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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RYAN MICHAEL ROTH, Defendant and Appellant.	B276429 Los Angeles County Super. Ct. No. BA417741

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed in part, reversed in part, and remanded with directions.

Willoughby & Associates and Anthony Willoughby for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The Street Terrorism Enforcement and Prevention Act (the STEP Act) imposes additional prison time on any defendant who commits a felony to benefit a criminal street gang. In 2013, Markell Thomas and defendant Ryan Michael Roth—both members of the Avenue Piru gang—robbed two women who were responding to a Craigslist ad. Neither Thomas nor Roth sported gang tattoos. They did not wear gang colors, throw gang signs, or yell their gang's name. The victims were not gang members themselves and didn't know about Roth's or Thomas's membership. No gang members attempted to dissuade the victims from calling the police or from testifying. There is no evidence of bragging or of graffiti taking credit for the crimes—and no evidence other Avenue Piru members knew about the crime or shared in the proceeds. We therefore reverse the true findings on the gang enhancements for insufficient evidence, vacate the sentence, and remand for resentencing. We otherwise affirm the judgment.

PROCEDURAL BACKGROUND

This case stems from two related trials about a series of Craigslist robberies.

By amended information filed August 19, 2015, Roth was charged with one count of felony murder (Pen. Code,[1] §§ 187, subd. (a), 190.2, subd. (a)(17); count 1), one count of attempted murder (§ 664/187, subd. (a); count 2), and six counts of robbery

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1 All undesignated statutory references are to the Penal Code.

(§ 211; counts 3, 4, 6–7, 9–10).[2] The information also alleged various gun (§ 12022.53, subds. (b)–(e)(1)) and gang (§ 186.22, subd. (b)(1)(C)) enhancements for all counts. As relevant here, for counts 6 and 7, the information alleged that a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)) and that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Roth pled not guilty and denied the allegations.

After a trial at which Thomas testified against Roth, Roth was acquitted of murder, attempted murder, and four of the six robbery counts. The jury was unable to reach a verdict on the other two robbery counts—counts 6 and 7—and the court declared a mistrial. At the second trial, a jury convicted Roth of the two remaining robberies and found the gang and personal-use allegations true. Thomas did not testify in that trial, and although the gang expert relied in part on Thomas's statements, the court barred the defense from mentioning Thomas's plea deal.

The court sentenced Roth to an aggregate term of 19 years 4 months in prison. The court selected count 6 (§ 211) as the base term and imposed 15 years—the upper term of five years plus 10 years for the personal-use enhancement (§ 12022.53, subds. (b), (e)(1)). The court imposed four years four months for count 7—

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[2] The original information filed December 31, 2014, charged Thomas with the same crimes and enhancements, as well as five additional counts of robbery (§ 211; counts 5, 8, 11–13), one of which also carried an armed enhancement (§ 12022, subd. (a)(1)). On July 8, 2015, Thomas entered into a leniency agreement with the District Attorney's Office in which he agreed to testify against Roth in exchange for a plea to voluntary manslaughter. He is not a party to this appeal.

one-third the midterm of three years plus one-third of the mandatory 10-year term for the gun enhancement—to run consecutively.

Roth filed a timely notice of appeal.

FACTUAL BACKGROUND

1. The Robbery

On August 22, 2013, April Louie responded to an advertisement on Craigslist for a $300 iPhone. The next afternoon, she drove with her sister Cara Louie-Saito to meet the seller on the 10000 block of Crenshaw Boulevard in Inglewood. The seller chose the location. When they arrived, Cara—the driver—parked the car and turned it off. April sent the seller a text message that they had arrived. He replied that he would be right out.

April and Cara saw two men, later identified as Roth and Thomas, standing on the sidewalk and talking about 40 feet behind the car. The men approached the car. Roth went to the driver's side window; Thomas went to the passenger's side.

April asked Thomas if he was the one selling the phone. He said yes, then pointed a gun at her head. He told April to "give him everything [she] had." April opened the glove compartment, removed the $300 she brought to buy the phone, and gave it to Thomas. He also demanded April's and Cara's mobile phones; April handed them over.

Meanwhile, Roth, who was on the driver's side, reached into the car and tried to remove the keys from the ignition. Cara "started wrestling, fighting back with him trying to get him away from the keys," and to "get him out of the car." Thomas told April to tell her friend—i.e., Cara—"It's not worth it." April looked at

Cara and saw her "kind of wrestling with" Roth. She told Cara to stop fighting, and Cara did. Roth took the keys from the ignition.

Roth and Thomas said they would throw the keys in the grass; they told Cara and April to count to 100 before getting out of the car or they would "shoot." The men fled, threw the keys in the grass, and continued running. A bystander called 911.

In October 2013, Los Angeles Police Department Detective Dean Vinluan was assigned to investigate a series of Craigslist robberies. He identified Thomas as a suspect. The investigation then led him to Roth.

2. The Gang Evidence

After Roth's arrest, Vinluan put him in a county jail cell with a confidential informant and a recording device. The informant asked Roth, "Where you from, homie?" He replied, "Avenue Piru." A recording of the exchange was played for the jury.

