violation of their constitutional rights to confront witnesses against them. They point out that Ahrens related hearsay statements to support his opinion that they were active members of the Westside gang. The hearsay statements were obtained from "documentation" and discussions with other law enforcement officers regarding prior police contacts with Garcia and Botello. Garcia and Botello rely upon *People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*), holding that a gang expert witness may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."

Sanchez also held that the trier of fact must necessarily consider the basis for expert testimony for its truth in order to evaluate the expert's opinion, which in turn implicates the Sixth Amendment right of confrontation. (*Sanchez, supra*, 63 Cal.4th 665, 684.) "When 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 If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686, fn. omitted.)

Garcia and Botello did not forfeit any argument regarding their constitutional right to confront witnesses. Ahrens's testimony was proper pursuant to decisional law existing at the time of trial. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-620, overruled in part by *Sanchez, supra*, 63 Cal.4th 665, 686, fn. 13.) Accordingly, objection to each and every basis for Ahrens's opinion that Garcia and Botello were active members of the Westside gang would have been futile. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 ["Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause"].)

Here Ahrens testified to case-specific facts through hearsay statements regarding Garcia and Botello. Ahrens stated that he obtained the factual information from "documentation" and discussions with other police officers. Generally, the case-specific facts concerned admissions of Westside gang

membership, presence with known Westside gang members, and involvement in other gang-related crimes. This information was not independently proven nor covered by a hearsay exception. (*Sanchez, supra*, 63 Cal.4th 665, 686.) As such, it should have been excluded. (*Id.* at pp. 694-698.)

Nevertheless, the error is harmless beyond a reasonable doubt. (*Sanchez, supra*, 63 Cal.4th 665, 698 [improper admission of hearsay may constitute state law statutory error, and erroneous admission of testimonial hearsay may constitute confrontation violation].) Ahrens's opinion was supported by independent admissible evidence that Garcia and Botello were active Westside gang members. Each man had facial or head tattoos declaring Westside membership. During the Salgado robbery, one of the robbers shouted "Westside." Approximately one hour prior to the robbery, a photograph of Garcia, Jaimes, and Gomez was taken with Botello's cell phone. In the photograph, Garcia and Gomez were making gang hand-signs. Kushner testified that he saw Garcia making gang signs and pointing to his Westside tattoo during a field show-up. Garcia and Botello also suffered prior convictions for street terrorism, pursuant to section 186.22, subdivision (a). Beyond a reasonable doubt, the inadmissible hearsay did not contribute to the verdict. (*Sanchez*, at p. 698; *People v. Meraz, supra*, 6 Cal.App.5th 1162, 1176-1177.)

IV.

Botello contends that the trial court erred by permitting evidence of his prior gang-related acts. (Evid. Code, § 1101, subd. (a).) He asserts that the error violates his constitutional right to confront witnesses and to a fair trial pursuant to the federal and California Constitutions.

Here Ahrens testified (nine pages of transcript) that Botello was involved in four “altercation[s]” (1993, 1994, 1995, 1996 [a stabbing]), and a 2001 conviction for street terrorism, also based upon a gang-related stabbing.

The trial court did not abuse its discretion by admitting evidence of Botello’s prior gang-related activity. (*People v. Tran* (2011) 51 Cal.4th 1040, 1050.) “The evidence was highly probative on several issues relevant to the charge of active participation in a criminal street gang, providing direct evidence of a predicate offense, that defendant actively participated in [Westside], and that defendant knew [Westside] engaged in a pattern of criminal gang activity “ (*Ibid.*) The risk of undue prejudice was low because many of the prior “altercations” were no more inflammatory than the present charged offenses, and the street terrorism act rested upon a conviction arising from Botello’s plea. (*Id.* at pp. 1047, 1050.) Finally, the court instructed with CALCRIM No. 375 (“Evidence of Uncharged Offenses to Prove Intent, Motive, Knowledge”) informing the jury that evidence of separate criminal acts was admitted for a limited purpose and could not be considered to prove defendants were persons of bad character or were disposed to commit crimes. Thus the probative value of the evidence far outweighed any undue prejudice. (*People v. Cage* (2015) 62 Cal.4th 256, 275 [the prejudice that section 352 seeks to avoid is that which evokes an emotional bias against the defendant and which has little effect on the issues].)

V.

Botello argues that the prosecutor did not establish an associational or organizational connection between the predicate criminal offenses committed by subset members of the

Westside gang and the broader Westside gang. (*People v. Prunty* (2015) 62 Cal.4th 59, 71 [prosecution must establish associational or organizational connection between subsets and larger gang].) He asserts that he has been deprived of due process of law pursuant to the federal and California Constitutions because the prosecutor failed to prove the existence of a criminal street gang beyond a reasonable doubt. (§ 186.22, subd. (f); *Prunty*, at p. 71.)

When the prosecutor relies upon the conduct of subsets to establish the existence of a criminal street gang, he must establish a connection among the subsets and that the gang the subsets comprise is the same gang that the defendant sought to promote or benefit. (*People v. Prunty, supra*, 62 Cal.4th 59, 85.)

Here the prosecutor established with sufficient evidence that Westside is a criminal street gang and that the predicate crimes were committed by Westside gang members, not members of any subsets of Westside. Ahrens testified to four predicate crimes committed by Westside members; the prosecutor presented and the trial court admitted into evidence certified court documents reflecting convictions regarding the predicate crimes. Moreover, Botello and Garcia had gang-related tattoos indicating their affiliation with Westside and “Westside” was shouted during the Salgado robbery. Ahrens testified that Garcia and Botello each suffered prior convictions for street terrorism. (§ 186.22, subd. (a).) Although they may have associated with the subset gang Tiny Locos, the criminal street gang in issue here was Westside.

VI.

Botello contends that a combination of errors rendered his trial fundamentally unfair, requiring reversal. The

few errors that occurred during Botello's trial were harmless, whether considered individually or collectively. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [stating general rule].) Botello was entitled to a fair trial, but not a perfect one. (*United States v. Hasting* (1983) 461 U.S. 499, 508-509 [the Constitution does not guarantee an error-free, perfect trial]; *People v. Anzalone* (2013) 56 Cal.4th 545, 556.)

We modify Garcia's judgment to strike one of the two five-year sentence enhancements imposed for Case No. 1189743, pursuant to section 667, subdivision (a). We otherwise affirm. The trial court shall prepare an amended abstract of judgment and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

We affirm Botello's judgment.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Frank J. Ochoa, Judge

Superior Court County of Santa Barbara

Susan B. Lascher, under appointment by the Court of Appeal, Esther Sorkin, under appointment by the Court of Appeal, for Defendant and Appellant Marcial Garcia.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant Christian E. Botello.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi, Connie H. Kan, Allison Chung, Deputy Attorneys General, for Plaintiff and Respondent.