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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD DEAN CLAYBORN, Defendant and Appellant.	B265764 (Los Angeles County Super. Ct. No. BA358363)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Law Offices of James Koester, James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Richard Dean Clayborn of attempted premeditated murder (Pen. Code, §§ 664, 187, subd. (a)),[1] possession of a firearm by a felon (former § 12021, subd. (a)(1)), and possessing for sale, selling, and transporting methamphetamine (Health & Saf. Code, §§ 11378, 11379, subd. (a)). It also found true enhancement allegations that all of the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

Relying on *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), defendant argues that the gang enhancement allegations were not supported by substantial evidence because defendant's gang had subsets and the prosecution failed to link defendant's subset to those of the gang members who committed predicate crimes. He further contends that the prosecution failed to prove that his drug crimes, which occurred outside of his gang's territory, were committed for the gang's benefit.

Defendant also challenges the denial of his motion for new trial. He argues that the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to timely disclose that one of its police officer witnesses was found liable for malicious prosecution in a federal lawsuit. Such information would have been material to his attempted murder charge, he contends, because the case against him was weak and the witness's interpretations of phone calls defendant made in jail were crucial to establishing his identity as the perpetrator of the attempted murder.

We are not persuaded by any of defendant's arguments. First, the prosecution did not seek to prove the gang

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

enhancements with evidence that gang members belonged to gang subsets other than defendant's; there was no evidence that defendant or the predicate offenders belonged to or sought to benefit any particular subset of the broader Toonerville gang. The rule announced in *Prunty* accordingly was not implicated. Second, the evidence demonstrated that defendant conducted his drug transactions in association with the Toonerville gang. Finally, to the extent that defendant preserved his *Brady* argument, he has not shown a reasonable probability that the outcome of the trial would have been different absent the challenged testimony. Eyewitness testimony and ballistics evidence supported defendant's attempted murder conviction, and defendant has offered only speculation that the alleged *Brady* material could have affected the jury's view of this evidence. The judgment of the trial court accordingly is affirmed.

PROCEDURAL HISTORY

An amended information filed on September 28, 2012 charged defendant with one count of attempted premeditated murder of Alonso Loera (§§ 664, 187), two counts of possession of a firearm by a felon (former § 12021, subd. (a)(1)), and one count each of possessing for sale (Health & Saf. Code, § 11378), selling (Health & Saf. Code, § 11379, subd. (a)), and transporting (*ibid.*) methamphetamine. The amended information further alleged that defendant was personally armed with a firearm while possessing and transporting the methamphetamine (§ 12022, subd. (c)); that he or another principal used and personally discharged a firearm during the attempted murder (§ 12022.53, subds. (b), (c), & (e)(1)); and that defendant committed all of his crimes for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote,

further, or assist in criminal conduct by gang members (§ 186.22, subds. (b)(1)(A), (C)). The amended information also alleged that defendant suffered a prior serious felony conviction within the meaning of sections 667, subdivision (a)(1), 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d).

The amended information contained similar charges and allegations against two codefendants, Randy Harp and Misael Gutierrez. It alleged possession of a firearm by a felon (former § 12021, subd. (a)(1)) and attempted premeditated murder charges (§§ 664, 187, subd. (a)) as to both Harp and Gutierrez, as well as firearm and gang enhancements related to those offenses. The amended information further alleged that Harp sold PCP for the benefit of a criminal street gang (Health & Saf. Code, § 11379.5; Pen. Code, § 186.22, subd. (b)(1)(A)), and that both he and Gutierrez suffered previous convictions for serious felonies and had prison priors. (§§ 667, subds. (a)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d).)

The court bifurcated the allegations relating to the alleged prior convictions, and all three defendants proceeded to a joint jury trial on the remaining charges and allegations. The jury found defendant and Harp guilty as charged, but acquitted Gutierrez. Defendant filed a motion for new trial, which the trial court ultimately denied. Defendant later waived his right to trial on the priors allegations and admitted those allegations.

Harp died while in custody awaiting sentencing.

The court sentenced defendant to an aggregate term of 55 years to life. The court harmonized defendant's sentence with the sentence he received in a different case, the appeal of which is pending before this court. The court awarded defendant 2,124 days of presentence custody credit and ordered him to pay

various fines and fees. Defendant timely appealed.

FACTUAL BACKGROUND[2]

A. *The Toonerville Gang*

Los Angeles Police Department (LAPD) Sergeant John Strasner testified as the prosecution's gang expert. Strasner worked in LAPD's gang enforcement detail from 2004-2008. In that capacity, he was tasked with monitoring six gangs that operate in the northeastern portion of the city. One of those gangs was Toonerville, the main territory of which was bordered by the 134 freeway to the north, Los Feliz Boulevard to the south, San Fernando Road to the east, and the Los Angeles River to the west. Chevy Chase Park, near the middle of that area, served as Toonerville's geographic "heart," though the gang also had "a part in Glendale and a part up in . . . the Tujunga area."

Strasner explained that some Toonerville gang members identified with "cliques" "based on who they grew up with and kind of the area that they grew up in." Strasner testified that the cliques included the Night Owls, Vagos, Jokers, Tokers, and Chevy Chase Locos, but all of the members "still claim membership in the Toonerville gang, they just - - they're more, hey, I'm from Toonerville, but I hangout [*sic*] with the Chevy Chase Locos or I hangout [*sic*] with the Night Owls, things like that." Alonso Loera, who identified himself as a former Toonerville gang member, also agreed with the prosecutor's assertion that "there's the overall gang and then there's subsets of the gang." Loera testified that one such subset or clique, the Gangsters, dated back to 1977. Loera denied membership in the

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[2] Because Gutierrez was acquitted and Harp is now deceased, we do not include facts pertinent solely to them in this discussion.

