

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUISE DESHAWN DAVIS et al.,

Defendants and Appellants.

B253574

(Los Angeles County
Super. Ct. No. BA406096)

APPEAL from judgments of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant Marquise Davis.

Susan Wolk, under appointment by the Court of Appeal, for Defendant and Appellant Davon Winston.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Davon Winston (Winston) and Marquise Davis (Davis) appeal from the judgments after jury trial in which they were convicted of multiple counts of robbery and related offenses, and gang enhancement allegations were found to be true. On appeal, defendants raise multiple issues relating to the gang enhancement evidence, and further challenge an omission in the verdict forms relating to the crime of dissuading a witness by force or threat. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because the issues raised on appeal only tangentially relate to defendants' convictions of robbery, only a brief discussion of the facts of those offenses is necessary.

1. The Walmart Incident

On December 13, 2012, at 1:00 a.m., defendants robbed a family who had just completed their Christmas shopping at a Long Beach Walmart. The family consisted of Doretha Sellers, her daughter and goddaughter, and her two granddaughters (aged 5 and 6). Defendants, along with two female companions, spotted the family when they were shopping inside the Walmart. Sellers paid for their purchases with cash, which Sellers had kept tucked in her bra. After she paid, she put the rest of the money back in her bra.

The family then returned to their car. After they put their purchases in the trunk, they settled the children in car seats in the back. As the adults were nearly all seated in the car, defendants approached simultaneously –Davis came to the driver's side and Winston came to the passenger side. Winston had a handgun. He pointed it at Sellers and demanded the money he had seen her with in the store. Initially, Sellers refused, but after Winston threatened her further with the gun, and the rest of the family pleaded with her to comply, Sellers turned over her money and a necklace. In the meantime, Davis obtained earrings and a cell phone from Sellers's daughter. He also obtained jewelry from the two young children.

When he first approached Sellers at the car, Winston had been holding a hoodie over his face with his free hand. In the course of robbing her, Winston released the

hoodie. Winston demanded that Sellers give him her I.D., because she had seen his face. Sellers did not have an I.D. Winston waved the gun at all of the passengers inside the car, saying that he would not leave until he had someone's I.D. Ultimately, Sellers's goddaughter turned over her I.D., which satisfied defendants. Winston confirmed with Davis that he got everything, and the two men ran off.

At no point during the robbery did defendants identify themselves as gang members. During the robbery, Sellers had asked Winston why he was doing it; he responded with something about "[N-word]s being hungry out here."

After defendants ran off, they jumped in a getaway car – a silver Dodge Charger – which one of their female companions was driving while the other was in the front passenger seat.

The family reported the robbery and a private security officer heard about it over his police scanner. He drove around the area looking for a silver Dodge Charger. He spotted the Charger parked suspiciously nearby, partially obscured from the road. He obtained the license plate from the silver Charger, and relayed it to his dispatcher.

2. *The Starbucks Robbery*

On December 21, 2012, around 11:30 p.m., defendants robbed a Starbucks at a strip mall in Hollywood. Winston was first in the door; he was wearing a mask and holding a gun. Davis followed behind him; he was also masked.

Winston ordered everyone to the ground. Starbucks employees and at least one customer complied. Winston ordered everyone to empty their pockets; the customer complied, placing his wallet next to himself on the floor. Davis approached the barista at the cash registers and demanded that she open the registers. She said that she could not do so; she did not have the key. Winston joined Davis and the barista. He put his gun to the barista's head and asked her where the key was. She repeated that she did not know. Winston then approached a second barista, who had been lying on the floor, and demanded, at gunpoint, that she get up and open the register. She responded that the manager had the keys in the back room, and returned to the ground.

The manager was in the back room. He had heard the commotion out front, and witnessed it on security camera screens. He telephoned 911 on the store phone, and kept the emergency operator informed while he watched the robbery on the security camera feed. At this point, defendants came to the back room. They asked the manager if he had called the police. The manager denied it, but Winston grabbed the phone from his hand and saw that he had called 911. Knowing what defendants wanted, the manager then walked past defendants and out to the registers. He opened the register drawers and got on the floor. Defendants removed the cash from the registers and fled. They did not take the customer's wallet.

