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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LEAMON VICTOR WILLIAMS et al., Defendants and Appellants.	B267191 (Los Angeles County Super. Ct. No. TA136685)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed as modified.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant Leamon Victor Williams.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant Daviena Lashay Cox.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Scott A. Taryle and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Leamon Victor Williams and Daviena Lashay Cox each appeal from their judgment of conviction of one count of assault by means of force likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(4)), with true findings on a great bodily injury enhancement (§ 12022.7, subd. (a)) and a gang enhancement (§ 186.22, subd. (b)(1)(C)). On appeal, Williams and Cox join in arguing that (1) the evidence was insufficient to support the jury's gang enhancement findings; (2) admission of the gang expert's testimony violated the hearsay rules in the Evidence Code and the confrontation clause in the Sixth Amendment; and (3) the trial court erred in imposing both the great bodily injury enhancement and the gang enhancement. We modify the judgment to stay the great bodily injury enhancement as to each appellant, but otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In an amended information, the Los Angeles County District Attorney charged Williams and Cox with one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). It was alleged that they personally inflicted great bodily injury on the victim during the offense (§ 12022.7, subd. (a)), and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). It also was alleged that Williams had served a prior prison term within the

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

meaning of section 667.5, subdivision (b), and had a prior serious or violent felony conviction within the meaning of section 667, subdivision (a)(1), section 1170, subdivision (b), and/or the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12).

II. The Prosecution Evidence

On February 7, 2015, Cleviara Farmer, the victim in this case, was working at a Liberty Tax office in Compton, California. At approximately 5:30 p.m., prior to the start of her shift, Farmer was standing in front of the office and looking at her cell phone. Williams walked by and then stood with a group of men who were congregated on the sidewalk. Cox also walked by and briefly made eye contact with Farmer. Farmer did not know Williams or Cox, and had never seen either of them before.

As Farmer stood in front of the office, Williams suddenly said to her, "Get off your phone, fat ass." Farmer initially ignored him and continued looking at her cell phone. When Williams repeated the remark, Farmer asked him who he was talking to. Williams replied, "I'm talking to you bitch." After Farmer told him that they did not know one another, Williams continued to call her a "bitch." As Farmer walked back inside the office, she said to Williams, "I'm not the bitch, you are."

Williams followed Farmer into the office, and then began striking her with his fists. Williams punched Farmer in her face at least eight times. As Williams was hitting Farmer, Cox walked up and also began striking Farmer with her fists. When Farmer fell to the ground, Williams and Cox repeatedly kicked Farmer in her head and the left side of her body. As Williams was assaulting Farmer, he said "Piru," which Farmer understood was the name of a street gang. At some point during the assault,

Farmer lost consciousness. When she awoke a short time later, both Williams and Cox had left.

Farmer was treated by paramedics at the scene and then taken to a hospital. She had two black eyes, a bloody mouth and nose, and a swollen forehead. She also had severe pain in her jaw and throughout the left side of her body. Six months later, Farmer continued to have pain in her jaw, shoulder, wrist, and ankle, and to suffer from frequent migraines.

Los Angeles County Sheriff's Detective Raul Magadan was assigned to investigate the case. He showed Farmer six-pack photographic lineups that included Williams and Cox, and she identified both of them as the individuals who had assaulted her. At some point after the assault, Farmer saw a posting on her Facebook page, which stated, "Bitch don't get liberty taxed equals knocked tf out." When Farmer clicked on the Facebook profile of the person who had posted the message, she saw a picture of Williams with the name "Brandon Kompton Williams." Farmer sent screen shots of the posting and Williams' profile page to Detective Magadan.

During the course of his investigation, Detective Magadan found a video clip from July 2011, which showed Williams being "jumped," or initiated, into a gang called Fruit Town Piru by accepting a beating from members of the gang. The video further showed that Cox was present at the initiation and told the gang members who were beating Williams when he had enough. The video was played for the jury at trial.

As part of his investigation, Detective Magadan also monitored the jailhouse calls of both Williams and Cox. In one of Williams' calls, he identified himself as "Brandon." In one of Cox's calls, she identified herself as "Bam," and when asked

where she was from, she answered "Fruit Town Piru." In another call, Cox indicated that she might be involved in a fight later that day with a woman from the Nutty Blocc Crips, a rival of the Fruit Town Piru gang. The audio recordings of these calls also were played for the jury.