Gangsters, stating instead, "I was just Toonerville."

The Toonerville gang had approximately 400 active members in 2008. Members used the letters T.V.R., meaning "Toonerville Rifa," or Toonerville Rules All, to identify themselves and their territory. Because many trains run through Toonerville territory, members also used trains or trolleys to symbolize their gang membership. Some members tattooed these and other symbols on their bodies, both to demonstrate their allegiance to the gang and to intimidate non-members. Strasner opined that several of defendant's tattoos marked him as a Toonerville member, including "T.V.R." on his chin, neck, and chest; "Toonerville" on his cheek, abdomen, and back; and trolley cars on his arm and back.

Strasner, who had personal contact with defendant in 2008, opined that defendant was an active Toonerville gang member at that time. Defendant used the gang moniker "Risky." Strasner also opined that codefendants Harp and Gutierrez, who had Toonerville gang tattoos and appeared in photographs with defendant and other known Toonerville members, were active members of Toonerville; Harp was known as "Doughboy" and Gutierrez was known as "Husky." One of Harp's tattoos read "Vagos," which Strasner testified was one of the Toonerville cliques associated with the Tujunga area.

Active members of the Toonerville gang sought to cultivate fear in the community and respect among themselves by committing crimes, also referred to as "putting in work" for the gang. Such crimes ranged from graffitiing gang symbols to "selling dope" to committing shootings; the more significant or dangerous the "work," the more respect the member earned. Work was assigned by "shot callers," high-ranking gang members

who ascended to supervisory positions by committing crimes or making a lot of money for the gang. In 2008, Timothy McGhee was the leader of and a shot caller for Toonerville. McGhee, known as "Huero" and "Eskimo," retained his position of influence despite being on death row for committing murder.

Strasner testified that Toonerville's primary activities included "selling narcotics, beatings, shootings, and murder." He further testified that three Toonerville gang members, Patrick Evans, Cesar Ortega, and Isael Aguirre had suffered convictions for crimes including murder, attempted murder, and shooting at an occupied vehicle. He explained that the gang used proceeds generated by the drug sales to buy drugs, weapons, and pay "rent" or "taxes" to the Mexican Mafia, a powerful prison gang that controls many Southern California street gangs, including Toonerville. According to Strasner, "[t]o be part of the Mexican Mafia and not get beat up or shot at on the outside you have to pay taxes to [the] Mexican Mafia for that protection in jail or in prison. If you don't pay those taxes you get greenlighted which means that any gang that is in good graces with the Mexican Mafia has the obligation or the right to do violent acts towards you for not paying your taxes or for not respecting the Mexican Mafia."

Strasner further testified that the Toonerville gang also assessed a "tax" on anyone, including its members, who sold drugs in its territory. At least some portion of that tax was remitted to the Mexican Mafia. Strasner testified that gang members could not avoid paying taxes by selling drugs outside of Toonerville territory. When asked about a hypothetical gang member who sold drugs outside the territory, in Van Nuys, Strasner opined that taxes would still be due: "Well, you're still

selling dope and you're still from Toonerville and you still got to pay your taxes to the Mexican Mafia. It doesn't really matter where you sell it, it's that you are selling it, and you're going to be raising funds for that." He agreed "that then benefits Toonerville and it allows the individual to continue selling." Individuals who refused to pay taxes or were delinquent in paying them would "open themselves up to violent actions from the gang members," ranging from being beaten to being murdered.

B. ***The "Mongol Murder" and the Toonerville Task Force***

In the early morning hours of October 8, 2008, a member of the Mongols Motorcycle Gang was murdered on the freeway in Glendale. Glendale Police Department (GPD) Detective Arthur Frank testified that the GPD received information that Toonerville gang members committed the murder. The GPD and LAPD convened a joint Toonerville Task Force ("the Task Force") to investigate the Mongol murder and other open cases believed to involve Toonerville gang members. Eventually, the Task Force obtained authorization to intercept and monitor the phone calls of various Toonerville gang members. In the immediate wake of the Mongol murder, however, the Task Force used more traditional means of investigation to identify defendant as a suspect. On October 10, 2008, it established a covert surveillance operation outside the Van Nuys tattoo business where defendant worked.

C. ***The Drug Transaction and Related Searches***

LAPD Detective Eric Bonner was a member of the Task Force team surveilling defendant on October 10, 2008. Bonner testified that he observed a green Oldsmobile pull into the parking lot of the tattoo parlor. The driver got out of the car, disappeared from view, and returned a few minutes later accompanied by defendant. The driver and defendant stopped

near a red Toyota Camry, which Bonner had been informed was defendant's vehicle. Defendant reached under the rear bumper of the Camry. He emerged holding what "appeared to be a clear plastic baggie," which he handed to the driver of the Oldsmobile. The driver handed defendant "what appeared to be U.S. currency rolled up like in a bundle - - or folded up." The driver of the Oldsmobile got back into his car and drove away. Bonner's photographs documenting the interaction were admitted into evidence.

Based on his experience and training, Bonner believed that he had witnessed a drug transaction. He used his radio to inform another member of the surveillance team, LAPD Detective Joseph Fleming, who was stationed down the street, what he had seen. Fleming in turn directed LAPD Officer Russell Elkins to conduct a traffic stop on the green Oldsmobile.