Inglewood Police Department Detective Jose Barragan, the prosecution's gang expert, opined that Roth and Thomas were members of the Avenue Piru gang. Barragan had never met either defendant and conceded that he had never seen graffiti with Roth's name or moniker on it, that Roth was not identified as a gang member in the Inglewood Police Department database, and that he had not been identified as an associate on any other gang member's field identification card. According to Barragan, Avenue Piru claimed a territory bordered by Century Boulevard to the north, Imperial Highway to the south, Van Ness Avenue to the east, and Crenshaw Boulevard to the west. The location of the robbery on the 10000 block of Crenshaw Boulevard was at the border of the gang's territory. The gang's primary activities were

"[p]ossession—they—sales of narcotics, possession of firearms, robberies, shootings" and "[v]andalism, felony vandalism."

After being presented with a hypothetical based on the evidence in this case, Barragan opined that the crimes were committed in association with and for the benefit of Avenue Piru.

CONTENTIONS

Roth contends: (1) the court abused its discretion by discharging a sitting juror following opening statements; (2) there is insufficient evidence to support the gang enhancements; (3) the gang expert testified to case-specific hearsay in violation of state law and the Confrontation Clause; (4) the court abused its discretion by excluding defense impeachment evidence—a photograph of Inglewood police officers appearing to throw gang signs and testimony from April's aunt that April had spoken to her about the robbery; (5) the prosecutor committed prejudicial misconduct during the defense closing argument by loudly objecting to a PowerPoint slide and turning off the projector in violation of the court's previous order; and (6) we should remand to allow the court to exercise its discretion to strike the gun enhancements under Senate Bill No. 620 (2017–2018 Reg. Sess.) (Stats. 2017, ch. 682, § 2).

DISCUSSION

1. The court properly dismissed Juror No. 4.

Roth contends the court abused its discretion by dismissing Juror No. 4, a college student, after concluding the juror could not focus on the case. We disagree.

1.1. Standard of Review

"Section 1089 authorizes the trial court to discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror is 'found to be unable to perform his or her duty.' A trial court 'has broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve.' [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 621.)

While we review the court's decision to discharge a sitting juror for abuse of discretion, " 'a somewhat stronger showing' than is typical for abuse of discretion review must be made to support such decisions on appeal. [Citation.] ... [T]he basis for a juror's disqualification must appear on the record as a 'demonstrable reality.' This standard involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence in the record supports the trial court's decision. [Citation.] ... However, in applying the demonstrable reality test, we do not reweigh the evidence. [Citation.] The inquiry is whether 'the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' [Citation.]" (*People v. Lomax* (2010) 49 Cal.4th 530, 589–590, fn. omitted.)

1.2. Proceedings Below

The afternoon of May 3, 2016, after opening statements, the court told counsel:

> I saw [Juror No.] 4, and 4 was a little more attentive during this argument that was being made. He was drumming on his leg like he said

> he does.[3] So I'm going to make some more inquiry. I am considering whether or not I'm going to excuse him for cause. I haven't decided yet.

After defense counsel declined to stipulate to the juror's discharge, the court said, "Let me talk to him again. I did do some research during the lunch hour. If a juror is inattentive or sleeps or whatever during trial, that is grounds to excuse him."

The court called Juror No. 4 into the courtroom and told him:

> I want you to be candid and honest with me. I watched you this afternoon. You weren't as bad as you were this morning. You were drumming on your leg or something. That's what you told us about, some kind of nervous habit you have?

Juror No. 4 responded, "Yeah," and the following exchange ensued:

> CT. Here is sort of the bottom line: Can you be attentive during this trial and watch the evidence and pay attention? Or are you going to be

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3 Throughout this exchange, the court and the parties appear to refer to statements made by Juror No. 4 during voir dire that morning. Voir dire is not part of the normal record on appeal, and defendant's appellate counsel did not move to augment the record with a transcript of those proceedings. (Cal. Rules of Court, rules 8.320(b) [normal clerk's transcript], 8.340(c) [augmenting the record].) As such, we are unable to evaluate whether this inquiry was or should have been undertaken before trial.

distracted by whatever else is going on in your life, in particular your final exams and so forth?

J4. Yeah, I think I'll be pretty distracted, Your Honor.

CT. So that means you wouldn't be paying attention to the evidence and all that is being presented?

J4. No, I would pay attention, but I would be pretty distracted. This is like—I find this actually pretty fascinating, but this is just like not like the right time, with everything that is going on right now.

CT. All right. And again, … your first final is when, May 12th?

J4. Yes.

CT. Are you supposed to also be in classes during this time?

J4. Yeah, I'm supposed to be in class today, but … I didn't expect to be selected so I thought, oh, missing one day hopefully won't be too bad.

Juror No. 4 left the courtroom, and the court told counsel:

> I'm concerned about him. I think there is good cause to excuse him. He was inattentive this morning [during voir dire], he was sleeping. Even this afternoon he was drumming frenetically or with high energy on his leg. I just don't think he's someone—and he's indicated that he thinks he's going to be distracted, … he's got finals and classes. I'm inclined to excuse him for cause, to find good cause.

Defense counsel objected to the removal of the juror. The prosecutor agreed with the court, noting that Juror No. 4 "appears to want to stay, but in candor is telling us he would be too distracted." After questioning Juror No. 4 again, the court excused him for cause, citing *People v. Johnson* (1993) 6 Cal.4th 1 and stating, "I am exercising my discretion, and it's based on my observation of him."

