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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. RODERICK COLEMAN et al., Defendants and Appellants.	2d Crim. No. B224305 (Super. Ct. No. 1288180) (Santa Barbara County)

Roderick Coleman and Patrick McMillan appeal the judgments following their convictions for residential robbery (Pen. Code, § 211)[1], first degree burglary (§ 459), forcible rape (§ 261, subd. (a)(2)), sexual penetration by a foreign object (§ 289, subd. (a)(1)), and cruelty to a child by endangering health (§ 273a, subd. (b)). McMillan also appeals his conviction for dissuading a witness. (§ 136.1, subd. (b)(2).) The juries[2] found allegations to be true that (1) the robbery, burglary, rape, sexual penetration, and dissuading a witness were committed for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)(1)); (2) a principal personally used a firearm in the robbery, rape, and sexual penetration offenses (§ 12022.53, subds. (b) & (e)(1)); (3) McMillan personally used a dangerous weapon and inflicted great bodily

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

[2] McMillan and Coleman were tried jointly but before separate juries.

injury in the robbery and burglary (§§ 12022, subd. (b)(1), 12022.7, subd. (a)); and (4) Coleman personally used a firearm in the robbery, burglary, rape, and sexual penetration (§ 12022.5, subd. (a)). The juries also found that the rape and sexual penetration offenses fell within the meaning of the One Strike law (§ 667.61), and McMillan's jury found that McMillan had served two prior prison terms. (§ 667.5, subd. (b).) McMillan was sentenced to a total prison term of 38 years plus 57 years to life. Coleman was sentenced to a total prison term of 26 years plus 25 years to life.

Both appellants contend that admission of written and oral statements by a non-testifying codefendant violated their constitutional right to confront witnesses under the *Bruton/Aranda* rule,[3] and that the gang enhancements were not supported by substantial or admissible evidence. McMillan contends that his dissuading a witness conviction was not supported by substantial evidence, and that he received an unauthorized sentence for that offense. We will vacate McMillan's sentence for dissuading a witness and remand for resentencing. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

Facts

In October 2008, 22-year-old Jane Doe lived in Lompoc, California, with her 30-year-old boyfriend T.G., and their two young children. Doe was acquainted with both McMillan and Coleman. G. went to school with McMillan and had seen Coleman. Doe's friend Bridgette Oliver knew both McMillan and Coleman.

On the night of October 15, G. left for work on his employer's night shift, and Doe put her children to bed. At approximately 11:00 p.m., McMillan and Coleman broke into the house. They had been told that G. had marijuana and money obtained from its sale in the house. McMillan was wearing woman's tights over his head, and Coleman was wearing a gorilla mask. They referred to each other as "Cuz," and were armed with a gun and a baseball bat.

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[3] (*Bruton v. United States* (1968) 391 U.S. 123, 135-137 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518, 528-531 (*Aranda*).)

Appellants demanded money and marijuana. They physically restrained Doe. They choked her, held her down, and raped her. Doe was also penetrated by a stick or plastic object. After the assault, Doe told appellants there was marijuana in the car and money in a closet in her son's room. Coleman found the drugs in the car and McMillan forced Doe into her son's room where he retrieved $1,100 in cash. Her son was awake and saw the incident. Appellants then brought Doe into her daughter's room where they told her to remain until they escaped. Her daughter was awake.

After appellants left the house, Doe telephoned G, and told him what had happened. Doe drove to G.'s workplace and G. drove her to the hospital.

Doe was examined by a SART nurse. Doe had trouble breathing and swallowing, but was able to describe the attack. Doe was bruised and scratched and had swelling on her neck and face. Her vaginal area was tender. Doe also described the events to police officers when the officers arrived at the hospital. When police went to Doe's house, they found the front door broken and a baseball bat on the floor.

After the SART examination, Doe went to her parents' home where she was met by her friend Bridgette Oliver. Oliver thought she knew who the assailants were and showed Doe a photograph of McMillan on the Internet. Doe identified McMillan as one of the assailants.