Elkins testified that he stopped the Oldsmobile shortly after it left the tattoo parlor. The driver consented to a search, and Elkins found a "small clear zip lock baggie containing an off-white substance resembling methamphetamine" in his jacket pocket. Scientific testing later confirmed that the baggie contained 0.22 grams of methamphetamine. Fleming opined that 0.22 grams of methamphetamine was a usable quantity, and that a hypothetical interaction like the one Bonner observed was a sale of methamphetamine. Fleming further explained that such a quantity of methamphetamine was "in the range of a 20."

The Task Force did not take immediate action against defendant. Instead, Fleming testified, their intent "was to write a search warrant for any possible locations that he may maintain his stash of narcotics." Fleming testified that he obtained a search warrant for defendant's residence and car. Fleming and

other law enforcement officers set up a surveillance operation around defendant's residence to serve and execute the search warrant on October 13, 2008.

Fleming testified that he saw defendant get into the Toyota Camry that had been parked at the tattoo parlor and leave his residence. Fleming covertly followed defendant for several minutes, then directed a marked LAPD vehicle to conduct a traffic stop of his car. During that stop, officers recovered $2,583 in cash. They arrested defendant and towed his car to the GPD. An inventory search of the car revealed a loaded 9-millimeter Smith & Wesson semiautomatic gun on the driver's side of the car, between the gas pedal and gear shift. Officers also found several live rounds of 9-millimeter ammunition under the carpeting beneath the driver's seat, and a bandana containing 14 baggies of a white crystalline substance under the dashboard. Testing confirmed that the baggies contained a total of 4.52 grams of methamphetamine. When given a hypothetical about the methamphetamine recovered from the car, Fleming opined that it was transported and possessed for the purpose of sales. Strasner opined that gang members act for the benefit of their gang when they possess weapons because "they use them to protect themselves from rival gang members, to assault rival gang members or commit a crime involving a firearm."

Fleming returned to defendant's residence to execute the search warrant after defendant's arrest. He and the other officers served the warrant on defendant's girlfriend, Lindsay Lilburn, and searched the bedroom that defendant shared with her. Fleming testified that the bedroom search turned up a small digital scale and roughly $1,100 in cash. In the garage, Fleming found a box labeled "Risky's"; it contained a .25 caliber gun.

D. ***The Shooting***

On October 12, 2008—after the Task Force had observed the drug transaction at the tattoo parlor, but before it arrested defendant—Alonso Loera was selling heroin in Chevy Chase Park. Loera was a longtime heroin addict and former Toonerville gang member who used the moniker "Chino"; the name was given to him because he "used to smoke a lot of weed, [and his] eyes would turn Chinese." Loera had a lengthy prison record (15 separate commitments) and went by the name "Chinaman" when he was incarcerated. Loera testified that he informally left the Toonerville gang in 2003 because he was getting older—he was 49 at the time of trial—and no longer wanted to participate in violence and gang missions. Loera nonetheless continued to sell drugs in Toonerville gang territory, though he did not pay the requisite "taxes" because he did not believe it was "the right thing," and he already had been "greenlighted" after going into protective custody in prison.

Loera testified that, around 11:00 a.m. on October 12, 2008, he saw codefendant Harp, whom he knew as "Doughboy," drive by Chevy Chase Park in a red car. Harp called out to Loera, who approached the car. Harp indicated that he wanted some heroin, but would not accept it at the current location. He told Loera to go to Bemis Street, on the other side of the park. Loera walked toward Bemis Street while Harp drove away. As Loera walked, he saw Harp drive by with two additional people in the car. Loera did not recognize the people at that point because they were wearing hoodies.

After Loera reached the designated location, Harp stopped the car near him. At that point, Loera saw "Husky and Risky" in the car. Although he testified that he had never seen defendant

prior to that interaction, he identified defendant as Risky and codefendant Gutierrez as Husky in court. Loera approached the driver's door and gave Harp some heroin "on the house." Harp told him, "wait up, these homies want to get at you." Loera interpreted that to mean that Risky and Husky wanted to talk to him. Loera "knew something was wrong" and started to back away from the car. Before he got very far, Loera testified, Husky and Risky got out of the car and started shooting at him while Doughboy said, "kill him, kill him, kill him, kill him."

Loera ran away, "zig zagging, yelling for my life," as Husky and Risky fired about 15 to 18 shots in his direction. He testified that he yelled he was shot and dove to the ground behind some cars in the hopes that the shooters would believe they had hit him. Eventually, the shooters got back into the car and left. After determining that he had not been shot, Loera left the scene. He testified that he heard sirens and left because he was scared.

LAPD Officer Antonio Vargas testified that he was working gang enforcement detail on October 12, 2008. He and his partner received a radio report around 11:30 a.m. that shots had been fired near Chevy Chase Park. When Vargas arrived on the scene five to 10 minutes later, he found several cars with bullet holes in them parked along Bemis Street. Although he did not find any evidence that anyone had been shot, he recovered eight 9-millimeter shell casings, six .45-caliber shell casings, and three bullet fragments from the ground. Vargas booked the recovered casings and fragments into evidence at the police station. A firearms expert testified that all of the 9-millimeter casings had been fired from the Smith & Wesson that was found in defendant's car.

A few hours after the shooting, Loera telephoned GPD Officer Warren Holmes. Loera had Holmes's business cell phone number because he occasionally provided Holmes with information about Toonerville; Holmes testified that he had "just kind of built up a trusting relationship" with Loera after talking with him regularly. Loera left Holmes a message describing the shooting incident. Holmes called back the next day and arranged a meeting with Loera. He also passed the information on to GPD Detective Jeff Newton.