In addition to serving as the investigating officer on the case, Detective Magadan testified as a gang expert on the Fruit Town Piru gang. According to his testimony, Detective Magadan currently was a gang detective with the Safe Streets Bureau of the Sheriff's Department and was assigned to the Compton Sheriff's Station. His primary job duties were to investigate gang-related crimes committed by certain street gangs, including Fruit Town Piru. He previously had worked as a patrol officer at the Compton station where he responded to hundreds of gang-related crimes and made hundreds of gang-related arrests. He also had worked as a gang enforcement officer at that station where he was responsible for identifying and documenting active gang members in the area, and arresting gang members who had committed gang-related crimes. In addition, Detective Magadan had prior experience working on a homicide gang task force where he assisted in the investigation of gang-related murders throughout Los Angeles County.

Detective Magadan testified that respect, reputation, and fear were important aspects of gang culture. A gang member gained respect within the gang by committing crimes for the gang's benefit. A gang used the commission of violent crimes by its members to instill fear in the community. A gang with a reputation for violence commanded respect within the community and was able to commit crimes without fear of being reported by residents to the police. It was common for gang members who

felt disrespected to retaliate for fear of being perceived as weak by their own gang or by rival gang members. It also was common for gang members to commit crimes together to facilitate their criminal efforts and aid in their escape.

According to Detective Magadan, Fruit Town Piru was a street gang in Compton with approximately 290 active members. The gang associated itself with the letter "P" and the color burgundy. The primary activities of the gang included narcotics possession and sales, weapons violations, assaults, attempted murders, and murders. Prior crimes committed by members of Fruit Town Piru included a murder in May 2013 and a murder, attempted murder, and possession of a firearm by a felon in May 2012. The territory claimed by the gang was in the northwest area of Compton. The assault in this case occurred on the border of the gang's territory at a location where its members were known to congregate.

Detective Magadan opined that both Williams and Cox were members of the Fruit Town Piru gang. William's gang moniker was "Red," and Cox's gang moniker was "Bam." Detective Magadan based his opinion about Williams' gang membership on the fact that Williams frequented known Fruit Town Piru locations, had tattoos showing his affiliation to the gang, was seen in a video being jumped into the gang, and identified himself as a Piru gang member when he committed the assault in this case. Detective Magadan based his opinion about Cox's gang membership on the fact that Cox had been detained with other Fruit Town Piru members on numerous occasions, frequented areas known to be associated with the gang, admitted she was a member of the gang during a jailhouse call, and assisted Williams in committing the assault in this case.

Detective Magadan was familiar with both Williams and Cox through his personal contacts with them as well as through the use of informants. On prior occasions, Detective Magadan had detained Williams and Cox while they were in the presence of other Fruit Town Piru members.

When presented with a hypothetical based on the facts of this case, Detective Magadan opined that the assault would have been committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. Detective Magadan reasoned that the assault occurred because the female victim had disrespected a member of the gang, and the gang needed to retaliate against her to maintain its reputation. The two gang members who committed the assault were acting in concert when they joined in beating the victim, and one of them identified his membership in the gang by yelling "Piru" during the beating. Detective Magadan also noted that the assault was committed in the presence of other people, which would instill fear and intimidation in the community and deter future victims from reporting gang-related crimes to the police. By creating an atmosphere of fear, the assault also would serve to enhance the reputation of the two gang members who committed the crime and allow the gang to continue its criminal enterprise without fear of prosecution.

III. Defense Evidence

Cox testified on her own behalf. She grew up in Compton and had friends or relatives who were members of the Fruit Town Piru gang. Cox was an associate of the gang and spent a lot of time with Fruit Town Piru members. Williams was Cox's cousin. On the day of the assault, Cox was waiting to get her hair cut at

a nearby barbershop when she heard a loud argument between Farmer and Williams. When Cox walked over to the area where the argument was taking place, she saw that Farmer was acting in an aggressive manner and threatening to "tase" Williams. Farmer also was holding an object in her hand, but Cox did not know if it was a taser. Farmer swung her hand at Williams, and he "swung to block" her hand. At that point, Cox stepped in and punched Farmer three times. Cox denied that Williams punched Farmer in her face or that anyone kicked her, but acknowledged that Farmer ended up on the ground during the altercation. Cox testified that she became involved in the altercation because she felt it would be better for another female to fight Farmer instead of Williams. On cross-examination, Cox admitted that she said in one of her jailhouse calls that she was from Fruit Town Piru. She also admitted that she told Detective Magadan during a police interview that she saw Williams punch Farmer in the face and then saw Farmer stumble backward.