McMillan was arrested on October 17. He told police that he was with Aundrice Dixon and Gloria Thomas at the time of the offenses. Dixon and G. had a son together, and Thomas was a friend of McMillan.

Dixon told police that she had seen both appellants on the afternoon of October 15 and that they came to her home sometime during the evening of October 15 or early morning of October 16. Thomas told police that McMillan had told her that he and Coleman were involved in the offenses and needed an alibi. Bridgette Oliver told police that McMillan and Coleman were always together, and that Jane Doe's description of one of her assailants matched McMillan.

In a confession which was not presented to McMillan's jury, Coleman admitted that he and McMillan broke into the Doe-G. house, and tied up and physically

assaulted Doe. Coleman admitted to stealing the marijuana, but denied that she was raped by either appellant.

Procedural History

Prior to trial, McMillan made a motion for severance arguing that admission of certain statements by Coleman would deny him the right to cross-examination if Coleman did not testify. Coleman joined in the motion arguing that admission of statements by McMillan would have the same effect if McMillan did not testify. The trial court denied severance but ordered separate juries for McMillan and Coleman.

While in jail awaiting trial, McMillan and Coleman exchanged numerous written communications referred to as "letters" or "kites." There were also letters and telephone calls by McMillan and Coleman to third parties. In motions in limine, the prosecution sought a ruling that the written and telephonic communications were admissible as admissions, adoptive admissions, statements between co-conspirators, evidence giving context to other evidence, and evidence relied on by the prosecution's gang expert. McMillan and Coleman argued that admission would violate the *Bruton/Aranda* rule and were not admissible under any exception to the hearsay rule. The trial court ruled that the communications were admissible.

Evidence admitted pursuant to the ruling included letters from McMillan to Coleman, letters from Coleman to McMillan, letters from McMillan to friends, letters from Coleman to friends, letters from third parties to Coleman, and telephone conversations between McMillan, Gloria Thomas and T.G. Coleman wrote letters to friends asking the friends to remember their loyalties and help Coleman avoid prosecution for the charged offenses. Some letters also indicated that he was worried that some people might "snitch" on him.

In one letter to his cousin, Coleman stated: "Me and Pat [McMillan] are trying to get out of here . . . . Will you please write him [unidentified] and tell him to stop being so uptight because me and Pat need you and DeShawn is stepping on our toes by telling you things that you shouldn't do, that we need you to do. Make sense? Here is a

hint. LHRT.[4] Do you even remember what that means? . . . It's our code word. . . . So make sure whenever you write or talk to him you refer to what you and your sis and Keyana is doing as the LHR . . . or the get down." In a letter to Keyana Coleman, Coleman stated: "But I need you to holla at the boy and let him know they will subpoena his girl. So either they leave town . . . or she must plead the fifth. . . . Since she is the alleged 'victim' and the only witness, my nigga 'P' was like can't make her relive what she supposedly went through. We know she's lying. The DA don't."

Coleman wrote letters to McMillan about various subjects unrelated to the charges against them but sometimes suggesting knowledge of the crimes. In one letter, Coleman stated: "I really need a female on the outside on the team right now even though she's a slut, she can be of use. LHRT." Coleman told McMillan in another letter that he had written to his lawyer and "gave him the whole spizziel[5] from Point A to Point B. I tried to tell those people I was at my auntie Robin's house that morning but they didn't want to believe my Black ass. So I put together a story from all the rumors I heard on the streets and gave it to them how I heard myself."

McMillan wrote letters to Coleman stating that there was no evidence against them except Coleman's confession. He also referred to attempts to convince other people to help him on the case, and expressed concern that some might falter in their support. In one letter McMillan told Coleman: "My focus has always been GeGe and it still is because that's all that matters. JoJo has been back full swing and she's going to get on it ASAP. As long as GeGe pays that 5,000 bucks its 100. . . . When I say I've been on it, trust me. As far as M and R go, whenever you get at them, just tell them not to say something stupid. Brother, I think things will work out." McMillan wrote to a relative regarding the charges and expressed his belief that the charges should be resolved through "street justice" rather than trial. The letter stated: "I'm hoodsta or as you would

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4 The meaning of "LHRT" is unclear, but appears to refer to loyalty between Coleman and McMillan and other individuals.