On October 14, 2008, Loera met with Holmes and Newton behind a Glendale movie theater. During that meeting, Newton showed Loera photographs of defendant, Harp, and Gutierrez; Newton testified he used individual photos rather than six-packs because Loera had told Holmes the monikers of his assailants, and Newton knew those monikers to be associated with defendant and the codefendants. Loera identified the picture of defendant as Risky, the picture of Harp as Doughboy, and the picture of Gutierrez as Husky. Loera also gave Newton two .45-caliber slugs, which Loera testified he retrieved from Chevy Chase Park the day after the shooting. Newton testified that Loera told him he retrieved the slugs immediately after the shooting.

A few weeks after the shooting, Loera met with Holmes, Newton, and a third detective, Chris Vasquez, at the police station. He told them what had happened, but said Harp had asked him for a cigarette rather than heroin. Loera explained at trial that he did not want to get in trouble for selling heroin; Holmes testified that he did not know Loera sold heroin. Harp's counsel further impeached Loera at trial by playing for the jury a video of Loera drawing Toonerville graffiti in a court holding cell;

Loera had denied making the graffiti, which the courtroom bailiff testified said "Chino," "Nino," and "T.V.R. G/L." Strasner testified that "G/L" could stand for "greenlighted," and agreed with Harp's counsel that it would be "stupid and possibly fatal" for someone who was greenlighted to publicly identify himself or herself as such.

Strasner opined that a hypothetical shooting matching the facts as Loera described them was committed for the benefit of, at the direction of, and in association with a criminal street gang.

E. ***The Recorded Phone Calls and Visits***

After defendant was arrested, he was held in custody at the Los Angeles County Jail. His phone calls and in-person visits were recorded. During an October 16, 2008 visit with his girlfriend, Lilburn, defendant instructed her, "when you get my gun, give it to Lil P," and "tell him to hold on to it." Defendant also told Lilburn there was "a 8-ball and like 20-20's" "in the bandana." He instructed Lilburn to "[g]ive that to Dre and let her just get the money." Defendant also added that "Midget owes me 120."

Detective Frank, a member of the Task Force who listened to approximately 1,500 jail recordings involving Toonerville members, testified that Little P was a Toonerville member named Gabriel Serna and Midget was a Toonerville member named Homero Aguirre.[3] Frank testified that Aguirre was a Task Force "target subject," and that defendant was telling Lilburn that

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[3] Strasner also testified earlier in the trial that Homero Aguirre was a Toonerville gang member who used the moniker Midget. Strasner further testified that Aguirre was the brother of Isael Aguirre, a Toonerville gang member who committed one of the three predicate offenses.

Aguirre owed him money for drug sales. Frank also testified that the Task Force refrained from telling Lilburn—to whom defendant's car was registered—that they had recovered drugs and a gun from the vehicle until November 21, 2008. Thus, he explained, the conversations recorded prior to that time indicated no knowledge by Lilburn or defendant that police had recovered those items.

During a phone call recorded on October 18, 2008, defendant instructed Lilburn to "[t]ake all the little packages, put all the little packages all together with the big package . . . . and then go fucking hide that shit." He then told her to "get at fucking Jizette and tell her to get you some black, some heroin." Frank testified that Jizette was an associate of Toonerville, and the prosecution introduced into evidence a photograph of her making a Toonerville gang sign. Later in the conversation, Lilburn criticized defendant for "doing the fucking tweeker game" and noted that defendant, who did not use drugs, continued to sell them even though he could "let people do it." She remarked, "you're so adamant about being clean. . . . and not getting high," at which defendant laughed and said, "But I destroy everybody else." Defendant also objected to Lilburn keeping some of the drugs from the car and selling them as she needed money; he said, "[I]f you're thinking like that then take over my fucking, my, my, my fucking shift." Lilburn assured defendant that she was "not trying to" take over his shift.

On October 20, 2008, Lilburn patched Aguirre into a jail call with defendant. Defendant asked Aguirre if he had heard "what happened the other day," "with fucking Jap." When Aguirre asked "With who," defendant responded, "With Jap. Read between the lines dick." Aguirre then said, "Oh, the Asian

guy," to which defendant replied "Yeah." Defendant told Aguirre, "You got to fucking finish that shit dick." Aguirre told defendant he had already talked with "the white dude," who "was heated." Defendant then said, "Well at least we fucking went, motherfucker. That's the most anybody else did." Frank testified that, based on his experience with the Task Force, he believed "the white dude" was Toonerville shot caller Timothy McGhee. Frank further testified that McGhee being "heated" meant that he was upset about a failed gang mission.

A few weeks later, on November 13, 2008, defendant spoke to Aguirre again. Aguirre told defendant, "They was tripping out on how it was a foul ball," "instead of a home run." Defendant responded, "Yeah, I know. . . . That motherfucker did . . . the matrix homie." Frank opined that "the matrix" was a reference to dodging bullets, like the famous scene in the movie of the same name. Defendant also talked to Serna during the multi-way call. Defendant told Serna that Serna had to "keep the circle going" and that his "girl [Lilburn] is going to give you the number to three people that you just give them four at a time. . . . And then you're going to charge them fucking two twenty five a piece." Defendant further stated, "It's going to be a big responsibility." Frank opined that defendant was "trying to set Mr. [S]erna up to take care of his customers in the drug sales."