1.3. The court did not abuse its discretion.

The Supreme Court has held that a "trial court does not abuse its discretion if it discharges a juror who falls asleep during the trial. [Citation.]" (*People v. Ramirez* (2006) 39 Cal.4th 398, 458.) In *Ramirez*, "the trial judge had observed that the juror had difficulty paying attention during trial and appeared to fall asleep. The judge's observations were consistent with the testimony of the jury foreperson that the juror had fallen asleep twice during deliberations. The trial court, therefore, did not abuse its discretion in discharging the juror." (*Ibid.*)

In *Johnson*, the defendant claimed on appeal that there was no evidence a discharged juror had actually been sleeping. (*People v. Johnson*, *supra*, 6 Cal.4th at p. 1, disapproved on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 879.) The Supreme Court rejected this claim, finding "ample evidence indicating that on one or more occasions [the juror] had actually fallen asleep during trial. The court, its two deputies, and the prosecutor each stated on the record that they had observed [the juror] exhibiting various physical indicia of sleep, including eye closures, head nodding, and slumping in his chair." (*Johnson*, at p. 21.)

In this case, the court was in the position to observe the juror's demeanor, and the court was persuaded that the juror

could not perform his duties. (Accord, *People v. Schmeck* (2005) 37 Cal.4th 240, 298.) The court saw Juror No. 4 fall asleep for 10 minutes during voir dire of the alternate jurors—a fact the defense did not dispute—and conducted a thorough inquiry into whether the juror would be able to focus on the case. We conclude the " 'court's conclusion is manifestly supported by evidence on which the court actually relied.' [Citation.]" (*People v. Lomax*, *supra*, 49 Cal.4th at p. 590, fn. omitted.) Accordingly, the court did not abuse its discretion in discharging the juror.

2. There is insufficient evidence to support the gang enhancements.

A criminal defendant may not be convicted of any crime or enhancement unless the prosecution proves every fact necessary for conviction beyond a reasonable doubt. (U.S. Const., 5th & 14th Amends.; see Cal. Const., art. I, §§ 7, 15; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Tenner* (1993) 6 Cal.4th 559, 566.) "This cardinal principle of criminal jurisprudence" (*Tenner*, at p. 566) is so fundamental to the American system of justice that criminal defendants are always "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." (*United States v. Powell* (1984) 469 U.S. 57, 67.) Here, Roth contends there is insufficient evidence he committed the robberies for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) We agree.

2.1. Standard of Review

In assessing the sufficiency of the evidence to support an enhancement, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty

beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*).) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Deference is not abdication, however, and substantial evidence is not synonymous with *any* evidence. " 'A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' [Citation.] Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence." (*In re James R.* (2009) 176 Cal.App.4th 129, 135.) Similarly, we "may not … ' "go beyond inference and into the realm of speculation in order to find support for a judgment." ' " (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947 (*Franklin*); *People v. Waidla* (2000) 22 Cal.4th 690, 735 [speculation is not evidence and cannot support a conviction].) Evidence that merely raises a strong suspicion of guilt is insufficient to support a conviction. (*People v. Thompson* (1980) 27 Cal.3d 303, 324.)

2.2. Elements of the Gang Enhancement

"Section 186.22, subdivision (b)(1) imposes various sentencing enhancements on a defendant convicted of a gang-related felony committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. [¶] There are two prongs to the gang enhancement"—the gang-

related prong and the specific-intent prong—"both of which must be established by the evidence. [Citation.]" (*Franklin*, *supra*, 248 Cal.App.4th at p. 948.)

The first prong requires the prosecution to prove that the underlying felony was "gang-related," that is, that the defendant committed the charged offense "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b)(1); *Albillar*, *supra*, 51 Cal.4th at p. 60.) Since "[n]ot every crime committed by gang members is related to a gang," "the Legislature included" this requirement "to make it 'clear that a criminal offense is subject to increased punishment under the STEP Act only if the crime is "gang related." ' [Citation.]" (*Albillar*, at p. 60.) Put another way, the charged offense itself—not just the defendant—must be gang-related.

The second prong "requires that a defendant commit the gang-related felony 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*Albillar*, *supra*, 51 Cal.4th at p. 64; § 186.22, subd. (b)(1).) Of course, "[r]arely is the perpetrator's intent proven by direct evidence; usually it must be inferred from the facts and circumstances surrounding the case. [Citation.]" (*People v. Perez* (2017) 18 Cal.App.5th 598, 607 (*Perez*).) "Our Supreme Court has thus held that the scienter requirement may be satisfied with proof 'that the defendant intended to and did commit the charged felony with known members of a gang,' from which 'the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.' [Citation.]" (*Franklin*, *supra*, 248 Cal.App.4th at p. 949 quoting *Albillar*, at p. 68; accord, *People v. Ramirez* (2016) 244

Cal.App.4th 800, 819 [limiting this language to the second prong]; *People v. Rios* (2013) 222 Cal.App.4th 542, 570 [same].)

Because we conclude the evidence was insufficient to support the enhancement's first prong, we need not reach the second prong. (*People v. Rios*, *supra*, 222 Cal.App.4th at p. 575.)

2.3. The evidence was insufficient to support a finding that the robberies were committed for the benefit of a gang.

The facts of this case do not naturally raise an inference that the robbery was committed to benefit Avenue Piru. (Compare *People v. Livingston* (2012) 53 Cal.4th 1145, 1171 (*Livingston*) ["a driveby shooting by a gang member of a rival gang member is a prototypical example of a gang-related crime"].) The robbery occurred on the border of the gang's claimed territory. The victims were not gang members and were unaware of the robbers' gang affiliation. The robbers didn't refer to their gang during or after the robbery. They didn't wear gang colors or sport gang tattoos. There was no evidence that the Avenue Pirus claimed responsibility for the crime, that the robbers bragged about the crime, that they told their gang what they'd done, or that they gave the gang any of the loot. No one tried to dissuade the victims from calling the police or from testifying. The only support for a finding that the robbery was committed to benefit Avenue Piru was Barragan's expert testimony.