Williams testified on his own behalf. He admitted that he was a member of Fruit Town Piru, but denied that he was active in the gang or had committed any crimes for the gang's benefit. On the day of the assault, Williams was waiting to get his hair cut at a nearby business. When Williams first saw Farmer, he mistakenly thought she was the pregnant girlfriend of one of his friends, and jokingly said to her, "Get off your phone, fat ass." After Farmer swore at Williams in response, he realized his mistake and apologized to her. Farmer continued to curse at Williams, however, and threatened to "tase" him. She then approached Williams with an object in her hand and swung it toward him. In response, Williams swung his hand at Farmer and knocked the object she was holding to the ground. At that

point, some of Williams' friends pulled him away because he was on parole. Williams saw Cox approach Farmer, but he did not see what happened between them because he left the area. On cross-examination, Williams admitted his gang moniker was "Red." He also admitted that he wrote the Facebook posting which stated, "Bitch don't get liberty taxed equals knocked the fuck out." Williams testified that other Facebook users were commenting on the incident, and that he intended his post to be a "subliminal message" that "it can happen to you."

IV. Verdict and Sentencing

The jury found both Williams and Cox guilty as charged of assault by means of force likely to produce great bodily injury. As to each of them, the jury also found true both the great bodily injury enhancement and the gang enhancement. The trial court sentenced Williams to a total term of 24 years in state prison, consisting of six years on the assault count, plus three years on the great bodily injury enhancement, 10 years on the gang enhancement, and five years for the prior serious felony conviction. The trial court sentenced Cox to a total state prison term of 15 years, consisting of two years on the assault count, plus three years on the great bodily injury enhancement and 10 years on the gang enhancement. Williams and Cox appealed.

DISCUSSION

I. Sufficiency of Evidence on Gang Enhancements

Appellants join in challenging the sufficiency of the evidence supporting the jury's gang enhancement findings. They specifically contend that the evidence was insufficient to show that the "primary activities" of the Fruit Town Piru gang were to commit certain enumerated crimes within the meaning of section

186.22, subdivision (f). They also claim that the evidence was insufficient to prove that they committed the charged offense "for the benefit of, at the direction of, or in association with any criminal street gang," and "with the specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b). We conclude that neither argument has merit.

A. Overview of Governing Law

The California Street Terrorism Enforcement and Prevention Act was enacted by the Legislature "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One component of the statute is a sentence enhancement for felonies 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)(1).) A "criminal street gang" is "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 criminal acts enumerated in [§ 186.22, subd. (e)], 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).)

"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.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

B. The Gang Enhancement as to Each Appellant Was Supported by Substantial Evidence

1. Primary Activities of the Gang

To prove a gang is a "criminal street gang," the prosecution must show that the gang has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and has engaged in a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e), (f); see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617, disapproved on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations," as opposed to the occasional commission of those crimes by one or more of the group's members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) "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." (*Id.* at p. 324.) "The testimony of a gang expert, founded on his or her conversations with gang

members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

At the joint trial of Appellants, the prosecution offered the expert testimony of Detective Magadan to prove the primary activities element of the gang enhancement allegations. The prosecutor specifically asked Detective Magadan, "What are some of the primary activities of [the Fruit Town Piru] gang?" In response, Detective Magadan testified: "The primary activities of the gang range from possession of narcotics, narcotics for sales, weapons violations. I would say assaults, assaults with deadly weapon[s], attempted murders, and murders." Appellants argue that Detective Magadan's testimony lacked an adequate foundation because he failed to provide sufficient information about the knowledge and experience that formed the basis of his opinion. In particular, they assert that, apart from testifying that he had investigated numerous crimes involving Fruit Town Piru members, Detective Magadan did not describe the nature of those crimes or detail any particular investigations.

The record reflects, however, that Detective Magadan testified to having extensive training and experience in gang culture and gang crimes, thus demonstrating the special knowledge, skill, and experience sufficient to qualify him as an expert. As discussed, Detective Magadan had been a deputy sheriff for 14 years and a gang detective for three and a half years. As a gang detective, he was responsible for investigating gang-related crimes committed by Compton-based street gangs, including Fruit Town Piru. Detective Magadan also had prior

experience working as a patrol officer and gang enforcement officer at the Compton Sheriff's station, and previously had served on a homicide gang task force. In addition to his work experience, Detective Magadan had received approximately 300 hours of gang training through various law enforcement agencies, had taught on the subject of gangs at the Los Angeles County Sheriff's Academy, and had testified as a gang expert more than 20 times in the Los Angeles County Superior Court.