The Task Force wiretap went live in November 2008. On December 1, 2008, it intercepted a phone call between Harp and Gutierrez. Harp told Gutierrez, "They had the shooting about Chino in the paperwork for the gang injunction." Gutierrez asked what it said, to which Harp replied, "Nothing. Just some fools pulled up in a car and busted up some other fool. And they don't know who's who or what's what really." Harp also noted, "They

found casings for 9 and 45 woo woo woo." In a call between defendant and Lilburn exactly one year later, defendant told Lilburn that the gun recovered from the Camry "goes with my . . . the one attempted murder on Chevy Chase. That gun goes to whatever that attempted murder is." When Lilburn expressed concern, defendant told her, "Yeah, that victim said that, um, he came up to us, asked us for a cigarette and then told us to give him the cigarette from the other side of the park. It's all bullshit."

F. *The Defense Case*

Defendant did not present any evidence in his defense. In addition to calling the bailiff to impeach Loera, Harp called Charles Gothard as a witness. Gothard testified that he was a former Toonerville gang member who lived a few houses away from Chevy Chase Park. He knew Loera, whom he called Chino, and regularly bought heroin from him at Chevy Chase Park.

Gothard testified that on the morning of October 12, 2008, he was walking down the street toward his home when he saw Harp drive by. Gothard did not recognize anyone else in the car. Harp said, "Hi Pops," and Gothard waved back at him. Gothard testified that his own focus mostly remained on Chino, however, because he hoped to buy some drugs. "All of a sudden," Gothard heard two or three gunshots. He looked up and saw Chino shooting toward Harp. Gothard then saw Chino run into the park. Gothard went to his backyard. He did not hear any more shots. Gothard stayed in his backyard when the police arrived.

DISCUSSION

I. Gang Enhancements

Defendant contends that the gang enhancements should be reversed as to all counts because there was insufficient evidence

that he acted for the benefit of the same gang subset to which the individuals who committed the predicate offenses belonged. In the alternative, he contends that there was insufficient evidence that he committed the drug offenses in association with a gang or with the specific intent to further any gang interest or motive.[4] We conclude the enhancements were supported by sufficient evidence.

A. Standard of Review

"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. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted

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[4] Defendant also challenges the sufficiency of the evidence supporting the application of the gang enhancement to his conviction for possessing a firearm. He acknowledges in his reply brief, however, that the firearm found in his car with the methamphetamine "was identified as the same firearm that was used in the Loera attempted murder. Thus, if sufficient evidence supports the gang allegations as to the Loera shooting, there would be sufficient evidence to support the gang allegation as to appellant's continued possession of the firearm two days following the Loera shooting." Because we conclude sufficient evidence supports the application of the gang enhancement to the Loera shooting, we do not separately address defendant's challenge to the enhancement as applied to the firearm conviction.

simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) "Reversal for insufficient evidence is warranted only where it clearly appears that upon no hypothesis whatever is there sufficient evidence to support a conviction." (*People v. Ewing* (2016) 244 Cal.App.4th 359, 371 (*Ewing*).)

B. *Prunty* and Subset Evidence

Section 186.22, also known as the Street Terrorism Enforcement and Prevention Act (the STEP Act), imposes a sentencing enhancement on those who commit felonies "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b).) A "criminal street gang," in turn, is defined as "any 'ongoing organization, association, or group of three or more persons' that shares a common name or identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses, and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses.' (186.22, subd. (f)[.])" (*Prunty*, *supra*, 62 Cal.4th at p. 67.) To prove the existence of a criminal street gang, the prosecution "must demonstrate that the gang satisfies the separate elements of the STEP Act's definition and that the defendant sought to benefit that particular gang when committing the underlying felony." (*Ibid.*)

In *Prunty*, the Supreme Court considered the type of showing the prosecution must make "when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets." (*Prunty, supra*, 62 Cal.4th at p. 67.) The Supreme Court held that "the STEP Act requires the prosecution to

introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang" (*ibid.*), and when "the prosecution relies on the conduct of subsets to show a criminal street gang's existence, the prosecution must show a connection among those subsets, and also that the gang those subsets comprise is the same gang the defendant sought to benefit" (*id.* at p. 85). Thus, if the prosecution "seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67-68.) The bottom line is that "the prosecution must show that the group the defendant acted to benefit, the group that committed the predicate offenses, and the group whose primary activities are introduced, is one and the same." (*Id.* at p. 81.)

Defendant contends that the evidence in this case did not comport with the requirements of *Prunty*. He argues that the prosecution's gang expert, Strasner, "failed to distinguish or to otherwise explain the extent of any common associational and cooperative relationships between appellant's and/or his co-defendant's subsets and the subsets that the gang members upon whom the prosecution relied to prove the commissions or convictions of the predict [*sic*] crimes may have belonged." Although defendant is correct Strasner did not provide testimony linking various Toonerville gang subsets, we disagree that such testimony was necessary in light of the prosecution's theory that defendant and the individuals who committed the predicate offenses all acted to benefit the broader Toonerville gang.