Certainly, " '[e]xpert opinion that particular criminal conduct benefited a gang' is not only permissible but can [also] be sufficient to support the [ ] section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) As such, a "cottage industry of gang experts has grown to meet a perceived need to assist juries in understanding

all things gang related. While a gang expert is prohibited from opining on a defendant's specific intent when committing a crime, the prosecution can ask hypothetical questions based on the evidence presented to the jury whether the alleged crime was committed to benefit a gang and whether the hypothetical perpetrator harbored the requisite specific intent. [Citation.]" (*Perez*, *supra*, 18 Cal.App.5th at pp. 607–608.)

But "there are caveats to the sufficiency" of such testimony. (*Perez*, *supra*, 18 Cal.App.5th at p. 608.) " '[P]urely conclusory and factually unsupported opinions' that the charged crimes are for the benefit of the gang because any violent crime enhances the gang's reputation is insufficient to support a gang enhancement. [Citation.]" (*Ibid.*; accord, *People v. Ramirez*, *supra*, 244 Cal.App.4th at pp. 819–820; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1359; *People v. Ramon* (2009) 175 Cal.App.4th 843, 853.)

Here, in response to the prosecutor's hypothetical question tracking the facts of this case, Barragan opined that the robberies would benefit Avenue Piru by serving as a "recruitment tool" and allowing "them to commit crimes within their territory, within our community with a lesser chance of being caught by law enforcement because" members of the community "become fearful … of being witnesses, of being victimized by the same gang." Barragan explained that he based his opinion on the facts that "the robbery was committed in broad daylight. The robbery was committed in Avenue Piru gang territory. There was a weapon involved." He acknowledged, however, that neither robber said anything about Avenue Piru, threw up any gang signs, sported any visible tattoos, or said anything related to a gang.

"In this gang expert's view, therefore, essentially any [crime committed] by a gang member is gang related because the use of violence enhances the gang member's reputation, and thereby inures to the gang's benefit by instilling fear in the community. Many courts have soundly rejected such a sweeping generalization untethered, as it is, to specific evidence of both prongs of the gang enhancement. [Citations.]" (*Perez*, *supra*, 18 Cal.App.5th at p. 610.) We join those courts.

First, it is unclear to us *how* this robbery could generate the sought-after respect, recruitment, and community fear. There was no evidence that Roth told Avenue Piru members about the robbery or that the gang otherwise found out about it—an apparently necessary first step in any quest to raise one's "respect level" in the gang with misdeeds. Likewise, a gang's actions cannot generate fear in the community or tempt "kids that are naïve" to join the gang unless members of the community *know* the gang has acted. But neither Roth nor Thomas referred to Avenue Piru during the robberies. There is no evidence either the victims or the community at large were aware of their gang ties.[4] The crime was not a prototypical gang crime such that bystanders could infer it must be gang-related. Nor did the prosecution present evidence that Avenue Piru had such a stranglehold on their territory that residents could assume its members were behind *any* criminal activity that might occur. To the contrary, Barragan testified that the robbery happened on

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[4] As such, we cannot discern the relevance of the People's assertion that "April and Cara themselves were members of the general community." We note, however, that the robbery was arranged online, and there is no evidence the victims lived in or near Avenue Piru territory.

the border of territories claimed by multiple gangs—including 18th Street.[5]

Second, that robbery is, according to Barragan, a primary activity of the Avenue Piru gang does not mean that every robbery committed by one or more Avenue Piru members is committed for the gang's benefit. Gang members sometimes commit crimes for personal gain—and robbery can be personally profitable. The prosecution presented no evidence that Avenue Piru was running a Craigslist robbery ring or that this crime had unusual hallmarks that indicated an Avenue Piru operation. Indeed, the prosecution presented no evidence to suggest the gang received a cut of the stolen $300 or any proceeds from the sale or trade of the two older-model mobile phones.

While "it is true that the testimony of a single witness, including the testimony of an expert, may be sufficient to constitute substantial evidence [citation], when an expert bases his or her conclusion on factors that are 'speculative, remote or conjectural,' or on 'assumptions ... not supported by the record,' the expert's opinion 'cannot rise to the dignity of substantial evidence' and a judgment based solely on that opinion 'must be reversed for lack of substantial evidence.' " (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191–1192.) Here, because there was *no* evidentiary support for any of the

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[5] The People assert the "record also reflects that there may have been a third-party witness who feared to come forward, namely the woman who called 911 for April and Cara." In support of this claim, the People cite to two pages of the reporter's transcript, both of which indicate that an unknown witness called 911. The People do not cite any evidence to support their claim that this woman "feared to come forward," and our review of the record has not revealed any basis for it.

purported ways in which Barragan testified that the robbery would have or could have benefited Avenue Piru, his opinion to that effect cannot support a finding that the crime was committed for the benefit of a gang.

