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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR GARCIA SEGURA,

Defendant and Appellant.

B268752

(Los Angeles County  
Super. Ct. No. KA077015)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

On appeal, defendant Oscar Garcia Segura essentially concedes he committed an attempted murder. But he challenges the findings that the attempted murder was committed with premeditation and deliberation and for the benefit of his El Monte Flores gang. Defendant also argues that gang expert testimony violated the confrontation clause. We affirm.

### **PROCEDURE**

Defendant was charged with the attempted willful, deliberate and premeditated murder of Jose A. and of Samantha C. As to the attempted murder of Jose, firearm enhancements pursuant to Penal Code<sup>1</sup> section 12022.53, subdivisions (b), (c), (d), and (e)(1) were alleged, a gang enhancement pursuant to section 186.22 was alleged, and a great bodily injury enhancement pursuant to section 12022.7, subdivision (a) was alleged. Defendant also was charged with possession of a firearm by a felon. Prior convictions within the meaning of section 667.5, subdivision (b), section 667, subdivision (a)(1), and the “Three Strikes” law also were alleged.

Jurors found defendant not guilty of the attempted murder of Samantha, but found all other allegations true. The court found defendant suffered two prior convictions within the meaning of section 667.5, subdivision (b), one prior conviction within the meaning of the Three Strikes law, and one prior conviction within the meaning of section 667, subdivision (a)(1).

For the attempted murder of Jose and the enhancements, defendant was sentenced to prison for a total term of 60 years to life. For being a felon in possession of a firearm, defendant was sentenced to the midterm of two years and the sentence was stayed.

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<sup>1</sup> Undesignated statutory citations are to the Penal Code.

## FACTS

A video of the early morning of November 1, 2006, at Tina's Tavern shows defendant shooting Jose at close range.<sup>2</sup> Jose was hit four times—in his chest, waist, and both legs. Defendant left Tina's Tavern with two fellow El Monte Flores (EMF) gang members. The parties stipulated that EMF is a criminal street gang.

Prior to the shooting, Jose was asked “where you were from,” which he understood as a question regarding his gang membership. After the questioning, defendant demanded the cigarette placed behind Jose's ear, and Jose responded, “Fuck you.” Defendant began fighting with Jose. Jose testified that he was attacked by more than two individuals (defendant and others) prior to the shooting.

Just before Jose was shot, someone said, “El Monte Flores.” Jose tried to run but three or four men pursued him, including defendant who pursued him with a gun. Jose also testified that defendant's gun “jammed,” and defendant tried to clear it.

Samantha, who was near Jose, was shot twice. Jose trapped her when he fell in front of her.

A witness heard gunshots, saw defendant exit the bar and then reenter the bar. When he was outside defendant said, “fuck that shit.” Another witness heard initial shots, saw defendant ask another patron, “Do you want to die, too,” and then heard additional shots fired. A third witness saw defendant leave the bar, and upon returning, warn another customer to refrain from calling 911.

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<sup>2</sup> The video was a compilation of segments from various camera angles. Defense counsel represented that the full version of the video was not more helpful to the defense. Based on that representation, the court found that playing the entire video would involve an undue consumption of time.

After Jose was shot four times, defendant exited the bar and left the scene with his fellow gang members Michael Elizalde and Marco Alatorre.

In 2006, Detective David Garcia was assigned to the gang detail in El Monte. Garcia personally contacted gang members at least 500 times. Garcia had numerous contacts with defendant. Defendant told Garcia that he was an EMF member multiple times. Garcia testified that defendant was a member of EMF.

As part of his trial testimony, Detective Garcia was asked to review the video of the shooting at Tina's Tavern. He recognized defendant on the video. Garcia also recognized other EMF gang members Elizalde and Alatorre, who were with defendant in Tina's Tavern. Garcia knew Elizalde since he was 15 years old through contacts on the street. Elizalde admitted to Garcia that he was a member of EMF. On the night Jose was shot, Elizalde was wearing a T-shirt commonly worn by EMF gang members. It said, "Monte Fools." Garcia had multiple contacts with Alatorre, including one when Alatorre was a suspect in a crime. Garcia knew him as a member of EMF.

Gang expert Ralph Batres testified that the EMF gang had about 800 members, and its principal activities included robbery, rape, murder, drug sales, witness intimidation, burglary, and forgery. He testified that defendant had numerous tattoos reflecting his EMF membership. Batres testified that gang members were concerned about their reputation and frequently wanted to be known as violent. According to Batres, a gang member would earn respect by committing violent crimes.