In *Prunty*, the defendant identified as a member of the Norteño gang as well as the Detroit Boulevard subset of that gang. (*Prunty*, *supra*, 62 Cal.4th at p. 67.) The evidence showed that Prunty used the term "Norte" when shooting a perceived gang rival in a shopping center. (*Ibid.*) The prosecution theorized that Prunty committed the assault to benefit the Norteño street gang, which its expert testified was not associated with any particular turf but rather was spread throughout Sacramento, "'with a lot of subsets based on different neighborhoods.'" (*Id.* at p. 69.) The prosecution introduced evidence that members of two of these subsets, the Varrio Gardenland Norteños and the Varrio Centro Norteños, committed predicate crimes to benefit the Norteño gang. (*Ibid.*) The Supreme Court concluded this evidence was insufficient to establish the associational or organizational connection required by section 186.22 because it did not demonstrate any link "between the two alleged Norteño subsets that committed the requisite predicate offenses, and the larger Norteño gang that Prunty allegedly assaulted [the victim] to benefit." (*Id.* at p. 81.) The Supreme Court suggested that the prosecution could have overcome this deficiency by demonstrating that the subsets whose members committed the predicate offenses self-identified as members of the larger Norteño gang that defendant sought to benefit. (*Id.* at p. 82.) "But [the expert] never addressed the Norteño gang's relationship to any of the subsets at issue." (*Id.* at p. 83.) Instead, he "simply described the subsets by name, characterized them as Norteños, and testified as to the alleged predicate offenses" and did not offer "additional information about their behavior or practices that could reasonably lead the jury to conclude they shared an identity with a larger group."

(*Ibid.*)

Here, the prosecution's theory and evidence were quite different. The prosecution theorized that defendant acted to benefit the Toonerville gang, as did the Toonerville members who committed the predicate offenses. The prosecution did not introduce any evidence that defendant or the predicate offenders belonged to or sought to benefit a particular Toonerville gang subset. Its theory turned on the conduct of the Toonerville gang as a whole, not "the conduct of one or more gang subsets," and therefore did not trigger the rule in *Prunty*. (*Prunty*, *supra*, 62 Cal.4th at p. 71, fn. 2.) While there was evidence that the Toonerville gang contained at least some subsets, there was no evidence that all members of the Toonerville gang were divided into subsets, or that defendant, his codefendants, or the predicate offenders "were also necessarily members of some subset or subsets within Toonerville." To the contrary, Strasner testified that members who were in subsets "still claim membership in Toonerville gang," and Loera, a former gang member, testified that he did not belong to any subsets and "was just Toonerville."

Defendant urges us to hold, essentially, that *Prunty* applies any time the record contains even the slightest suggestion of "multiple subsets within an overarching, or umbrella gang, but there is no evidence identifying either the defendant's specific subset or specifically identifying the subsets that the members who committed the predicate offenses belonged [*sic*]." He contends this "expansive literal application of *Prunty*'s holding" was embraced by the court in *People v. Nicholes* (2016) 246 Cal.App.4th 836 (*Nicholes*) and is the "more correct application" of *Prunty* than that adopted in another recent case, *Ewing*, *supra*, 244 Cal.App.4th 359. We are not persuaded that *Nicholes* sweeps

as broadly as defendant contends, nor do we believe that its approach is materially different than that used in *Ewing*—both cases straightforwardly apply the rule announced in *Prunty*.

In *Nicholes*, the prosecution's gang expert opined that Nicholes was an active participant in the Norteños gang at the time of the shooting; this opinion was based upon Nicholes's previous admission that he was an active participant in the Oak Park subset of the Norteños gang. (*Nicholes*, *supra*, 246 Cal.App.4th at p. 843.) The expert further testified that the Norteño gang operates "'under a big umbrella so there's different gangs or levels of gangs within them. So the Norteño being the big umbrella, the Norteño criminal street gang, and there are subsets within that gang. . . .'" (*Id.* at p. 842.) The expert identified several such subsets, including Oak Park, Yuba City, Varrio Live Oak, and East Morez. (*Id.* at p. 843.) His testimony about the predicate offenses suggested that they were committed by "members of one of the subsets he had identified as operating in Sutter County—Yuba City Norteños, Varrio Live Oak Norteños or East Morez." (*Id.* at p. 846.) But there was no evidence that the predicate offenses were committed by the Oak Park subset to which Nicholes belonged. (*Ibid.*) The *Nicholes* court concluded that *Prunty* was applicable because the prosecution's theory turned on the conduct of one or more subsets—the Sutter County subsets that committed the predicate offenses and defendant's Oak Park subset—and its burden was not satisfied because there was no evidentiary link between them. (See *ibid.*)

In *Ewing*, "the prosecution contended defendant was actively participating or associating with the Norteno criminal street gang, and, more specifically, with the Norteno gang

regiment that was being established in Redding around the time of the charged offenses. The prosecution offered several predicate offenses of other Norteno gang members *who were helping to set up the same Norteno gang regiment*, including two predicate offenses committed by Valdovino, the regiment leader." (*Ewing*, *supra*, 244 Cal.App.4th at p. 372 [emphases added].) The court concluded that this showing met the requirements of *Prunty* if that case applied—which the court noted "arguably" did not because "the prosecution did not proffer the predicate crimes of subset gang members to prove the existence of a criminal street gang." (*Ewing*, *supra*, 244 Cal.App.4th at pp. 372-373.) The court concluded that the sameness requirement articulated in *Prunty* was satisfied because the prosecution's theory that defendant and the predicate offenders sought to benefit a particular Norteño regiment was supported by ample evidence. (See *id.* at pp. 374-377.)