The Starbucks employees ultimately discovered that defendants had taken the cell phones owned by the manager and one of the baristas from the back room.

Just outside the Starbucks, defendants encountered a security guard who worked at the strip mall. Winston pointed his gun at the security guard and asked him if he had a gun. Winston ordered the security guard to lift his jacket to prove he was unarmed. The security guard said he did not have anything. Defendants ran off.

3. *The Investigation*

Police responded immediately to the Starbucks robbery. Police asked people in the neighborhood if they had seen anyone run by; one witness saw defendants run from the Starbucks and get into a blue or silver Dodge Charger.

When one of the officers at the scene learned that the Starbucks's manager's iPhone had been stolen, she opened the "Where's my iPhone" application on her own iPhone and asked the manager to log in to the application. This pulled up the location of the manager's iPhone on a map on the officer's phone. The officer followed the location of the manager's iPhone, and reported it to other officers who gave chase. Eventually, the iPhone was tracked to a gas station at the intersection of Compton and Firestone. Officers spotted the silver Dodge Charger at that location.

There were two women in the front of the car – the same two women who drove defendants' getaway car in the Walmart robbery. Defendants were in the back seat.

When the officers conducted a felony stop, Winston fled from the car. He was chased by officers and found hiding in the crawl space under a house. After Winston was arrested, an officer crawled under the house and recovered the Starbucks's manager's iPhone from the crawl space.

Davis complied with police commands and was arrested without incident, although he fumbled with something at his feet before he got out of the car. Officers searched the car and found the handgun under the floorboard where he had been sitting. Police also recovered the barista's stolen cell phone from Davis.¹

On January 9, 2013, the investigating officer for the Walmart robbery ran the license plate he had for the silver Charger. He discovered that the car had been impounded by LAPD in connection with the Starbucks robbery. At this point, defendants and their female companions became suspects in the Walmart robbery. The investigating officer showed Davis some still photographs from the Walmart security camera videos taken near the time of the robbery; Davis admitted to police that he was in those photographs.

4. *The Charges*

Initially, charges were brought against defendants and their female companions/getaway drivers. The female companions ultimately pleaded no contest to three counts of robbery, and admitted gang enhancements, in exchange for 15-year sentences.

The operative pleading against defendants is the third amended information. In connection with the Walmart robbery, defendants were charged with four counts of robbery (Pen. Code, § 211) (Sellers, her daughter, her goddaughter, and one of the

¹ In fact, there were a total of six cell phones taken into evidence by the police – one under the house where Winston was hiding; one in Davis's possession; and four more on the passenger floorboard of the car. It appears that the six phones belonged to the Starbucks manager, the barista, and the four occupants of the car, although the evidence was not perfectly clear as to which phone was found where.

granddaughters), and three counts of dissuading a witness by force or threat (Pen. Code, § 136.1, subd. (c)) (Sellers, her daughter, and her goddaughter). In connection with the Starbucks robbery, defendants were charged with two counts of robbery (the manager and the barista whose phone was taken), one count of attempted robbery (Pen. Code, §§ 211/664) (the customer) and one count of assault with a firearm (Pen. Code, § 245, subd. (b)) (the security guard). Additionally, Winston was charged with one count of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)).

Numerous firearm allegations were also alleged.² It was further alleged that Winston had suffered a prior conviction within the meaning of the Three Strikes law (Pen. Code, § 1170.12), which was also a five-year prior (Pen. Code, § 667, subd. (a)(1)), and that he had suffered two prior prison terms (Pen. Code, § 667.5, subd. (a)). Finally, and most importantly for our purposes, it was alleged that defendants committed each offense for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of Penal Code section 186.22, subdivision (b).

Trial of the prior conviction allegations was bifurcated. Outside the presence of the jury, Winston pleaded no contest to the count of felon in possession of a firearm, and admitted the related gang enhancement allegation.