2.4. The evidence was insufficient to support a finding that the robberies were committed in association with a gang.

The lack of evidence Roth committed the robberies for the benefit of Avenue Piru would not be fatal if the evidence instead supported a finding that he acted "in association with" a criminal street gang. (See *Albillar*, *supra*, 51 Cal.4th at p. 60 [first prong of § 186.22, subd. (b)(1), requires proof defendant committed the underlying felony "for the benefit of, at the direction of, or in association with any criminal street gang"].) But again, the prosecutor produced no evidence on the point.[6]

Barragan opined the hypothetical robbery was committed in association with Avenue Piru because "they placed a Craigslist ad, they both arrive at the scene together, they committed the crime together and then they left together. It shows their association and they're both Avenue Piru gang members." Yet even assuming Barragan's testimony about Roth's and Thomas's gang membership was properly admitted, this evidence

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[6] The People cite one case for the proposition that such evidence, standing alone, is sufficient to satisfy the *second* prong of the enhancement. And the published cases that consider the issue explicitly limit *Albillar*'s language on this point to the second prong. (*Livingston*, *supra*, 53 Cal.4th at p. 1171; *Franklin*, *supra*, 248 Cal.App.4th at p. 949; *People v. Ramirez*, *supra*, 244 Cal.App.4th at p. 819; *People v. Rios*, *supra*, 222 Cal.App.4th at p. 570.)

established only that two members of a criminal street gang committed a crime together.[7]

The prosecutor avoided this shortcoming below by suggesting to the jury that the two prongs of the enhancement were alternatives, and that he only needed to prove one. He explained:

> So after you have determined that a gang does exist, you need to determine whether the crimes were committed for the benefit of, or at the direction of, or in association with a criminal street gang. These are or's and not and's because the gang allegation applies in different situation[s].
>
> So when **one** gang member commits an act and the evidence shows you that in committing that act he's doing so to benefit the gang with the intent of benefitting and furthering criminal conduct, that one gang member acting alone is enough.
>
> But when you have **two gang members** acting together, the law just says if they're associating with each other while they commit a crime,

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[7] Because we reverse the enhancements for insufficient evidence, we do not reach defendant's additional claims that Barragan's testimony violated *People v. Sanchez* (2016) 63 Cal.4th 665 and that the court abused its discretion by excluding a photograph of Inglewood police officers throwing gang signs. We note, however—and the People concede—that Barragan's opinions relied on extensive hearsay. Absent that evidence, it is unclear that there is substantial evidence of Thomas's gang membership.

> meaning both gang members are committing the crime together, **that alone supports the gang allegation** because—that's part of the reason why gangs are dangerous, is because of their numbers, and because they're willing to commit crimes together and outnumber people, the way they did here.
>
> And it has to be done with the specific intent to promote, further or assist. Not the whole gang, but promote, further and assist criminal conduct by gang members. If their act assists criminal conduct by gang members, then that is enough to—and they intended to do that, that is enough to meet the gang allegation.
>
> So in this case you have **two separate theories** of why this—it meets the gang allegation: the **first one is there were two gang members committing the crime together**, Markell Thomas and the defendant, both Avenue Piru gang members. And the **other theory** is that it was done for the benefit of Avenue Piru gang members. (Emphasis added.)

This explanation allowed the jury to find that Thomas and Roth, knowing each other's gang membership and acting together, *necessarily* acted in association with *their gang*.[8] In so

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[8] Defendant does not ask us to reverse based on the prosecutor's misstatements. (See *People v. Morales* (2001) 25 Cal.4th 34, 43 [when a prosecutor relies on alternate theories, some of which are legally correct and others of which are legally incorrect, and the reviewing

doing, the prosecutor conflated the requirement of the first prong of section 186.22, subdivision (b)(1)—that Roth committed the crimes in association *with the gang*, a finding having no evidentiary support—with the requirement of the second prong—that Roth specifically intend to promote, further, or assist criminal conduct by *gang members*, a finding arguably supported by the evidence.

Yet the California Supreme Court has always carefully maintained the statutory distinction between gang crimes on the one hand and crimes committed by gang members on the other: subdivision (a) punishes the former, while subdivision (b)(1) punishes the latter. (See *Albillar*, *supra*, 51 Cal.4th at pp. 55–56; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138–1139.) Subdivision (a) targets "gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang related. [Citation.]" (*Rodriguez*, at p. 1138.) While it doesn't matter whether the perpetrators acted with a gang purpose, they must be *active* gang members. (*Id.* at p. 1135; *Albillar*, at pp. 54–55; *People v. Castenada* (2000) 23 Cal.4th 743, 745–749, 752, fn. 3 [membership must be " 'more than nominal, passive, inactive or purely technical' "].)

Subdivision (b)(1), on the other hand, "punishes gang-related conduct, i.e., felonies committed with the specific intent to benefit, further, or promote the gang," regardless of whether the felony was committed by gang members. (*People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1138, *id*. at pp. 1130, 1139.) While the

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court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand].)

perpetrators need not be active gang members, they must commit the crime for a *gang purpose*.

The Supreme Court illustrated this distinction in *Albillar*. In that case, the defendants' active "reli[ance] on their common gang membership" supported the court's conclusion that they acted in association with their gang. (*Albillar*, *supra*, 51 Cal.4th at p. 60.) The gang expert testified that gang members may gain status and respect within the gang by " 'being with other … gang members, committing crimes,' " " 'so that [as the gang expert in that case testified] it's recognized within the group that this person is contributing to the gang or is still showing his heart and interest in the gang.' " (*Ibid*.) When gang members "actively assist[ ] each other in committing … crimes, … their common gang membership ensure[s] that they [can] rely on each other's cooperation in committing these crimes and that they … benefit from committing them together." Gang members may "rel[y] on the gang's internal code to ensure that none of them [will] cooperate with the police." (*Id*. at pp. 61–62.)