With respect to the Fruit Town Piru gang, Detective Magadan testified that he personally had investigated numerous crimes involving members of the gang. He also reviewed police reports prepared by other officers about crimes committed by the gang and regularly spoke with officers in the field about current gang trends within the city of Compton. While Appellants claim that Detective Magadan failed to describe any particular crimes or investigations involving Fruit Town Piru, the record reflects he testified about two specific crimes committed by members of the gang that he personally assisted in investigating – a murder of a rival gang member committed in May 2013, and a murder and attempted murder of several individuals in rival gang territory committed in May 2012. Detective Magadan also described assisting in the investigations of a burglary and an assault with a deadly weapon involving a Fruit Town Piru member who was detained with Williams in 2013. Thus, contrary to Appellants' claim, the foundation for Detective Magadan's opinion about the primary activities of the gang was well-established. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330 [gang expert's "eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony" about the

gang's primary activities]; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1465 [gang expert's "personal experience in the field gathering gang intelligence, contacting gang members, and investigating gang-related crimes" provided adequate foundation for his testimony about the gang's primary activities].)

Under these circumstances, Appellants' reliance on *In re Alexander L.* (2007) 149 Cal.App.4th 605, is misplaced. In that case, the appellate court reversed a true finding on a gang enhancement on the ground that the gang expert's testimony was insufficient to establish the primary activities element. When asked about the primary activities of the defendant's gang, the expert testified, "'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.'" (*Id.* at p. 611.) However, the expert did not explain the basis for his knowledge and conceded on cross-examination that the vast majority of crimes involving the gang were graffiti-related. (*Id.* at pp. 611-612.) As this Court explained in *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107-108, the expert testimony in *Alexander L.* was insufficient to support a gang enhancement finding because the witness did not identify the gang's primary activities, equivocated on direct examination, and contradicted himself on cross-examination. Detective Magadan's testimony, in contrast, did not suffer from these deficiencies, and when considered as a whole, was sufficient to prove the primary activities element of the gang enhancement allegations.

2. Benefit of the Gang and Specific Intent to Promote Criminal Gang Conduct

To obtain a true finding on a gang enhancement allegation, the prosecution also must prove that the charged 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)(1).) To establish these elements of the gang enhancement statute, "the prosecution may . . . present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) "'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]'" (*People v. Ward* (2005) 36 Cal.4th 186, 209.) While a gang expert may not ordinarily testify whether the defendant committed a particular crime for the benefit of a gang, the expert "properly could . . . express an opinion, based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) Indeed, "'[e]xpert opinion that particular criminal conduct benefited a gang" is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*Ibid.*)

In this case, there was substantial evidence connecting the assault against Farmer to the Fruit Town Piru gang. The jury heard evidence that both Williams and Cox were members of the gang, and that Williams had prominent gang tattoos signifying his affiliation to the gang. The assault took place on the border of

the gang's territory at a location where Fruit Town Piru members were known to congregate. The jury also heard evidence that the confrontation began when Williams made insulting remarks to Farmer and repeatedly called her a bitch, and she responded by cursing at him. Williams then physically assaulted Farmer by punching her at least eight times in the face, and Cox joined Williams in the assault by punching and kicking Farmer multiple times while she was on the ground. During the assault, Williams called out "Piru," which Farmer understood referred to the gang. The incident began in a public place in front of a large group of people, and ended inside the office when Farmer lost consciousness and Williams and Cox left the scene. From this evidence, the jury reasonably could have concluded that Williams and Cox acted in concert to assault Farmer because she had disrespected a Fruit Town Piru member publicly in the gang's territory.

On appeal, Cox contends that the evidence showed she was not acting for the benefit of the Fruit Town Piru gang, but rather to assist her cousin, Williams, because she did not want him to be involved in a fight with a woman. In support of this claim, Cox points to her trial testimony that she happened to be in the area that day because she was getting her hair done at a nearby shop, and that she did not know what the conflict between Williams and Farmer was about when she stepped into the fight to protect her cousin. However, Farmer testified that Williams and Cox were together with a group of people about three to four feet away from her when the confrontation began, and that Cox was in that spot when Williams started punching Farmer. From such testimony, the jury reasonably could have inferred that Cox was aware that Williams initiated the conflict because she was with

him when he verbally insulted Farmer, and was only a few feet away when he began the physical assault.

Farmer also testified that Cox did not simply take Williams' place when she became involved in the assault, but rather joined Williams in repeatedly punching and kicking Farmer as she was lying on the ground. While there was no evidence that Cox ever announced her gang affiliation, she was actively participating in the assault when Williams called out "Piru." Given that the assault involved two Fruit Town Piru members acting in concert in their gang's territory, the jury reasonably could have concluded that the crime was gang-related and committed with the specific intent to assist members of the Fruit Town Piru gang. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 68 ["if substantial evidence establishes that the defendant intended to and did commit the charged felony with known 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. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["[c]ommission of a crime in concert with known gang members . . . supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime"].)