² Specifically, with respect to every robbery and the attempted robbery, it was alleged that Winston personally used a firearm within the meaning of Penal Code sections 12022.5, subdivision (a) and 12022.53, subdivision (b); and that a principal was armed within the meaning of Penal Code section 12022, subdivision (a)(1). Further, because of the gang enhancements, it was alleged that the Penal Code section 12022.53 subdivision (b) enhancement was also applicable to Davis pursuant to Penal Code section 12022.53, subd. (e)(1) [applying the subdivision (b) enhancement to any principal when the gang enhancement is also satisfied]. With respect to the counts of dissuading a witness, it was alleged that Winston personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a) and that a principal was armed within the meaning of Penal Code section 12022, subdivision (a)(1). As to assault with a firearm, it was alleged that Winston personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a).

5. *The Trial*

At trial, defendants could not legitimately argue that they had not committed the Starbucks robbery. Defendants elicited some brief testimony suggesting Sellers's goddaughter had initially identified different individuals as the Walmart robbers, but the testimony was not persuasive in light of the evidence that the same car was used in both robberies and Davis admitted being in the Walmart that night at 1:00 a.m. The main issue at trial was whether the gang enhancement allegations were true. In order to establish the gang enhancement allegations, the prosecution introduced evidence from Deputy Sheriff Antonio Guillen, a gang investigator.

Deputy Guillen had substantial experience with criminal street gangs in general. He testified as to gang culture and the gang lifestyle. Part of the gang lifestyle involves Louis Vuitton clothing and other high end fashion brands. This shows "flash," and inspires youngsters by making the gang lifestyle appealing.

Deputy Guillen testified to his knowledge of the 92 Bishop Bloods. The 92 Bishop Bloods is an ongoing organization which has been in existence since the 1970's. Law enforcement has documented over 100 members of the gang, but gang members have mentioned to Deputy Guillen that there are approximately 200 members. The gang celebrates its "hood date" on September 2 (i.e. 9-2) each year, and on that day, there is a street party where well over 100 people attend. At the party, they wear red (because it is a Blood gang), play music, drink in the street, smoke marijuana and use other drugs. The gang has allies (typically other Blood gangs) and rivals. The gang uses several symbols to identify itself, including "ESB" (for East Side Blood), the number 92, and the bishop chess piece. The gang's primary activities include vandalism, possession of narcotics for sale, weapons possession, car theft, robbery, burglary and shootings. Deputy Guillen identified two prior convictions by 92 Bishop Blood gang members; in each case, Detective Guillen indicated that the officers handling the case told him that the individual involved admitted being a 92 Bishop Blood.

The defendants in this case each possess numerous tattoos, which Detective Guillen explained reflect their gang membership and lifestyle. Davis's tattoos include: a dollar sign and a Louis Vuitton logo; the letters "B.I.P" (representing "Blood in Peace," as opposed to "Rest in Peace") with monikers (only certain people have the right to use "B.I.P." about a deceased "homeboy"); a hand flashing the letter "B" (for Blood) with "ESB" underneath it; "Bishop"; a second "B.I.P." tattoo; a "9" and a "2"; and, from behind, a large "9" on his left upper arm and a large "2" on his right. Winston's tattoos include: a red Notre Dame logo (the Notre Dame is a stylized "N.D.," which letters also stand for "Nine-Deuce" and represent 92); a large red "92" on his chest; a large "ESB"; the text "Watts Blood," wherein the "oo" in Blood is replaced with "92"; a "B.I.P." tattoo; the Watts towers with a police helicopter (to show the gangster life); a chess bishop with the word "Bishop" on it; a gun at his waistband; a red "ES"; and red dice – the numbers on the visible sides of the dice add up to 9 and 2.

Police were able to recover photographs from the memory card in one of the recovered mobile phones. Some of the photos appear to be of Davis. The photos show men showing off gang signs and tattoos. There are also photos of guns, a masked man holding a gun while posing for the camera, a man (possibly Davis) holding a wad of cash while taking a "selfie," and a man posing for the camera while holding a rifle in each hand and carrying a handgun in his pocket.