5 Use of "zz" in a word is a code. The "zz" should be deleted from the word to discover its true meaning. In other words, "spizziel" refers to the word "spiel."

say gangsta in every essence of the word. I hope to God those 'good people' got through to that dude so he keeps it hood. Yeah, his broad told four different stories and there's no evidence, but with that said I'm still in jail, so my belief remains street justice." McMillan also wrote a letter to Keyana Coleman which asked her to "get O boy's girl's number so you can talk directly to her instead of going through her dude. Speak to her."

There was also evidence of verbal and written communications involving Tyrone Leekins. Tyrone Leekins heard McMillan and Coleman discussing a "come up" before the offenses had been committed. Leekins believed that the "come up" referred to an impending robbery. The next day Coleman told Leekins that he had gotten money and marijuana from a "come up on Tip." "Tip" is a nickname for T.G. Coleman also wrote letters to Leekins when both men were in jail. The letters told Leekins to get out of protective custody and made vague references to the reason why Coleman was in jail. One letter stated: "I know you didn't expect this. From me, huh. I'm good man. But I'm so good at this lyin ass female that don't testify but about you my cousin wrote this and told me you're in PC. Nigger, I know you're a premiere writer from 805. Please, my nigger, get out of there." Coleman also told Leekins that he wanted the matter to be handled in the "streets" and "100 percent hood."

In letters by McMillan to friend Gloria Thomas, McMillan asked Thomas to provide an alibi for him. A few days after the offenses, McMillan and Thomas spoke multiple times on the telephone. McMillan asked Thomas to tell Coleman, who had not yet been arrested, to "stay solid." McMillan stated: "That mother fucker (inaudible) ya mean, but uh. Shit, you know when that - that time comes, just let that mother fucker know, to stay solid." McMillan also inquired about what the police were doing in the investigation, and whether certain people were saying good or bad things, and to contact certain people to help prepare an alibi. One of the telephone calls took place between McMillan, Thomas, and victim T.G.. McMillan asked G. whether G. was "keeping it street or letting mother fuckers make decisions for you. . . . Like the police." McMillan told G. that G. and his wife were the only people who mattered, and "I'm just saying . . . we're gonna keep it in the street--not see what happens. Keeping it street."

DISCUSSION

No Error in Admission of Out-Of-Court Statements

Neither McMillan nor Coleman testified at trial and both contend that all the out-of-court written and verbal communications admitted into evidence violated their constitutional rights of confrontation and cross-examination. We disagree. There was no confrontation clause violation because the statements were non-testimonial, and admissible under exceptions to the hearsay rule.

Admission of an out-of-court statement by a non-testifying defendant which incriminates a codefendant in a joint trial generally violates the confrontation clause if the statement would be inadmissible against the codefendant in a separate trial. (*Bruton, supra,* 391 U.S. at pp. 135-137; *Aranda, supra*, 63 Cal.2d at pp. 528-531.) If the statements would have been admissible in a separate trial under an exception to the hearsay rule, they are also admissible in a joint trial. (*People v. Smith* (2005) 135 Cal.App.4th 914, 922, overruled on other grounds in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291; *People v. Parrish* (2007) 152 Cal.App.4th 263, 271-272.) Although admission of out-of-court *testimonial* statements is barred even if admissible under a hearsay exception, there is no confrontation clause violation when *non-testimonial* statements are admitted under a state law exception to the hearsay rule. (*Crawford v. Washington* (2004) 541 U.S. 36, 68–69; *Davis v. Washington* (2006) 547 U.S. 813, 821; *Whorton v. Bockting* (2007) 549 U.S. 406, 420; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812.)[6]

Here, it is uncontested that the challenged statements are non-testimonial. The statements were informal statements to an associate or friend, not formal statements to a government officer. (*People v. Jefferson* (2008) 158 Cal.App.4th 830, 842.) The