The jury also heard Detective Magadan's expert testimony that, based on a hypothetical drawn from the evidence in this case, the assault against Farmer would have been committed for the benefit of and in association with the Fruit Town Piru gang. Detective Magadan testified that an act of disrespect against a gang member would compel the gang to publicly retaliate against the perceived offender "in order to save face and maintain the gang's reputation." Detective Magadan further testified that the

commission of a violent assault in front of other people would instill "an atmosphere of fear and intimidation within the community", which would deter victims from coming forward to report gang-related crimes. Such an act of violence also would serve to enhance the reputation of the gang members who committed the assault and enable the gang to continue operating its criminal enterprise with impunity. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 63 ["[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang'"]; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 619 [based on expert testimony that a gang relied on violent assaults to frighten residents, "the jury could reasonably conclude that the attack on [the victim] . . . was committed 'for the benefit of, at the direction of, or in association with' that gang"].)

Based on the totality of this evidence, the jury reasonably could have concluded that both Williams and Cox committed the assault against Farmer for the benefit of, at the direction of, or in association with the Fruit Town Piru gang, and with the specific intent to promote, further, or assist in criminal conduct by its members. The jury's true finding on the gang enhancement as to each appellant was supported by substantial evidence.

II. Admissibility of the Gang Expert Testimony

Appellants also join in arguing that, under the California Supreme Court's recent decision in *People v. Sanchez*, *supra*, 63 Cal.4th 665 (*Sanchez*), the admission of Detective Magadan's expert testimony violated California hearsay law and their Sixth Amendment right of confrontation. They specifically assert that Detective Magadan impermissibly relied on testimonial hearsay

in offering his opinion about their gang membership because the opinion was based on out-of-court statements by persons who did not testify and were not subject to prior cross-examination. Based on the legal principles set forth in *Sanchez*, we conclude that Appellants have failed to demonstrate any prejudicial error in the admission of Detective Magadan's expert testimony.[2]

A. The *Sanchez* Decision

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that the Sixth Amendment right of confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford*, *supra*, at pp. 53-54.) In *Sanchez*, the California Supreme Court considered the extent to which *Crawford* precludes an expert witness from

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[2] The Attorney General contends that Appellants have forfeited their claim on appeal by failing to object to Detective Magadan's testimony on hearsay or confrontation clause grounds at trial. Any objection likely would have been futile, however, because the trial court was bound to follow pre-*Sanchez* decisions, which generally held that expert "basis" evidence is not admitted for its truth, and thus, does not implicate the hearsay doctrine or the confrontation clause. (See *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13 [disapproving "prior decisions concluding that an expert's basis testimony is not offered for its truth or that a limiting instruction . . . sufficiently addresses hearsay and confrontation concerns"].) We accordingly address the merits of Appellants' claim.

relating case-specific hearsay in explaining the basis for an opinion, and the proper application of California hearsay law to the scope of expert testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 670.) The *Sanchez* court held that the case-specific out-of-court statements related by the prosecution's gang expert constituted inadmissible hearsay under California law, and that, to the extent those statements were testimonial in nature, they also should have been excluded under *Crawford*. (*Id*. at pp. 670-671.)

In *Sanchez*, the prosecution's gang expert testified about his background, training, and experience as a gang suppression officer. He also testified about the gang to which the defendant allegedly belonged, including the gang's primary activities and its pattern of criminal activity. As to the defendant specifically, the expert testified about the prior contacts the defendant had with the police, as reflected in police reports, a California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.; STEP) notice, and a field identification (FI) card. The expert was not present during any of the defendant's police contacts and only related the information recorded by other officers. Based on such information, the expert opined that the defendant was a gang member. The jury found the defendant guilty of the underlying charge and made a true finding on the related gang enhancement allegation. (*Sanchez*, *supra*, 63 Cal.4th at pp. 671-673.) On appeal, the defendant challenged the expert's testimony about his prior police contacts, contending that it was based on testimonial hearsay in violation of the confrontation clause. (*Id*. at p. 674.)

With respect to California hearsay law, the *Sanchez* court drew a distinction between "an expert's testimony regarding his general knowledge in his field of expertise," and "case-specific facts about which the expert has no independent knowledge."