Deputy Guillen opined that both defendants are members of 92 Bishop Bloods, based on, among other things, their tattoos and his contacts with them and the people they associate with in the area. Deputy Guillen also reviewed photos taken from the getaway drivers' Facebook and Instagram accounts; based on those photos, he opined that the women were both affiliated or associated with Mob Piru Bloods.

Presented with a hypothetical tracking the facts of the Starbucks robbery, Deputy Guillen opined that the crime was committed for the benefit of the gang, at the direction

of the gang and in association with the gang.³ Taking these opinions in reverse order, Deputy Guillen concluded the crime was performed in association with the gang based on the fact that two 92 Bishop Bloods committed the robbery in association with each other. He concluded it was at the direction of the gang, since the use of the getaway car showed that the crime had obviously been planned. Finally, he testified that it benefitted the gang and the individuals in the gang as it would improve their reputation within the gang, given that they could go to a location far outside of gang territory and commit this violent crime. Deputy Guillen also testified that the robbery would benefit the gang because the proceeds of the robbery may go toward the purchase of guns to help the gang commit more crimes. When further questioned as to whether this conduct benefitted the gang itself, Deputy Guillen testified that when gang members commit crimes, they like to brag about them, which makes them look good and encourages younger guys in the gang to do the same thing to get the same respect. Counsel for Davis objected to this testimony on the basis that there was nothing in the hypothetical (or the facts of this case) showing that defendants transferred proceeds from the Starbucks robbery to the gang or bragged about the crime. The objection was overruled.

On appeal, defendants base several arguments on Deputy Guillen's purported refusal to identify gang members who told him something he mentioned at trial. We therefore discuss, at some length, the circumstances leading to this so-called refusal. On cross-examination, Davis's counsel attempted to elicit an admission from Deputy Guillen that he had no evidence that, in this case, defendants bragged about the robbery or transferred its proceeds to the gang. While Deputy Guillen conceded that he had no knowledge that the proceeds were shared with anyone, he did not admit that he had no knowledge that defendants disclosed the robbery to other 92 Bishop Bloods. Instead, he

³ Deputy Guillen was not asked a similar hypothetical based on the facts of the Walmart robbery; he testified before the prosecution put on evidence of that robbery. It appears that the prosecution chose not to recall him after testimony about the Walmart robbery, on the theory that the crimes were so similar, Deputy Guillen's testimony applied equally to both incidents.

testified that, while patrolling the area, he spoke to other members of the gang who said they knew that defendants Winston and Davis were fighting robbery cases. Winston then moved to strike the answer as nonresponsive, because the question related to *bragging about the crime*, while the deputy's answer simply volunteered that other gang members *knew defendants were on trial*. The court sustained the objection and struck Deputy Guillen's answer. Deputy Guillen then agreed that he had no direct evidence that Davis ever told anyone that he had participated in the Starbucks robbery. Despite the fact that the court had stricken Deputy Guillen's answer that other gang members told him that defendants were fighting robbery cases, Davis's counsel then asked, "And – so when you spoke to this unknown person did they tell you that they knew Mr. Davis participated in a Starbucks robbery?" Deputy Guillen said, "No," and Davis's counsel continued, "Okay, so you just made that up for the jury for today; correct?" Deputy Guillen responded, "No, I did not make it up. I speak to a lot of people in the community. I speak to some of the gang members that are from the [92] Bishop Bloods and I have a rapport with many of them. [¶] I speak to them. I say, hey, what's going on with this particular gangster, this one or the other, and they'll say, oh, you know, yeah, he's fighting – him and his crimey are fighting a robbery case – robbery cases." Davis's counsel then continued this line of questioning, seeking to obtain the names of the individuals with whom Deputy Guillen had these conversations relating to defendants. At one point, Deputy Guillen stated that he did not want to disclose their names as it may endanger their lives. The court directed him to answer the question, and Deputy Guillen stated, "I can't name the names." The issue arose as to whether Deputy Guillen was willfully refusing to comply with the court's directive. A conference was held at sidebar where the court suggested that possibly Deputy Guillen had originally known the names but could not answer now because he had forgotten them, and that this possibility should be explored before the court could conclude Deputy Guillen was intentionally refusing the court's order to answer. Davis's counsel continued his cross-examination of Deputy Guillen but did not pursue the issue. Neither did counsel for Winston.