Batres explained that when a gang member asks, "[w]here are you from"—the question Jose was asked—the gang member

wants to know who you are. Further, asking where are you from often is a method of instigating a fight.

Batres testified that defendant had numerous gang tattoos, and pictures of the tattoos were admitted into evidence. Defendant had the letters “EMF” tattooed on his stomach in large print. Defendant’s “TMS” tattoo stood for a clique within the EMF gang. On his bicep, defendant had a tattoo of a “little gangster guy sitting down.” Officer Batres concluded defendant was a gang member based on his tattoos as well as reports and statements from other officers.

Batres did not know defendant, Elizalde or Alatorre personally. When asked a hypothetical question with facts similar to the present case, Batres opined that the crimes were committed for the benefit of and in association with gang members.

## **DISCUSSION**

Defendant challenges the sufficiency of the evidence of premeditation and deliberation. He also challenges the sufficiency of the evidence to support the gang enhancement. Finally, defendant argues that his right of confrontation was violated. As we shall explain, defendant fails to demonstrate any reversible error.

### **1. Defendant Fails to Show the Record Lacks Sufficient Evidence**

Our task in deciding a challenge to the sufficiency of the evidence is well-established. “[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] In cases in which the People rely primarily on

circumstantial evidence, the standard of review is the same. [Citations.] [Citation.] ‘ “An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.” ’ ” (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812 (*Solomon*).)

***a. Premeditation and Deliberation***

Defendant argues that no substantial evidence supported the finding that the attempted murder of Jose was committed with premeditation and deliberation. He argues that the evidence demonstrated only a rash, impulsive shooting. We disagree. As we shall explain, when the evidence is viewed in accordance with the proper standard of review, it amply supported the verdict.

“ ‘ “Deliberation” refers to careful weighing of considerations in forming a course of action; “premeditation” means thought over in advance.’ ” (*Solomon, supra*, 49 Cal.4th at p. 812.)

“ ‘ “Premeditation and deliberation can occur in a brief interval. “The test is not time, but reflection. “Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.” ’ ” ’ ” (*Ibid.*)

Our high court further explained that “*People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*) discusses three types of evidence commonly shown in cases of premeditated murder: planning activity, preexisting motive, and manner of killing. [Citation.] Drawing on these three categories of evidence, *Anderson* provided one framework for reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. In so doing, *Anderson*’s goal ‘was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.’ [Citations.] But,

as we have often observed, ‘*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.’” (*Solomon, supra*, 49 Cal.4th at p. 812.)

Turning to this case, substantial evidence supported the findings of premeditation and deliberation. Defendant or one of his fellow gang members first asked Jose “where [are you] from,” a method of starting a fight. Defendant then demanded Jose’s cigarette and struck Jose. Subsequently, he pulled out a gun and shot Jose multiple times at close range. He threatened another patron who was trying to call authorities and shot a woman who was near Jose. Throughout his interactions with Jose, defendant escalated the level of violence, and at each interval he had an opportunity to reflect on his actions prior to choosing to shoot Jose multiple times. “The true test is not the duration of time as much as it is the extent of reflection.’” (*Solomon, supra*, 49 Cal.4th at p. 813.) Additionally, the four close-range gunshots including one to Jose’s chest supported the inference of deliberation. (*People v. Caro* (1988) 46 Cal.3d 1035, 1050, overruled on another ground as explained in *People v. Whitt* (1990) 51 Cal.3d 620, 657, fn. 29.)

At most, defendant demonstrates that jurors could have reached a different conclusion. As defendant argues, jurors could have concluded that he acted rashly and spontaneously, being upset that Jose would not relinquish his cigarette. Jurors could have concluded that even if defendant had felt disrespected in front of his gang members he lacked any motive to kill Jose.<sup>3</sup> However,

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<sup>3</sup> Defendant also argues that he was shooting randomly in a crowded bar. That inference is not supported by the record. Defendant shot Jose, hitting him four times. He also hit Samantha because of her proximity to Jose. No evidence was introduced

although jurors could have reached those conclusions, defendant fails to demonstrate jurors were required to reach those conclusions. Because the findings of premeditation and deliberation were supported by substantial evidence reversal is not required even though the record supported alternative conclusions. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 639.)