(*Sanchez*, *supra*, 63 Cal.4th at p. 676, italics omitted.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) Traditionally, "an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Ibid.*) Thus, "[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Id.* at p. 685.) On the other hand, "[w]hat an expert *cannot* do is 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." (*Id.* at p. 686.) "If an expert testifies to case-specific out-of-court statements to explain the bases for his [or her] opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684.)

With respect to the confrontation clause, the *Sanchez* court concluded that, if an expert relates to the jury case-specific out-of-court statements that constitute "*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." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) Citing post-*Crawford* United States Supreme Court precedent, the *Sanchez* court defined "[t]estimonial statements" as "those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*Id.* at p. 689.) The court defined "[n]ontestimonial statements" as "those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Ibid.*)

Turning to the facts of the case, the *Sanchez* court held that the gang expert's testimony about the defendant's membership in a gang conveyed case-specific testimonial hearsay in violation of state hearsay law and the confrontation clause. First, the police reports prepared by other officers documenting the defendant's prior contacts with the police were testimonial hearsay because they related "statements about a completed crime, made to an investigating officer by a nontestifying witness" during an official investigation. (*Sanchez*, *supra*, 63 Cal4th at p. 694.) Second, the STEP notice was testimonial hearsay because it was an official police document that "recorded [the] defendant's biographical information, whom he was with, and what statements he made," and the officer who recorded the information did so primarily "to establish facts to be later used against [the defendant] or his companions at trial." (*Id.* at p. 696.) Finally, the court noted that the record did not sufficiently disclose the circumstances surrounding the preparation of the FI card to determine whether it was testimonial hearsay, but "[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Id.* at p. 697.)

B. There Was No Prejudicial Error in the Admission of Detective Magadan's Testimony

Appellants challenge the admission of Detective Magadan's expert testimony opining that they were members of the Fruit Town Gang and had gang monikers. They contend that Detective Magadan's testimony about their gang membership violated both California law and the confrontation clause because it was based on testimonial hearsay provided by informants, who neither testified at trial nor were subject to prior cross-examination.[3]

At trial, Detective Magadan testified that he was familiar with both Williams and Cox. He stated that he "became familiar with Mr. Williams during the course of this investigation, [and]

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[3] In her appellate brief, Cox states that she is limiting her claim on appeal to the expert testimony about her membership in a gang. However, Cox also summarily asserts in her brief that Detective Magadan's testimony about the primary activities of the Fruit Town Piru gang was based on inadmissible hearsay because he testified that his knowledge about the gang was based, in part, on reading reports prepared by other officers about crimes committed by the gang and talking to other officers in the field about current gang trends. To the extent Appellant is contending that Detective Magadan was precluded from providing background testimony for his opinion about the gang's primary activities, that claim was expressly rejected in *Sanchez*. The *Sanchez* court explained that its "decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) Therefore, an expert properly may relate "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory," which is "relevant and admissible evidence as to the . . . gang's history and general operations." (*Id*. at p. 698.)

also through the use of informants and prior contacts." He confirmed that he personally had contacted Williams in the past and had detained Williams with members of the Fruit Town Piru gang. When asked how he was familiar with Cox, Detective Magadan stated: "I have personally contacted . . . Ms. Cox . . . on numerous occasions. Once again, through the use of informants. She has been detained with other members of the gang. She frequents the gang area."

Detective Magadan further opined that both Williams and Cox were members of the Fruit Town Piru gang and had gang monikers. With respect to Williams, Detective Magadan testified that his opinion was based "on the fact that [Williams] frequents known gang locations for this gang. He had tattoos depicting his affiliation to the gang. He was jumped into the gang or became a member of the gang. During this assault on the victim in this case, he identified himself as a Piru gang member as he struck the victim." With respect to Cox, Detective Magadan testified that his opinion was based "on the fact I have personally contacted her with other members of the gang on numerous occasions. She frequents areas known to be associated with the gang. During the course of my investigation, I also monitored her phone calls where she actually admits to another individual who challenges her that she's a member of the gang by saying, 'I'm from Fruit Town Piru.' Through the use of informants and through her assistance of Mr. Williams during this assault."

Appellants argue that Detective Magadan's testimony about their alleged membership in the Fruit Town Piru gang was based on testimonial hearsay because it was based entirely on case-specific, out-of-court statements provided by informants. The record reflects, however, that Detective Magadan did not rely

solely on informants in forming his opinion about Appellants' gang membership, but rather identified multiple sources of information as providing the bases for his opinion. These other sources of information were (1) Detective Magadan's personal contacts with Appellants in the presence of other Fruit Town Piru members; (2) Williams' tattoos signifying his affiliation with the gang, (3) the video of Williams being jumped into the gang and Cox commenting on the beating; (4) the jailhouse calls in which Cox identified herself as "Bam" and stated she was from Fruit Town Piru; and (5) Appellants' statements and/or conduct while committing the assault in this case. Detective Magadan's testimony about these other sources of information did not rely on out-of-court statements by unnamed informants, and did not run afoul of California hearsay rules or the confrontation clause.