The defendants offered the testimony of their own gang expert in response. Martin Flores is on the court's gang expert panel; he grew up in a community where gang activity was present. In contrast to Deputy Guillen, Flores testified that 92 Bishop Bloods has only 20 active members. When given a hypothetical based on the facts of the Starbucks robbery, he testified that he could not say for certain whether the crime was gang related. He thought the facts were susceptible of the interpretation that defendants committed the robbery for their own benefit. He gave his opinion that, most of time, people with some level of gang involvement commit crimes for themselves. Gang members do not always have jobs, and they sustain themselves and their families through criminal activity.

6. *The Verdict, Sentencing and Appeal*

Defendants were found guilty as charged; all enhancement allegations – including the gang enhancements – were found to be true. A bench trial was held on the prior conviction allegations against Winston. The prosecution proceeded only on the strike and the 5-year prior, not the prior prison terms. The court found the strike and 5-year prior true.

Defendants each received lengthy prison sentences. Winston was sentenced to three consecutive terms of 14 years to life, plus 112 years and 4 months in prison. Davis was sentenced to three consecutive terms of 7 years to life, plus 69 years in prison. Defendants filed timely notices of appeal.⁴ On appeal, where appropriate, each defendant joins in the contentions of the other.

⁴ On appeal, defendants raised multiple challenges to the sentences imposed. However, defendants have since been convicted in other proceedings, and were resentenced. In light of their resentencing, defendants no longer pursue their challenges to their sentences imposed in this case.

DISCUSSION

1. *Sufficient Evidence Supports the Gang Enhancements*

On appeal, defendants first contest the sufficiency of the evidence supporting the gang enhancements. Penal Code section 186.22, subdivision (b)(1) provides that “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall” receive an enhanced punishment. Thus, to establish the gang enhancement, the prosecution must establish: (1) the existence of a criminal street gang; (2) the crime was committed “for the benefit of, at the direction of, or in association with” the gang; and (3) the crime was committed “with the specific intent to promote, further, or assist in any criminal conduct by gang members.”

“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.” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

The first element, that a criminal street gang was involved, itself requires proof of three elements: (a) an ongoing association of three or more individuals with a common name, sign, or symbol; (b) the commission of specified crimes is one of its primary activities; and (c) the commission of two or more offenses (from a statutory list) by gang members. (Pen. Code, § 186.22, subd. (e); *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611 (*Alexander*).) Deputy Guillen testified to all of these things with respect to

92 Bishop Bloods. On appeal, defendants challenge Deputy Guillen’s testimony regarding the second element, that the commission of specified crimes is among the gang’s primary activities. When asked about the primary activities of 92 Bishop Bloods, Deputy Guillen responded with a list of offenses the “[92] Bishop Bloods have committed.” Relying on *Alexander*, defendants argue that this testimony was inadequate as it was conclusory and lacked an adequate foundation. But defendants did not interpose an objection to this testimony. Having failed to make a timely objection, the contention is waived.⁵ (Evid. Code, § 353; *People v. Demetrulias* (2006) 39 Cal.4th 1, 19-20; compare *Alexander*, at p. 612, fn. 4 [timely foundation objection was made].)

The second element of the gang enhancement allegation requires evidence that the offense was committed for the benefit of, at the direction of, or in association with the gang. Defendants focus much of their argument on the first alternative – that the crime was committed for the benefit of the gang. Defendants argue that there was no reasonable, credible evidence of solid value that either the Walmart or the Starbucks robbery was committed to benefit 92 Bishop Bloods. The robberies were outside of gang territory, no gang signs were shown or slogans yelled, there is no evidence that the gang itself received the proceeds of either robbery, and, to the extent the robbers said anything about their intent, it was only something about “[N-word]s being hungry out here.” Yet the element is phrased in the alternative, and can be satisfied by evidence that the offense was committed “in association with” the gang. Evidence that a defendant knowingly committed the charged crimes in association with another gang member is sufficient to establish this element. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1179.) The evidence that defendants Winston and Davis were both members of 92 Bishop Bloods was overwhelming; indeed it was written all over their bodies. Thus, each defendant clearly knew the other was a member of the gang, and they committed the crimes together, establishing this element. While it is conceivable that several gang members