Other evidence supported the expert's conclusion that these general rules applied in that case. "[T]hree 20-something gang members, heavily tattooed with gang signs, assisted each other in raping a 15-year-old girl in their apartment, which was cluttered with gang paraphernalia including gang clothing, photographs of the defendants and fellow gang members wearing gang clothing and flashing gang signs, papers with gang graffiti, and a phone list of fellow gang members. [Citation.]" (*Perez*, *supra*, 18 Cal.App.5th at p. 608.) The victim initially refrained from reporting the crime because she feared the gang would come after her family. After she reported it, girlfriends of members of the

gang made threatening phone calls to the victim and her family. (*Albillar*, *supra*, 51 Cal.4th at pp. 51, 53.)

And unlike in this case, in which the prosecution presented no evidence of Roth's and Thomas's levels of involvement in Avenue Piru, the gang members in *Albillar* were deeply enmeshed with their gang. "Alex had a gang tattoo across his chest and abdomen, in very large letters; Albert had gang tattoos on his neck, back, and forearm, as well as a misspelled gang tattoo on his stomach; and Madrigal had a gang tattoo on his face, which 'shows that the individual has a lot of love for that gang and is continually representing the gang and his affiliation with it.' " (*Albillar*, *supra*, 51 Cal.4th at p. 62.) This evidence also supported the expert's testimony, and taken together, amounted to "substantial evidence that defendants came together *as gang members* to attack Amanda M. and, thus, that they committed these crimes in association with the gang." (*Id.* at pp. 61–62.)

In short, *Albillar* does not support the proposition that accomplices' gang membership *alone* is sufficient to show the crime was committed "in association with any criminal street gang." (§ 186.22, subd. (b)(1).) The *Albillar* court did not hold simply that the "in association with any criminal street gang" element of the enhancement was satisfied because the sex crimes were committed by three members of the same gang. Instead, the court examined the way in which the offense was committed, the gang expert's detailed testimony, the way in which aspects of the offense provided evidentiary support for that testimony, the victim's knowledge of the perpetrators' gang membership, her behavior reflecting her fear of gang retaliation if she reported the crime, and the gang's efforts after the crime to dissuade the victim from cooperating in a prosecution.

If the perpetrators' mere gang membership had been sufficient to establish the crime had been committed "in association with any criminal street gang," the court would not have needed to engage in such a detailed and exacting analysis. Nor would the court have emphasized that "[n]ot every crime committed by gang members is related to a gang" (*Albillar*, *supra*, 51 Cal.4th at p. 60), explained that the perpetrators "came together *as gang members* to" commit the offenses (*id.* at p. 62), or stressed that "defendants' conduct exceeded that which was necessary to establish that the offenses were committed in concert" (*id.* at p. 61).

In this case, on the other hand, the evidence was insufficient to prove that Roth and Thomas "came together *as gang members* to" steal $300 and two older-model mobile phones. Barragan did not mention any of the factors emphasized by the *Albillar* court. He testified only that Roth and Thomas "placed a Craigslist ad," "arrive[d] at the scene together," committed the crime together, and left together.

And unlike the abundant evidence in *Albillar*, the evidence here did not support the expert's opinion. There was no evidence that Cara or April knew Roth and Thomas were gang members; Roth and Thomas did not refer to their gang or make gang signs; and there was no evidence anyone relied upon the gang or its reputation to attempt to dissuade April or Cara from contacting the police or from testifying against them.[9] (Compare *People v.*

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[9] We do not mean to suggest that the prosecution is required to prove the perpetrators of a crime called out or referred to their gang, wore gang colors or displayed gang tattoos or hand signs, or claimed responsibility for or bragged about the crime. These sorts of facts are

Weddington (2016) 246 Cal.App.4th 468, 485 [evidence supported expert's opinion that crime was gang-related where three defendants were active gang members, had gang tattoos, and committed a "signature crime" of the gang]; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1258, 1261–1261 [evidence supported expert's opinion that crime was gang-related where defendant was active gang member who, with two other active gang members, assaulted victim who was reporting a beating defendant and his cohorts were administering; the perpetrators' "gang membership was obvious"; and the crime was committed in a public place in gang territory]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1182–1183, review den. [in pre-*Albillar* decision, evidence was sufficient where defendant testified that he was dealing drugs to the victims when the shooting occurred, drug dealing was one of the gang's primary activities, defendant committed the crime with two other gang members, and defendant had gang graffiti in his backyard and multiple gang tattoos].)

Finally, we observe that the People's brief is extremely cursory on this issue. Other than a case noting a gang expert's testimony can constitute proof of a gang enhancement,[10] the People cite a single case: *Livingston*, *supra*, 53 Cal.4th 1145. *Livingston* does not assist us. There, a jury convicted Livingston of the murders of two security guards and the attempted murder, several months earlier, of a rival gang member. The night Livingston shot the security guards, he and two fellow gang

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relevant but not always necessary, depending on all of the circumstances of the case.

[10] *People v. Vang*, *supra*, 52 Cal.4th at p. 1048.

members had argued with one of the guards about six hours earlier. (*Id.* at pp. 1152–1154.) Livingston had gang tattoos and was well known to the victims. (*Ibid.*) When Livingston shot the rival gang member a few months earlier, he was a passenger in a car with two fellow gang members. The victim and his fellow gang members were fully dressed in their gang's color. (*Id.* at p. 1150.)