Specifically, Detective Magadan properly could testify about his prior contacts with Williams and Cox as well as his own observations of Williams' gang-related tattoos. (*Sanchez*, *supra*, 63 Cal.4th at p. 685 [gang experts "can rely on information within their personal knowledge"].) Unlike the gang expert in *Sanchez*, Detective Magadan testified that he personally had contacted Appellants in the presence of other gang members, and thus, he had personal knowledge of the case-specific facts related to those contacts. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1176 [gang expert's testimony about "his interactions with appellants . . . was not barred under state or federal law because he was present during these contacts, had personal knowledge of the facts, and was subject to cross-examination at trial"].) Detective Magadan also had personal knowledge of Williams' gang-related tattoos because he had observed those tattoos while Williams was in custody. (*Sanchez*, *supra*, at p. 677 [presence of a tattoo "would

be a case-specific fact that could be established by a witness who saw the tattoo," and an expert could then "give an opinion that the . . . tattoo shows the person belongs to the gang"].)

In explaining the basis for his opinion about Appellants' gang membership, Detective Magadan also could properly testify about out-of-court statements that were "independently proven by competent evidence or [were] covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) In particular, Detective Magadan could testify about statements made by Cox during Williams' gang initiation video and Cox's jailhouse calls because the contents of those recordings were independently proven when they were played for the jury at trial. Similarly, Williams' reference to "Piru" while committing the assault in this case was independently established through Farmer's trial testimony about what Williams said during the assault. The out-of-court statements made by Appellants during these incidents were admissible under the well-recognized exception to the hearsay rule for admissions of a party (Evid. Code, § 1220), and as Appellants' own admissions, they did not implicate the confrontation clause. (*People v. Jennings* (2010) 50 Cal.4th 616, 661-662 [defendant's own admissions were admissible as a hearsay exception and did not violate the confrontation clause].)

The only source of information for Detective Magadan's testimony that arguably could implicate the hearsay rule and the confrontation clause are the informants that he relied on in forming his opinion about Appellants' gang membership. Detective Magadan testified that one of the ways he was familiar with Williams and Cox was "through the use of informants," and that he based his opinion that Cox was a Fruit Town Piru gang member, in part, on "the use of informants." Detective Magadan

did not, however, convey any particular out-of-court statements made by these informants, nor did he relate to the jury any case-specific information about what the informants said, to whom they said it, and the circumstances surrounding such statements. In *Sanchez*, the court explained that, while "an expert cannot . . . relate as true case-specific facts asserted in hearsay statements," the expert "may still rely on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685, 686.) Detective Magadan thus was not precluded from testifying in general terms that he relied on informants as a basis for his opinion that Appellants were Fruit Town Piru gang members.

Moreover, to the extent that Detective Magadan's expert testimony could be construed as relating case-specific out-of-court statements made by informants, the record does not support a conclusion that such statements were testimonial in nature, and thus, subject to the confrontation clause. There is no indication in the record that any purported statements made by informants about Appellants' gang membership took place in the context of a custodial interrogation or an official investigation of a completed crime, or that Detective Magadan's primary purpose in speaking to these individuals was to preserve facts for use at a later trial. (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 413 [expert's testimony about information he received from informants did not violate the confrontation clause where he "did not testify to any particular statement made by any one person to him about [co-defendant's] gang affiliation," and there was "no indication [the information] was gathered as part of the investigation of completed crimes"].) As the United States Supreme Court has observed, "not all those questioned by the police are witnesses"

for purposes of the Sixth Amendment and "not all 'interrogations by law enforcement officers,' [citation], are subject to the Confrontation Clause." (*Michigan v. Bryant* (2011) 562 U.S. 344, 355 quoting *Crawford*, *supra*, 541 U.S. at p. 53.) Because the record does not establish that Detective Magadan's opinion was based on testimonial hearsay, Appellants have not demonstrated a violation of their Sixth Amendment confrontation rights. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 586 [where "the record is not clear enough . . . to conclude which portions of the expert's testimony involved testimonial hearsay[,] . . . defendant has not demonstrated a violation of the confrontation clause"].)