***b. Gang Enhancement***

A gang enhancement under section 186.22, subdivision (b) requires proof of two elements: “(1) that the defendant committed a felony for the benefit of, at the direction of, *or* in association with any criminal street gang and (2) that he did so with the intent to promote, further, or assist in criminal conduct by gang members.” (*People v. Mejia* (2012) 211 Cal.App.4th 586, 613.)

Defendant argues that the gang enhancement is not supported by substantial evidence because his “hot temper flared” when Jose refused to give him a cigarette. Defendant further argues that the shooting was “instantaneous and reactive” demonstrating “his own personal anger,” not conduct for the benefit of the gang.

Once again, defendant’s argument ignores the proper standard of review. As explained, although jurors could have concluded that defendant acted rashly, their finding that he acted with premeditation and deliberation was supported by the evidence. Therefore, defendant’s premise that the shooting was instantaneous and reactive is not supported by the facts in the light most favorable to the judgment.

Strong evidence supported the gang enhancement. Defendant was in Tina’s Tavern with two fellow gang members, one of whom

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supporting the inference that defendant was shooting indiscriminately.



was wearing a T-shirt frequently worn by EMF members. Defendant approached Jose followed by others and one of them asked “where [are you] from,” a question about Jose’s background and often is a precursor to a gang fight. Before hitting Jose, either defendant or one of the other assailants identified defendant’s gang, saying “El Monte Flores.” Then defendant pulled out a gun and shot Jose multiple times prior to leaving with his fellow gang members.

Reasonable jurors could have concluded that defendant committed the crime in association with other gang members as Elizalde and Alatorre were present and left with defendant. (*People v. Mejia, supra*, 211 Cal.App.4th at p. 614.) The evidence further supported the inference that defendant acted for the benefit of his gang as his gang name was called out prior to the shooting, which can be interpreted as a method of gaining respect for the gang. Reasonable jurors also could have concluded that defendant had the specific intent to promote his gang as either he or his fellow gang member asked Jose where he was from, prior to the altercation and shot Jose after the EMF gang had been identified.

## **2. Defendant Fails to Show the Gang Enhancement Must Be Reversed Because of a Violation of the Confrontation Clause**

Defendant demonstrates that the admission of gang expert Batres’s testimony that Elizalde, and Alatorre were members of the EMF gang may have violated the confrontation clause because Batres did not personally know Alatorre or Elizalde. (See *Crawford v. Washington* (2004) 541 U.S. 36.) If the out-of-court statements were testimonial, their introduction would violate the confrontation

clause.<sup>4</sup> (See *People v. Sanchez*, *supra*, 63 Cal.4th at p. 670 [admission of testimonial hearsay violates confrontation clause].)

Regardless of whether the statements were testimonial, the admission of Batres's testimony was harmless beyond a reasonable doubt because other evidence demonstrated the undisputed facts of Alatorre and Elizalde's gang membership. Garcia knew Elizalde and Alatorre and testified based on his personal knowledge that both Alatorre and Elizalde were gang members. Garcia based his testimony on his personal interactions with Alatorre and Elizalde. Their gang membership was not a disputed issue at trial. Further, it was undisputed that Elizalde was wearing a T-shirt worn by many EMF members.

Contrary to defendant's argument, gang expert Batres's testimony that defendant was a member of EMF was properly admitted. In *People v. Sanchez*, *supra*, 63 Cal.4th 665, our high court held that "case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law." (*Id.* at p. 670.) However, *Sanchez* expressly condoned expert testimony that the presence of a particular tattoo shows that a person belongs to a gang. (*Id.* at p. 677.) Here, numerous pictures admitted as evidence showed defendant's numerous tattoos, and Batres properly testified that the tattoos reflected defendant's gang membership.

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<sup>4</sup> "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*People v. Sanchez* (2016) 63 Cal.4th 665, 689.) Statements made about a completed crime to an investigating officer by a nontestifying witness generally are testimonial. (*Id.* at p. 694.)

Although Batres also testified that he relied on police records, any error in admitting his testimony that defendant was a gang member was harmless beyond a reasonable doubt because Garcia testified that he personally knew defendant and knew him to be a member of EMF.

Defendant fails to show that Batres was asked a hypothetical question based on unproven case-specific facts. The facts he argues were unproven were proven through Garcia's testimony, which was undisputed. "An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts." (*People v. Sanchez, supra*, 63 Cal.4th at pp. 676-677.) Even if portions of Batres's testimony should have been excluded, defendant fails to demonstrate any prejudicial error.

#### **DISPOSITION**

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.