⁵ In any event, Deputy Guillen testified that he has personally investigated crimes committed by 92 Bishop Bloods

could commit a crime together “yet be on a frolic and detour unrelated to the gang” (*id.* at p. 1198), the evidence that this occurred in this case is not conclusive by any means. Instead, Deputy Guillen testified that the crimes committed in this case were the typical crimes that gangs like 92 Bishop Bloods commit. Moreover, the idea that defendants Winston and Davis committed these robberies simply to have money to feed themselves and their families is undermined by Davis’s dollar sign and Louis Vuitton tattoos and the cell phone photographs depicting the “flash” lifestyle so sought-after by gang members.

The third element of the gang enhancement allegation, that the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members, requires evidence that the defendant acted in order to assist criminal conduct by *gang members*, not necessarily to assist criminal conduct by *the gang*. (*People v. Albillar, supra*, 51 Cal.4th at p. 67.) Moreover, the prosecution need not show the crime was committed to assist *other* criminal conduct by gang members – the intent to assist *any* criminal conduct, including the crime itself – is sufficient. (*Id.* at p. 51.) Thus, this element, like the second element, can be satisfied by substantial evidence that the defendant intended to, and did commit, the charged offense with known members of the gang. (*Id.* at p. 68.) As both defendants committed the crimes together, this element is satisfied.⁶

2. *The Gang Evidence was Not Incompetent Hearsay and Did Not Violate Defendants’ Confrontation Rights*

Defendants next contend that the gang evidence was incompetent hearsay and violated their constitutional right of confrontation. Specifically, defendants challenge as

⁶ Winston suggests that, since Penal Code section 186.22, subdivision (b)(1) is phrased in terms of an intent to assist criminal conduct by gang *members*, in the plural, committing a crime in association with a single other gang member is insufficient. We have doubts that this interpretation was intended by the Legislature. In any event, defendants did not merely commit the robberies with each other; they also committed the crimes with their two female companions, who were, at the very least, associates with another Blood gang. Thus, any requirement of assisting criminal conduct by more than one other gang member has been established.

hearsay the following testimony of Deputy Guillen: (1) his testimony that 92 Bishop Bloods was a criminal street gang which has existed since the 1970's and has hundreds of members, which was based on admissions unidentified gang members made to him and other officers; (2) his testimony that two prior convictions were suffered by individuals who self-identified as 92 Bishop Bloods, which was based on information Deputy Guillen received from the officers to whom the individuals purportedly admitted their gang membership; and (3) his opinion testimony that the robberies improved defendants' reputation in the gang, which was based on statements made to Deputy Guillen by gang members Deputy Guillen refused to identify at trial.

As to the first and second categories of testimony, defendants did not object at trial that this testimony was hearsay or violated their right of confrontation. The contention is therefore waived.⁷ (Evid. Code, § 353; *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 19-20.) As to the third category, defendants are simply mistaken. Deputy Guillen's testimony that commission of these crimes would enhance the defendants' reputation in the community was based on his knowledge of how gangs like 92 Bishop Bloods operate, and the respect they accord members who commit violent crimes outside the gang's territory. To the extent Deputy Guillen testified *at all* to statements made by gang members Deputy Guillen declined to identify at trial, that testimony was: (1) elicited on cross-examination by Davis; (2) properly stricken by the trial court on Winston's motion; and (3) related only to the issue of whether other 92 Bishop Blood gang members knew defendants were fighting a robbery case – an issue of minimal, if any, relevance or prejudice.⁸

⁷ Moreover, it is apparent that at least some of the testimony was based on personal knowledge. Deputy Guillen testified to having attended the “Hood Date” celebrations for 92 Bishop Bloods five or six times, where he saw well over 100 people out for the celebration.