Finally, even assuming Detective Magadan's testimony about his use of informants conveyed inadmissible testimonial hearsay in violation of California law and the confrontation clause, we conclude that any error in admitting such testimony was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at p. 699 [admission of expert testimony in violation of the confrontation clause requires reversal unless the prosecution can show the error "was harmless beyond a reasonable doubt"].) Each appellant's membership in the Fruit Town Piru gang was well-established by other admissible evidence. Williams specifically admitted at trial that he was a member of Fruit Town Piru and that his gang moniker was "Red." The evidence also showed that Williams had prominent gang tattoos signifying his affiliation with the gang, and was seen in a video being jumped into the gang by other Fruit Town Piru members. Cox admitted at trial that she was an associate of the gang. In a jailhouse call made while she was in custody on this case, Cox identified herself as "Bam," and when asked where she was from, she answered "Fruit Town Piru." In another call, Cox related that she might be

involved in a fight with a woman from the Nutty Blocc Crips, a known rival of the Fruit Town Piru gang. In addition, Cox was seen in the video of Williams being jumped into the gang, and she told the gang members who were beating Williams as part of the initiation process when to stop the assault.

Detective Magadan's testimony that informants provided one source of information for his opinion that both Appellants were Fruit Town Piru members therefore added very little to the other evidence about their gang membership that was properly before the jury. Under these circumstances, we are convinced beyond a reasonable doubt that the jury would have reached the same verdict on the gang enhancement allegations had the evidence of Detective Magadan's reliance on informants as a basis for his opinion been excluded. Accordingly, any error in admitting such evidence was harmless.

III. Sentencing Error

Appellants contend, and the Attorney General concedes, that the trial court erred in imposing both a 10-year term for the gang enhancements under section 186.22, subdivision (b)(1)(C), and a three-year term for the great bodily injury enhancements under section 12022.7, subdivision (a). We agree.

Section 186.22, subdivision (b)(1)(C) provides for a 10-year sentence enhancement when the defendant commits a felony "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," and that "felony is a violent felony, as defined in subdivision (c) of Section 667.5." (§ 186.22, subd. (b)(1)(C).) Section 667.5, subdivision (c) defines a "violent felony" as including "[a]ny felony in which the defendant inflicts great bodily injury on any person other than an

accomplice which has been charged and proved as provided for in Section 12022.7. . . .” (§ 667.5, subd. (c)(8).) Section 12022.7, subdivision (a) in turn provides for a three-year sentence enhancement when the defendant “personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony. . . .” (§ 12022.7, subd. (a).)

Under section 1170.1, subdivision (g), “[w]hen two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.” (§ 1170.1, subd. (g).) In *People v. Gonzalez* (2009) 178 Cal.App.4th 1325, 1332, the appellate court held that section 1170.1, subdivision (g) prohibits the imposition of both a three-year enhancement under section 12022.7, subdivision (a) and a 10-year enhancement under section 186.22, subdivision (b)(1)(C) when “[t]he same infliction of great bodily injury on the same victim” turns an “underlying assault offense into a ‘violent felony’ under section 667.5.” In such a case, the trial court should impose “only the greatest of those enhancements as required by section 1170.1, subdivision (g).” (*Ibid*.)

In this case, the trial court imposed on each appellant a 10-year term for the gang enhancement under section 186.22, subdivision (b)(1)(C), and a consecutive three-year term for the great bodily injury enhancement under 12022.7, subdivision (a). Both enhancements were based on Appellants’ infliction of great bodily injury on the same victim in the commission of a single offense. Section 1170.1, subdivision (g) prohibits the imposition of both enhancements, and requires that only the 10-year gang enhancement be imposed. The judgment accordingly must be modified to stay the three-year great bodily injury enhancement

imposed on each appellant under section 12022.7, subdivision (a). (See *People v. Vega* (2013) 214 Cal.App.4th 1387, 1395-1396 [where gang enhancement and great bodily injury enhancement were based on infliction of great bodily injury on same victim in single offense, trial court was required to impose and then stay great bodily injury enhancement]; Cal. Rules of Court, rule 4.447 [where imposition of enhancement "exceeds limitations on the imposition of multiple enhancements," the trial court "must impose sentence for the aggregate term of imprisonment . . ., and must thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit"].)

DISPOSITION

As to each appellant, the judgment is modified to stay the three-year great bodily injury enhancement imposed under section 12022.7, subdivision (a). As modified, the judgment as to each appellant is affirmed. The superior court is directed to prepare amended abstracts of judgment and to forward certified copies to the Department of Corrections and Rehabilitation.

ZELON, Acting P. J.

We concur:

SEGAL, J. SMALL, J.*

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