Both *Nicholes* and *Ewing* follow the *Prunty* Court's instruction that the prosecution's theory determines whether *Prunty* will apply. (See *Prunty*, *supra*, 62 Cal.4th at p. 71, fn. 2.) Here, the theory was that defendant belonged to Toonerville, a 400-member gang with a relatively well-defined geographic area and whose members committed predicate offenses for its benefit. The prosecution argued that defendant sought to benefit Toonerville and acted in association with other Toonerville members; it never argued or even suggested that defendant or the predicate offenders identified with or sought to benefit a Toonerville subset. Loera testified that he was "just Toonerville," and Strasner testified that members who identified with subsets still primarily identified as Toonerville. We are not persuaded that the mere mention of the existence of subsets places subsets

at issue or demonstrates that a gang "operate[s] through subsets" such that *Prunty* applies. (*Nicholes*, *supra*, 246 Cal.App.4th at p. 848.) The broad language used in *Nicholes* must be read in the context of that case, which is factually distinguishable from this one but not from *Prunty*. When there is no evidence that any of the key players in the case identified with a subset, or that the gang consisted solely of subset members, it cannot be said that the prosecution's theory "turns on the conduct of one or more gang subsets." (*Prunty*, *supra*, 62 Cal.4th at p. 71, fn. 2.) The prosecution's showing in this case accordingly was sufficient.

C. Enhancements for Drug Convictions

Defendant argues in the alternative that the gang enhancement cannot apply to his drug convictions because there was no evidence that he was working cooperatively with other Toonerville members, selling within Toonerville territory, or aiming to benefit anyone other than himself. We disagree.

To support application of the gang enhancement to individual crimes, "'[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.' [Citation.]" (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (emphasis in original).) Although it is true that "a drug dealer may possess drugs in saleable quantities, along with a firearm for protection, regardless of any gang affiliation and without an intent to aid anyone but himself" (*People v. Sanchez* (2016) 63 Cal.4th 665, 699 (*Sanchez*)), the record in this case contains evidence from which the jury could infer that defendant engaged in drug transactions and possession in association with the

Toonerville gang. Defendant characterized his drug sales as a "shift," suggesting that he was acting at the direction of another and as part of a larger enterprise. He identified two Toonerville gang members (Midget and Lil P) who owed him drug money, and told Lilburn to contact a drug supplier, Jizette, whom Strasner testified was a known Toonerville associate. Defendant outlined for Serna, a Toonerville member, how to conduct the business and handle the "responsibility" of keeping the circle going while defendant was incarcerated. Defendant contends that the post-crimes transfer of responsibility to Serna demonstrates that he was not cooperating with Serna at the times the crimes were committed. However, the jury reasonably could infer that defendant passed the business to another Toonerville member because the business was related to Toonerville.

In addition to the evidence gleaned from the phone and jail conversations, the prosecution presented opinion evidence from Strasner that defendant's extra-territorial sales were for the benefit of the Toonerville gang. When presented with a hypothetical matching the facts of defendant's drug sales, Strasner opined that such sales would benefit Toonerville because the member would be generating money with which the gang could pay its taxes to the Mexican Mafia. Defendant contends that this "generalized testimony, absent any particularized evidence related to the facts of the specific case, is not substantial evidence that the specified gang member committed the instant crime for the benefit of his or her gang." He relies primarily on *Sanchez*, *supra*, 63 Cal.4th at p. 699 to support this contention. That case is distinguishable, however. In *Sanchez*, the defendant was apprehended in Delhi gang territory in the possession of saleable drugs and a firearm.

(*Sanchez*, *supra*, 63 Cal.4th at p. 671.) The prosecution sought to prove that the defendant possessed those contraband items for the benefit of the Delhi gang. The "great majority of the evidence that defendant associated with Delhi and acted with intent to promote its criminal conduct was [police officer] Stow's description of defendant's prior police contacts reciting facts from police reports and [gang injunction]" that he did not author or otherwise have personal knowledge of. (*Id.* at p. 699.) The Court held that Stow's testimony was inadmissible "case-specific hearsay" from which the jury could not conclude "that when defendant possessed drugs for sale in Delhi territory, he was associated with the gang, would pay a tax, or intended to 'promote, further, or assist in any criminal conduct by gang members.' (Pen. Code, § 186.22, subd. (b)(1).)" (*Ibid.*) Here, defendant does not contend that Strasner's opinion suffered from the same infirmity. To the contrary, he accurately characterizes it not as "case-specific hearsay" but as a "generalized opinion," which remains admissible under *Sanchez*. (See *id.* at pp. 684-686.) Strasner offered his opinion in the context of a proper hypothetical, and the factual bases for that opinion were not challenged. We are not persuaded that admissible expert testimony was insufficient to support an inference that defendant sold methamphetamine for the benefit of his gang. "'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

Defendant also contends that this case is analogous to *People v. Ochoa*, *supra*, 179 Cal.App.4th 650 and *In re Daniel C.* (2011) 195 Cal.App.4th 1350, in which the appellate court found

insufficient evidence supported application of the gang enhancement. Comparison with other sufficiency of the evidence cases is rarely helpful, since each case necessarily depends on its own facts (*People v. Thomas* (1992) 2 Cal.4th 489, 516), and defendant's reliance on these cases is not persuasive. The evidence supporting the enhancement findings in this case includes statements from defendant indicating that his drug business was gang-related and expert testimony about the taxation system the gangs use to further their criminal activities. A trier of fact readily could infer from this evidence that defendant's drug crimes benefitted his gang and helped to further additional gang members' crimes.