⁸ On appeal, Davis states that the “crux of [Deputy] Guillen's testimony” was his opinion that the robberies benefitted the gang. Davis further argues that the basis for this opinion was statements from other gang members, whose identity Deputy Guillen refused

Defendants argue that, if we find their hearsay and confrontation arguments have been waived or forfeited by a failure to object, their counsel rendered ineffective assistance. To prevail on an argument of ineffective assistance of counsel, a defendant must show that counsel's performance was, objectively considered, deficient under prevailing professional norms and prejudicial. (*People v. Burgener* (2003) 29 Cal.4th 833, 880.) To establish prejudice, the defendant must show a reasonable probability that, but for counsel's failings, the result of the proceedings would have been more favorable to the defendant. (*Ibid.*) Defendants cannot establish prejudice. Even if the challenged testimony were inadmissible, it would have made no difference as to the result. That 92 Bishop Bloods has existed since the 1970's and has hundreds of members was not decisive; what matters is that 92 Bishop Bloods was an active criminal street gang. Even defendants' expert, Flores, agreed that it had active members, although he put that number around 20. That the two individuals who committed the predicate offenses were self-identified members of 92 Bishop Bloods likely could have been established by other witnesses if necessary. And, as noted above, the fact that other 92 Bishop Blood gang members may have known defendants were fighting a robbery case is of such minimal relevance, it could have made no impact on the result in this case.

3. *The Gang Evidence Was Not Highly Prejudicial and Minimally Relevant*

Defendants next argue that a significant part of the gang evidence was superfluous, cumulative or of such minimal relevance that its only purpose was to inflame the jury. Defendant specifically identify the evidence of gang life, the history of the 92 Bishop Bloods gang, gang culture, and an "excessive number of photographs,"

to disclose. We disagree with this characterization of the record. The "crux" of Deputy Guillen's testimony was not his opinion that the gang was benefitted by the robberies; Deputy Guillen testified if the gang was not benefitted at all, he would nonetheless be testifying regarding the gang enhancement because, in the hypothetical presented based on the Starbucks robbery, the crimes were still committed at the direction of and in association with the gang. Moreover, the statements made to Deputy Guillen by the gang members he did not identify did not relate to whether the gang was benefitted, which was why those statements were stricken on Winston's motion.

including the photographs from the recovered cell phones. Defendants also argue the evidence of the gang's "Hood Date" celebrations were irrelevant, and that the multiple photos of their tattoos were unnecessary.

While gang evidence can be highly prejudicial and of minimal relevance when there are no gang enhancements alleged (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223), this was not such a case. Gang enhancements were alleged; thus evidence of defendants' gang involvement was relevant. Indeed, the main issue at trial was the truth of the gang enhancements. Defendants' defense was based on the theory that they committed these robberies for their own benefit, to get money to feed themselves and their families. To defeat this argument, the prosecution introduced evidence that: (1) 92 Bishop Bloods was an active gang, with hundreds of members, as personally witnessed by Deputy Guillen on "Hood Date"; (2) defendants were not just casual members, but were deeply involved in 92 Bishop Bloods, as evidenced by their multiple tattoos, including the "B.I.P." tattoos which can only be worn by someone who has earned the right; and (3) defendants were living the "flash" gang lifestyle, with money, guns, and designer clothes, as evidenced by the cell phone photographs. These facts, in combination, made it much more likely that when defendants committed robbery, they did so for the gang, and not merely for themselves.

To be sure, evidence that is more prejudicial than probative must be excluded (Evid. Code, § 352) and trial courts have discretion to determine when that line is crossed and the evidence has become too cumulative or prejudicial. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.) But defendants never made such an objection, and therefore any contention that the trial court erred in failing to exclude the evidence is waived. To the extent defendants again argue ineffective assistance of counsel for failing to object, we again conclude the defendants have failed to establish the reasonable probability of a more favorable result had an objection been made. We do not doubt that the trial court would have acted within its discretion had it excluded *some* of the cell phone photographs or *some* of the tattoo evidence, but it simply cannot be established that any evidence that might have been excluded would have made the difference in this

trial, given that a substantial amount of gang evidence was necessarily relevant and admissible, for the reasons discussed.