In affirming the gang enhancement, the Supreme Court reasoned the jury could have found the shooting of the security guards to be gang related even though the guards were not gang members because Livingston was devoted to his gang, "as attested to by the many Crips gang tattoos he bore." (*Livingston*, *supra*, 53 Cal.4th at p. 1171.) A witness saw one of his fellow gang members nearby after Livingston shot the guards. (*Id.* at p. 1154.) The court also noted that same fellow gang member, as well as a third gang member, had been with Livingston when he committed the driveby shooting of the rival gang member several months earlier. (*Id.* at pp. 1171–1172.) The security guards had identified Livingston's car in that earlier shooting. Thus, the court said, Livingston's shooting of the guards could enhance the gang's reputation within the apartment complex and show the gang was in charge. (*Id.* at p. 1172.) None of those factors is present in this case.

Because there is insufficient evidence to support the gang allegations, we reverse the true findings on the gang enhancements, vacate Roth's sentence, and remand for the court to impose an authorized sentence.[11]

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[11] On remand, before resentencing defendant, the court should determine if the personal-use enhancements are supported by sufficient evidence in light of our reversal of the gang enhancements.

3. The court properly excluded Helene Yee's testimony.

Roth contends the court abused its discretion by excluding testimony by April's aunt that April had spoken to her about the robbery. We disagree.

3.1. Legal Principles and Standard of Review

Only relevant evidence is admissible (Evid. Code, § 350)—and all relevant evidence is admissible unless excluded by the constitution or by statute (Evid. Code, § 351; see Cal. Const.,

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As discussed, the jury found the personal use allegations in section 12022.53, subdivisions (b) and (e), true. Under subdivision (b), "any person who, in the commission of a felony specified in subdivision (a) [including robbery], personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years." But the parties agreed that Roth did *not* personally use a firearm. His liability was based on Thomas's firearm use. For example, in closing argument, the prosecutor noted, "clearly in this case there is zero allegation that it was this defendant with the gun."

Under section 12022.53, subdivision (e)(1), the "enhancements provided in this section shall apply to any person who is a principal in the commission of an offense **if both of the following are pled and proved**: (A) The person violated subdivision (b) of Section 186.22. (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." (Emphasis added.) Thus, because Roth and Thomas were both principals in the offense, and because Thomas personally used a firearm within the meaning of subdivision (b), the enhancements could apply to Roth if—*and only if*—Roth also violated section 186.22, subdivision (b). As such, at sentencing, the court indicated it was sentencing Roth under subdivisions (b) *and* (e) "because he was not the one armed."

In addition, because the matter is remanded for reconsideration of the gun enhancements in light of our reversal of the gang enhancements, we do not address defendant's contention that we should remand for the trial court to exercise its discretion under Senate Bill No. 620.

art. I, § 28, subd. (d)). Evidence is relevant if it has some "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) This definition includes evidence "relevant to the credibility of a witness." (*Ibid*.; see Evid. Code, § 780 [fact finder may consider matters relevant to the truthfulness of the witness's testimony].) "The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1166.) A trial court has broad discretion in determining the relevance of evidence, but has no discretion to admit irrelevant evidence. (*Id*. at pp. 1166–1167.)

Conversely, a matter is *collateral* if it has no logical bearing on any material, disputed issue. (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) A fact may bear on the credibility of a witness and still be collateral to the case. (*Ibid*.; see *People v. Dement* (2011) 53 Cal.4th 1, 50–52 [holding that an inmate who testified for the prosecution about seeing a prison murder could not be impeached with evidence that he had lied in court about a murder he had been convicted of many years before], disapproved in part on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Harris* (2008) 43 Cal.4th 1269, 1291–1292 [not allowing prosecution witness who described alleged murderer's incriminating statements to be impeached with his poor performance on juvenile probation even though it showed lax character]; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9 [preventing prosecution witness who saw the murder from the roof of his apartment building from being impeached with

evidence disputing his claim that he had management's permission to be there].)

" 'Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]' … ' "The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." [Citation.]' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 374–375.)[12] We review the court's evidentiary rulings for abuse of discretion. (*Ibid.*)

3.2. The court did not abuse its discretion.

On cross-examination, counsel asked April who she spoke to about the robbery between when it occurred on August 23, 2013, and when she identified defendant from a six-pack on November 26, 2013. April replied that she had spoken to her sister Cara, as well as her "other sister, because she had to know what happened. I told my co-worker as well because when you get robbed it's typical to tell people that you got robbed." Defense counsel followed up: "Did you speak to anybody else?" April answered, "I can't recall who else I told."

Defense counsel sought to call April's aunt Helene Yee to impeach this testimony. Outside the jury's presence, Yee testified that April told her about the robbery. Yee could not remember when they spoke, but thought "it was fairly close to when [the robbery] happened … ."

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[12] Defendant does not claim that the exclusion of this evidence violated his constitutional right to present a defense.

The court excluded the evidence. First, the court ruled that Yee's testimony was irrelevant because "it's not impeachment." The court reasoned that the testimony "seem[ed] to be pretty collateral if [April] didn't actually say she told nobody else." And: "This is just a collateral matter. It is not anything that goes to their truth and veracity or what they saw and who they identified." Second, the court ruled that the probative value of the testimony was substantially outweighed by the undue consumption of time that would be required to recall April to explain her earlier testimony. (Evid. Code, § 352.)