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6 There is a developing body of law that *Bruton* and *Aranda* do not apply to non-testimonial statements at all. (See *People v. Arceo* (2011) 195 Cal.App.4th 556, 571–575; *United States v. Figueroa–Cartagena* (1st Cir. 2010) 612 F.3d 69, 85.) *Bruton* and *Aranda* are based solely on the right of confrontation and, "[i]f none of the co-defendants has a constitutional right to confront the declarant, none can complain that his right has been denied." (*Figueroa–Cartagena, supra,* at p. 85.) Because respondent does not make such a contention, we do not rely on these cases.

confrontation clause is concerned solely with hearsay statements that are out-of-court counterparts to testimony given by witnesses at trial. (*People v. Cage* (2007) 40 Cal.4th 965, 983; see *Davis v. Washington, supra*, 547 U.S. at p. 830, fn. 5; *Crawford v. Washington, supra,* 541 U.S. at p. 51.) To be testimonial, a statement must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony, must have been given and taken primarily to establish some fact for possible use in a criminal trial, and the purpose must be determined objectively based on the circumstances relevant to the intent of the participants in the conversation. (*Cage*, at p. 983.)

Here, McMillan and Coleman never intended to or spoke to anyone connected with law enforcement. They were not being interrogated or asked questions by a government official. They spoke to each other and to friends and relatives in an attempt to assess and respond to their predicament, and believed they could speak openly and freely. These circumstances are essentially the opposite of giving testimony. (See *People v. Jefferson, supra,* 158 Cal.App.4th at pp. 842-844.)

In addition, many of the statements are not incriminating in themselves. McMillan and Coleman usually spoke in vague language about what acquaintances and the victims of the offenses were saying to the police and to others. Both appellants were aware of why they had been arrested, and their communications focus on means to extricate themselves from prosecution for the offenses. Some of the statements imply involvement in the commission of the offenses, but avoid any direct admission of involvement by either appellant.

In any event, any incriminating statements are admissible in a joint trial under the co-conspirator exception to the hearsay rule. (Evid. Code, § 1223; *People v. Roberts* (1992) 2 Cal.4th 271, 304 [admission not barred by *Aranda/Bruton* rule].) The evidence supports the conclusion that a conspiracy existed to avoid prosecution by dissuading witnesses and fabricating alibis and other exculpatory evidence. The evidence also shows that the statements were made by participants in the conspiracy and furthered

the objectives of the conspiracy. (*In re Hardy* (2007) 41 Cal.4th 977, 995–996; *People v. Hardy* (1992) 2 Cal.4th 86, 139; Evid. Code, § 1223.)

McMillan and Coleman argue that any conspiracy ended when the charged offenses were completed, and that no conspiracy existed when the letters and telephone calls were made. Although a conspiracy typically ends when its objective is achieved or thwarted, a conspiracy may be deemed to extend beyond the crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy. (*People v. Saling* (1972) 7 Cal.3d 844, 852; see also *People v. Hardy*, *supra*, 2 Cal.4th at pp. 143-144.) "'A conspiracy is not necessarily a single event which unalterably takes place at a particular point in time when the participants reach a formal agreement; it may be flexible, occurring over a period of time and changing in response to changed circumstances.'" (*People v. Vargas* (2001) 91 Cal.App.4th 506, 553.) "'It is for the trier of fact—considering the unique circumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended.'" (*Hardy*, at p. 143; see also *People v. Gann* (2011) 193 Cal.App.4th 994, 1006.)

Here, substantial evidence supports the conclusion the McMillan-Coleman conspiracy included the goal of avoiding prosecution and conviction in any way possible, including by dissuading witnesses from testifying. At the time of the statements, McMillan and Coleman had or perceived some ability to alter their fate by acting in concert. The object of the conspiracy had not been attained or defeated and remained ongoing while appellants were awaiting trial for the charges. The challenged statements also furthered the object of the conspiracy. The statements sought to dissuade witnesses from testifying or otherwise cooperating with the police, and also to create favorable testimony whenever possible.