4. *The Omission From the Verdict Forms was Harmless*

Defendants next contest an omission from the verdict forms submitted to the jury regarding the Penal Code section 136.1 offense, dissuading a witness.

Penal Code section 136.1 describes several offenses related to dissuading or attempting to dissuade victims or witnesses from reporting crimes or testifying regarding them. The crimes described by subdivisions (a) and (b) of that statute are wobblers. However, subdivision (c) makes the crimes in subdivision (a) and (b) straight felony offenses if they were committed “knowingly and maliciously” and under one of several enumerated circumstances. One of those circumstances, set forth in subdivision (c)(1), is if the act of dissuasion or attempted dissuasion “is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person”⁹

When, as in this case, defendants are charged with violating Penal Code section 136.1, subdivision (c)(1), it is appropriate to instruct the jury in the language of CALCRIM No. 2623 that if the jury finds the defendant guilty of dissuading a victim or witness, the jury must also decide whether the prosecution has proven the additional (two-part) allegation that: (1) the defendant acted knowingly and maliciously; and (2) the defendant used force or threatened, either directly or indirectly, to use force. (*People v. Torres* (2011) 198 Cal.App.4th 1131, 1142.) The instruction was properly given in this case. However, the verdict forms provided to the jury simply asked the jury whether the defendants were guilty of “intimidating a witness and/or victim,” without

⁹ Not only does the subdivision (c)(1) allegation elevate the crime from a misdemeanor to a felony, but, in combination with the gang enhancement, it will result in an indeterminate life term. (Pen. Code, § 186.22, subd. (b)(4)(C); *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1065.)

specifically asking the jury whether it also found the additional allegation true.¹⁰
(Capitalization omitted.)

This was error. A defendant cannot be found guilty of, or sentenced under, subdivision (c)(1) without a jury finding that the additional factual allegation is true beyond a reasonable doubt. (*People v. Lopez, supra*, 208 Cal.App.4th at p. 1064; *People v. Torres, supra*, 198 Cal.App.4th at p. 1147.)

The error “ordinarily requires reversal of a conviction unless the error was harmless. But, if no rational jury could have found the missing element unproven, the error is harmless beyond a reasonable doubt and the conviction stands. [Citations.]” (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 416.) This is such a case. As to the first part of subdivision (c)(1), that the defendant acted knowingly and maliciously, the jury was instructed that this was an element of the basic Penal Code section 136.1 offense charged (CALCRIM No. 2622) and therefore necessarily found this to be true. The second element is whether the act of attempted dissuasion was accompanied by force or an express or implied threat of force or violence. Here, the only evidence relating to the attempted dissuasion was the testimony of the victims of the Walmart robbery. They testified that Winston accidentally revealed his face to Sellers, and then demanded that, because she had seen his face, she turn over her identification. When Sellers proved to have no I.D., Winston threatened all of the car’s occupants with the gun, and indicated that he would not leave until he had someone’s identification. The implied threat, which the jury found to be true, was obvious: if you identify me to the police, someone will come to your house. The act of attempted dissuasion was indisputably accompanied by force; Winston waved his handgun at everyone in the car. The jury found the firearm enhancement to be true. No rational jury could have found that defendants attempted to dissuade their victims, and used a handgun to do so, while also concluding that the

¹⁰ To be sure, the verdict forms asked the jury whether the defendants were guilty of intimidating a witness and/or victim “in violation of Penal Code Section 136.1(c),” but there was nothing in the jury instructions indicating that the reference to subdivision (c) incorporated the additional allegation addressed in CALCRIM No. 2623.

attempted dissuasion was not accompanied by force, or an express or implied threat of force or violence. Thus, the error was harmless beyond a reasonable doubt.

DISPOSITION

The judgments of conviction are affirmed.

OHTA, J.^{*}

WE CONCUR:

FLIER, ACTING P. J.

GRIMES, J.

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