We agree with the court below. April testified that she could not recall who else she told about the robbery. Yee's testimony was not inconsistent on this point. As such, the evidence was irrelevant under Evidence Code section 350. Even assuming some relevance, however, the court did not abuse its discretion in concluding that the minimal probative value of Yee's testimony would be substantially outweighed by consumption of time under Evidence Code section 352.

4. Roth forfeited the prosecutorial misconduct claim.

Roth argues the prosecutor committed prejudicial misconduct during the defense closing argument by loudly objecting to a PowerPoint slide and turning off the projector in violation of the court's previous order. We conclude that while the prosecutor plainly violated the court's order, the issue has been forfeited.

4.1. Proceedings Below

Before closing argument, the prosecutor objected to certain slides in defense counsel's PowerPoint presentation. Among them was a photograph of Armond Howard, an Avenue Piru member,

captioned "Little Mustache." Though the prosecutor insisted the slide violated the court's exclusion of third-party-culpability evidence, defense counsel explained the photograph was for illustrative purposes. (The eyewitness identifications were the primary issue in the case.) The court allowed the photograph on that basis.

Nevertheless, the prosecutor advised the trial court, "despite Your Honor's ruling[s], I have zero confidence that [defense counsel] is going to comply with them. So I am going to be sitting by the projector, and if I see something that Your Honor has ruled shouldn't be admitted, I'm going to turn it off." Defense counsel replied, "You're not going to do that." And the court agreed: "Yeah, you're not going to do that." But the prosecutor pressed the point: "Why is it [defense counsel] is allowed to ring the bell on hearings and rulings that are clearly been—he's been advised on. And without any—"

The court replied:

> Let me just give you this small piece of advice, okay? You do your job and I'll do my job, okay? You tell me whatever he does and then I'll decide what I need to do about it. [¶] … I will take whatever actions I have to do, including finding him in contempt, notifying the State Bar, whatever I have to do. But don't tell me how to do my job, okay?

The prosecutor said, "I understand," and the court continued, "You don't control whatever—the ELMO there. That's not up to you."

During the defense closing argument, counsel presented the slide and said, "My client has a clear or distinct mustache.

The girls said the person had a faint mustache or fuzz. [¶] That's more like faint and fuzz (indicating)." The prosecutor stood up, shut off the projector, and yelled, "Objection, Your Honor. May we approach?"

At sidebar, the court said, "I thought we handled this." The prosecutor responded that defense counsel had "made a full third party culpability argument here. He set up his argument by saying the girls testified about peach fuzz on the mustache. [Defense counsel] points to the photograph and says, 'That's peach fuzz.' How is that not a third party culpability argument?" Defense counsel replied, "It's not. I'm showing a photo saying that's fuzz."

The court told the prosecutor it would tell the jury "it's only being used for illustrative purpose[s]." The court then instructed, "Ladies and gentlemen, the last photograph you saw with the mustache, that is being used for illustrative purposes to show you what a mustache looked like, or a thin one."

After excusing the jurors for a recess, the court admonished the prosecutor:

> I got to tell you that I thought the tone of your objection was beyond the pale. I mean, I don't know why you have to yell out an objection in that manner, and I don't really think [defense counsel] crossed the line on that one. I think he was right within … the football lines.

As the prosecutor continued to argue the point, defense counsel asked that the record reflect that when the prosecutor "made that loud objection, counsel got up and shut off the projector."

The court replied, "I didn't know he did that. He shouldn't have done that." Turning to the prosecutor, the court said, "I [ ] thought I directed you rather clearly not to touch the machine. It's not your—you're going to find yourself in trouble. I specifically said it is not in your prerogative or your scope of duties to decide what—that is what the judge does."

4.2. Counsel's failure to request an admonition forfeits the claim.

" 'To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. [Citation.]' [Citation.] A failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm." (*People v. Linton* (2013) 56 Cal.4th 1146, 1205.) Here, Roth concedes that he failed to request an admonition, but argues that an admonition would not have cured the harm. We disagree.

An admonishment could have made a difference in this case. The prosecutor's outburst during defense argument was consistent with his own closing argument, the theme of which was that the jury should resist "lawyering tactics" and "the type of lawyering that has gone on in this case"—an argument punctuated with the frequent refrain "no amount of lawyering can change that." Admonishing the jury that defense counsel had done nothing wrong would not only have signaled to the jury that the prosecutor, not defense counsel, had acted inappropriately during the projector incident, but could also have tempered the jury's view of some of the prosecutor's earlier remarks that could have appeared to disparage defense counsel.

DISPOSITION

The true findings on the gang allegations (§ 186.22, subd. (b)(1)) are reversed for insufficient evidence. The sentence is vacated and the matter is remanded with directions to hold a hearing, consistent with the views expressed in footnote 11, to determine whether in light of our reversal of the gang enhancements, there is still sufficient evidence to support the gun enhancements (§ 12022.53, subds. (b), (e)). If the court concludes there is not sufficient evidence to support the gun enhancements, it should vacate the jury's true findings and dismiss the allegations. The court should then dismiss the gang allegations and resentence Roth in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

Upon resentencing, the court is instructed to amend the abstract of judgment to reflect defendant's new sentence and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The clerk of this court is directed to send a certified copy of this opinion and the remittitur to the Department of Corrections and Rehabilitation. (Cal. Rules of Court, rule 8.272(d)(2).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.