McMillan specifically challenges admission of the statement by Coleman to Tyrone Leekins that Coleman obtained money and marijuana in a "come up on Tip." McMillan argues that there was no evidence of any conspiracy at the time of this statement. We have previously discussed and rejected this argument. There is

circumstantial evidence that appellants conspired with each other to rob and burglarize the home of G. and Jane Doe.

The incriminating statements are also admissible under the declaration against penal interest exception to the hearsay rule. (Evid. Code, § 1230.) To qualify as a declaration against penal interest, the statement must genuinely and specifically inculpate the declarant to give the statement reliability and trustworthiness. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 329, 334; *People v. Leach* (1975) 15 Cal.3d 419, 441; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176–177.)

In determining trustworthiness, the trial court must look to the totality of the circumstances in which the statement was made, including whether the speaker spoke from personal knowledge, his possible motivation, and what was actually said. (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 334.) The least reliable circumstance is one in which the person has been arrested and attempts to improve his situation by deflecting criminal responsibility onto others. (*Id.* at p. 335.) The most reliable circumstance is one where the conversation occurs between friends in a noncoercive setting and inculpates the speaker without attributing blame to the other. (*Ibid.*)

Here, some of the statements may incriminate the declarant speaker but they were made informally, are based on personal knowledge, and do not attempt to shift blame to the codefendant. For example, Coleman wrote letters to friends asking the friends to remember their loyalties, and asking for help. In one letter, Coleman stated that he and McMillan "are trying to get out of here . . . .Will you please write him and tell him to stop being so uptight because me and Pat need you . . . ." He also wrote to Keyana Coleman in an attempt to make contact with victim Doe for the purpose of convincing her not to testify against them. He stated: "We know she's lying. The DA don't."

McMillan also referred to attempts to convince other people to help him on the case. In one letter McMillan told Coleman: "My focus has always been GeGe and it still is because that's all that matters. . . . When I say I've been on it, trust me. As far as M and R go, whenever you get at them, just tell them not to say something stupid. Brother, I think things will work out. . . ." McMillan wrote to a relative regarding the charges and

expressed his belief that the charges should be resolved through "street justice" rather than trial. These letters also did not attempt to shift the blame to Coleman but, instead, sought ways to extricate himself and Coleman from their situation.

The communications involving Tyrone Leekins similarly show trustworthiness. Coleman's letters to Leekins told Leekins to get out of protective custody and made vague references to the reason why Coleman was in jail. Coleman also told Leekins that he wanted the matter to be handled in the "streets" and "100 percent hood." The statements were made to friends or acquaintances under noncoercive circumstances and inferred their own culpability or no culpability at all.

Substantial Admissible Evidence Supports Gang Enhancement

McMillan and Coleman contend there was insufficient evidence to support the jury's findings that the offenses were "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." (§ 186.22, subd. (b)(4).) Appellants argue that the opinion of the prosecution's gang expert to that effect was not supported by substantial evidence. They also argue that, in giving his direct opinion of appellants' mental states, the gang expert exceeded the scope of a permissible expert opinion by attributing a specific intent to appellants and, in essence, advised the jury how to decide the case. We disagree.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains 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. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither

reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60; see also *People v. Ramon* (2009) 175 Cal.App.4th 843, 850.)

A gang enhancement requires proof of the existence of a criminal street gang[7] and that the offense was "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." (§ 186.22, subd. (b)(4).)

Expert testimony is admissible to prove these elements, including the motivation for a crime, and whether a crime was committed to benefit or promote a gang. (*People v. Albillar, supra*, 51 Cal.4th at p. 63; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.) But, an expert's opinion must be based on facts shown by the evidence, not on speculation or conjecture. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) More than mere gang membership is required because gang members can and do commit crimes for purely personal reasons. (*People v. Castaneda* (2000) 23 Cal.4th 743, 747; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Here, we conclude that the opinions of the prosecution's gang expert and the evidence supporting those opinions constitute substantial evidence supporting imposition of the gang enhancement. We further conclude the expert did not testify improperly as to the appellants' actual mental state or as to how the expert thought the case should be decided.

Gang expert, Detective Scott Casey, testified that both appellants were active members of the Central Coast Crips gang, a clique of the larger Los Angeles Crips gang. Casey testified that T.G. was a "shot caller" or leader of the Lompoc clique of the Bloods gang, another gang that originated in Los Angeles. Casey testified that, although the Crips and Bloods were rival gangs generally, they were not rivals in Lompoc and were able to coexist without significant problems.

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[7] Appellants admit they were members of a criminal street gang which is defined as "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 . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

Detective Casey testified that there were approximately 30 to 50 members of the Central Coast Crips. He identified various indicia of gang membership and that the primary criminal activities of the Central Coast Crips included robbery, burglary, drug crimes, and assault with a deadly weapon. Casey testified, however, that sexual assault was not an acceptable crime for gangs. Casey also testified to several predicate crimes essential to establishing the existence of a criminal street gang.

Detective Casey testified that an important element of being a gang member was to commit violent crimes for the purpose of enhancing the reputation and respect accorded a particular gang member and the gang generally. He testified that gang members sought to deal with their crimes and discord with other gangs "in the street" without involvement by law enforcement or the courts.

Detective Casey testified that he had heard the testimony of all witnesses, read the police reports, and read and listened to the letters and telephone calls from, to, and about McMillan and Coleman. He testified that he was familiar with all of the required elements of a gang enhancement.

Based on the evidence and his knowledge of gang activities, Casey testified that it was his opinion that the robbery and burglary were committed for the benefit of the Crips gang, in association with the gang, and at the direction of the gang. His reasons for the opinion included the positive effect that the violence of a home invasion robbery would have on a gang member's reputation, McMillan's expressed desire to generate money for the gang, and the commission of the crimes by multiple gang members. Casey also emphasized that high level gang member (McMillan) had taken a younger and lower level gang member (Coleman) under his wing to commit the crimes. A crime committed by a senior and younger gang member permits the younger person to observe and learn from the actions taken by the senior member. Committing a crime with fellow gang members may also increase the intimidation factor which is important to gang authority in general. (See *People v. Albillar, supra,* 51 Cal.4th at p. 63.) Casey also noted that the perpetrators called each other "cuz" which is a word used by Crips gang members to describe other Crips. Casey testified that, although the sexual assault was not committed

for the benefit of the Crips gang, it was committed in association with the gang. His opinion in this regard was based on the same circumstances as he cited in support for his opinion that the robbery and burglary were gang related.

The gang enhancement also requires proof that the offenses were committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Although the evidence was largely circumstantial as to intent, circumstantial evidence is sufficient. "There is rarely direct evidence that a crime was committed for the benefit of a gang. For this reason, 'we routinely draw inferences about intent from the predictable results of action. We cannot look into people's minds directly to see their purposes. We can discover mental state only from how people act and what they say.' [Citation.]" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 411-412.) If substantial evidence establishes the defendant intended to and did commit the offense with other members of a gang, "the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 68.) It is not necessary "that the defendant act with the specific intent to promote, further, or assist a *gang;* the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members.*" (*Id.* at p. 67.)

Moreover, an expert may provide an opinion that embraces the ultimate issue for the jury to determine if it is based on the evidence. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1045-1047, 1049; Evid. Code, § 805.) Here, Detective Casey testified about the nature of the offenses based on evidence of the offenses and appellants' gang affiliation. He did not simply state how he believed the case should be decided. And, the jury was not required to accept his opinion or the evidence supporting the opinion. (See *Vang*, *supra*, at pp. 1049-1050.) The trial court instructed the jury that "[t]he meaning and importance of any [expert] opinion are for you to decide," and that "[y]ou may disregard any opinion that you find to be unbelievable, unreasonable, or unsupported by the evidence." (CALCRIM No. 332.)

In a separate argument, Coleman contends that his constitutional due process rights were violated when the trial court permitted admission of inflammatory and prejudicial gang evidence. Coleman argues that, although gang evidence regarding the Lompoc Central Coast Crips was relevant, testimony regarding the more violent history and criminal activities of the Crips gang in Los Angeles was unnecessary and prejudicial. Coleman also claims testimony regarding keeping the matter "on the street" was inflammatory and inadmissible. We disagree.

Under Evidence Code section 352, a trial court may, in its discretion, exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. Because it may have a "highly inflammatory impact" on the jury, trial courts should carefully scrutinize the admission of evidence that a defendant is a gang member. (*People v. Gurule* (2002) 28 Cal.4th 557, 653.) We review a trial court's admission of evidence, including gang testimony, for abuse of discretion and will not disturb its ruling unless it was arbitrary, capricious, or patently absurd. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.)

Here, there was no abuse of discretion. The expert only testified briefly regarding the history of the Crips and Bloods, and that testimony was probative and helpful to understanding the expert's testimony generally. As to evidence that appellants expressed a desire to keep the matter "on the street" and out of court, appellants fail to show that the evidence was inflammatory and, clearly, its probative value exceeded the risk of undue prejudice.

Substantial Evidence of Dissuading a Witness

McMillan contends there was insufficient evidence to support his conviction for dissuading a witness. He claims section 136.1, subdivision (b) applies only to pre-arrest attempts to dissuade a witness from reporting a crime, not to attempts to

persuade a witness to drop charges after an arrest has been made. We disagree. Section 136.1, subdivision (b)(2) clearly applies to post-arrest conduct.[8]

The dissuading a witness allegation was based on a three-way telephone conversation among Gloria Thomas, McMillan, and T.G. which occurred three days after McMillan's arrest and four days after the offenses. The conversation concerned McMillan's desire to "keep it in the street" and out of the courts. In substance, McMillan was trying to induce G. to stop cooperating with the police.

McMillan relies on *People v. Fernandez* (2003) 106 Cal.App.4th 943, 946, where the defendant asked the victim to testify falsely at his preliminary hearing. The court concluded that section 136.1, subdivision (b)(1) applies only to pre-arrest efforts to prevent a witness from reporting a crime, and does not apply to post-arrest efforts to influence a witness's testimony. (*Id.* at pp. 947–952.)

Fernandez concerned section 136.1, subdivision (b)(1), whereas McMillan's conviction was for violation of section 136.1, subdivision (b)(2). Unlike subdivision (b)(1), which makes it a crime to attempt to dissuade a crime victim from "[m]aking any report of that victimization to any peace officer . . . ." Subdivision (b)(2) does not concern pre-arrest efforts. It covers efforts to dissuade a witness from causing a criminal case to be filed and prosecuted. The evidence in the instant case that McMillan tried to persuade G. to stop cooperating with the police supports his conviction under section 136.1, subdivision (b)(2).

Unauthorized Sentence for Dissuading Witness

McMillan was sentenced to seven years to life for dissuading a witness under the alternative sentencing scheme for gang-related offenses. (§ 186.22, subd. (b)(4)(C).) He contends that section 186.22, subdivision (b)(4)(C) does not apply in this case because the offense did not involve a threat to the witness. We agree.[9]

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[8] Section 136.1, subdivision (b)(2) provides that one type of prohibited conduct is: "Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof."

[9] Respondent argues that McMillan's claim was forfeited because he failed to object to the sentence in the trial court. McMillan, however, is not challenging a discretionary

Section 186.22, subdivision (b)(4) provides that "[a]ny person who is convicted of a felony enumerated in this paragraph 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 sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: . . . [¶] (C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; *or threats to victims and witnesses, as defined in Section 136.1*." (Italics added.)

Section 136.1 defines a group of offenses involving attempts to persuade or prevent a witness or victim from reporting a crime or testifying at trial. Section 136.1, subdivision (a) prohibits a person from knowingly and maliciously preventing or dissuading a witness or victim from attending or testifying at trial, or attempting to do so. Subdivision (b) prohibits preventing or dissuading a witness or victim from (1) reporting the crime, (2) causing an accusatory pleading to be sought and prosecuted, or (3) arresting or seeking the arrest of any person in connection with the crime. Subdivisions (a) and (b) offenses are "wobblers" permitting either a jail or prison sentence.

Section 136.1, subdivision (c) elevates a violation of subdivision (a) or (b) into a non-alternative straight felony. It provides in relevant part that "[e]very person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony . . . [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person." Accordingly, a violation of section 136.1, subdivision (a) or (b) is a lesser offense of subdivision (c). (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1321;

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sentencing choice. His claim is that the sentence was unauthorized, and a claim based on an unauthorized sentence is not forfeited by failure to object in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Rodriguez* (2000) 80 Cal.App.4th 372, 376.)

People v. Brenner (1992) 5 Cal.App.4th 335, 341.) Subdivision (c) requires a violation of subdivision (a) or (b) *plus* the use of force or threat as an additional element of the offense.

McMillan was convicted of attempting to dissuade G. from causing an accusatory pleading to be sought and prosecuted and assisting in the prosecution. (§ 136.1, subd. (b)(2).) McMillan was not charged with, or convicted of, a violation of section 136.1, subdivision (c). There was no allegation of the use of force, no evidence of force or threat, and the jury was not instructed to make a finding regarding the use of force or threat.

As previously stated, section 186.22, subdivision (b)(4)(C) permits a life sentence only when the underlying offense is a felony which includes "threats to victims and witnesses, as defined in Section 136.1." Without a charge, conviction, or jury finding of an express or implied threat as set forth in subdivision (c) of section 136.1, McMillan's conviction does not qualify for a life sentence under section 186.22, subdivision (b)(4)(C).

Relying on *People v. Neely* (2004) 124 Cal.App.4th 1258, respondent argues that the reference to "section 136.1" in section 186.22, subdivision (b)(4)(C) is not limited to any particular subdivision of section 136.1, and should be construed as including all the offenses set forth in that section. We disagree. In *Neely*, the defendant contended his prior conviction of violating section 136.1, subdivision (a)(2) did not qualify as a serious felony under section 1192.7, subdivision (c)(37). Section 1192.7, subdivision (c)(37) defines "intimidation of victims or witnesses, in violation of Section 136.1" as a serious felony. Noting that none of the specific offenses in section 136.1 mentions "intimidation," *Neely* concluded that the phrase "intimidation of victims or witnesses" in section 1192.7, subdivision (c)(37) constituted a shorthand description of section 136.1 generally. (*Neely*, at p. 1266.)

Unlike section 1192.7, subdivision (c)(37), section 186.22, subdivision (b)(4)(C) cannot be construed as a shorthand description of section 136.1 in its entirety. The requirement of force or threat in section 136.1 is expressly limited to a violation of

subdivision (c) which expressly and unambiguously creates a statutory distinction between offenses that require force or threat and offenses that do not.

We acknowledge that the intent of section 186.22, subdivision (b)(4) is to increase the punishment for gang-related crimes. (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1256.) But, we cannot ignore the clear and unambiguous language of both section 186.22, subdivision (b)(4)(C) and section 136.1.

In addition, any other interpretation of the statutes would raise a problem under *Apprendi v. New Jersey* (2000) 530 U.S. 466. In *Apprendi*, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) Subsequently, the court clarified that the prescribed statutory maximum is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington* (2004) 542 U.S. 296, 303.)

In the instant case, the instructions asked the jury to determine if McMillan had violated subdivision (b) of section 136.1 but did not ask the jury to find a violation of subdivision (c). In *Apprendi*'s terms, subdivision (c) does not describe an enhancement or sentencing factor applicable to a subdivision (b) violation. Section 136.1, subdivision (c)(1) must be recognized as describing a greater offense providing for a higher range of punishment than authorized for a subdivision (b) conviction.

DISPOSITION

Appellant McMillan's sentence of seven years to life for dissuading a witness (§ 136.1, subd. (b)) as determined under section 186.22, subdivision (b)(4)(C) is reversed. The matter is remanded for resentencing as set forth in section 136.1, subdivision (b). The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all

other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.*

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

Jed Beebe, Judge

Superior Court County of Santa Barbara

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