II. *Brady* Evidence

A. Background and Preservation of Argument

Following defendant's convictions, his attorney learned from the prosecution that one of the law enforcement witnesses, Detective Frank, had been found civilly liable in a federal lawsuit alleging false arrest and malicious prosecution. Defendant filed a motion for new trial pursuant to section 1181, subdivision 8, contending that this newly discovered evidence called Frank's credibility and therefore defendant's convictions into question. As defendant acknowledges in his opening brief, "the primary thrust of [his] new trial motion was focused on a newly discovered evidence theory regarding Frank's civil liability." The trial court rejected that theory and denied the motion.

Defendant's new trial motion also, as he puts it, "alluded to the fact that the discovery . . . should have been disclosed prior to [his] trial under compulsion of the 'Brady doctrine.'" He accordingly now contends that the prosecution violated *Brady*, *supra*, 373 U.S. 83 by failing to timely disclose the potentially

impeaching information about Frank, and that, if it had, there is a reasonable probability that the result of his trial would have been different.

The Attorney General contends that defendant forfeited any *Brady* claim by neglecting to more thoroughly develop and argue the issue below. We disagree. Defendant's invocation of *Brady* in his motion was quite slim—he merely asserted, without providing a case citation, that the information about Frank "should have been presented prior to trial under the Brady doctrine," and that the "evidence should have been turned over to the defense before trial under the Brady doctrine." Nevertheless, when ruling on the motion, the trial court characterized defendant's contentions as "information concerning Detective Frank's civil judgment should have been provided to the defense," and his ability to impeach Frank was prejudicially compromised. These comments, which implicate the substance of *Brady* and not merely newly discovered evidence, indicate that the trial court understood and considered defendant's *Brady*-related assertions. We accordingly consider defendant's *Brady* argument on the merits.

B. Governing Principles

"In *Brady*, the United States Supreme Court held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' [Citation.] Thus, under *Brady* and its progeny, the state is required to disclose to the defense any material, favorable evidence. [Citations.] Favorable evidence includes both evidence that is exculpatory to the defendant as well as evidence that is damaging to the

prosecution, such as evidence that impeaches a government witness." (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1471-1472.) Materiality "requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result."'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043 (*Salazar*).)

A defendant must make a three-part showing to establish a successful *Brady* claim. He or she must show (1) the evidence in question was favorable to the defendant, either because it was exculpatory or because it was impeaching; (2) the prosecution willfully or inadvertently suppressed the evidence; and (3) defendant suffered prejudice. (*Salazar*, *supra*, 35 Cal.4th at p. 1043.) "Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.'" (*Ibid.*) "'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, [citations]. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony."'" (*Id.* at p. 1050.) "Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim [citation], are subject to independent review. [Citation.] Because the [trier of fact] can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to

great weight when supported by substantial evidence." (*Id.* at p. 1042.)

C. Analysis

The Attorney General does not dispute defendant's contentions that evidence of the civil judgment against Frank was favorable to him and that the prosecution neglected to timely forward it to him. It disagrees with defendant's argument as to the third prong of *Brady*, that "the results of appellant's case in regards to his conviction for the attempted murder would have been different." We agree that defendant has not demonstrated the requisite prejudice.

Defendant argues that "virtually all of the evidence" implicating him in the Loera shooting "was subject to considerable questions" and "would have reasonably been undercut by evidence that Detective Frank had manipulated or otherwise suppressed exculpatory evidence" in the case that gave rise to his civil liability. Undoubtedly the eyewitness testimony of Loera, an admitted felon, former gang member, and heroin addict, was subject to impeachment on a variety of grounds. But there is nothing in the record indicating that Loera's testimony was in any way influenced by Frank or that Frank had appreciable contact with any of the officers with whom Loera directly interacted. Defendant's suggestion that Frank engaged in a "cooperative endeavor" with officers Holmes, Newton, or Vasquez is speculative at best. Even if the jury had heard that Frank conspired with other officers to bolster evidence on a previous occasion, it is unclear that the jury's assessment of lay witness Loera's testimony would have been affected.

Defendant also asserts that Frank's interpretation of certain jailhouse phone calls, including those referencing "Jap"

and "the matrix," was crucial to the prosecution's theory that defendant was one of the shooters. He contends that the "persuasive strength of Frank's interpretation would reasonably have been substantially compromised" if he had been able to impeach Frank with evidence of Frank's civil liability. However, Loera provided direct evidence that defendant tried to kill him, and Newton and Holmes corroborated portions of his story. Ballistics evidence tied the shell casings found at the scene to a gun found in defendant's car the very next day, and defendant himself told Lilburn that the gun from his car "goes with my . . . the attempted murder on Chevy Chase." Defendant's racially derogatory comments were plain enough for the jury to understand, particularly where Aguirre clarified during the same phone call that he and defendant were discussing "the Asian guy," and Loera previously had explained the racial underpinnings of his gang monikers. The ambiguous reference to "the matrix" arguably was clarified by Frank's testimony, but the jury also heard from Loera himself that he managed to dodge a barrage of bullets, a claim that the ballistics evidence corroborated.

Defendant recognizes that Gothard's suggestion that defendant and his cohorts shot Loera in self-defense "was developed and presented independently of Frank's involvement and testimony and thus evidence regarding the [civil] case would not have directly influenced the juror's determination of that issue." He nonetheless contends that the Frank impeachment evidence would have affected the jury's confidence in the investigation and, when coupled with Loera's conflicting testimony about the bullets he recovered from the scene, "may have raised a reasonable doubt that the prosecution had proven

the lack of self-defense." We are not persuaded. Gothard's testimony was not corroborated by any evidence in the case; the ballistics evidence directly contradicted Gothard's testimony that Loera fired the only shots by tying defendant's gun to the eight 9-millimeter casings recovered from the scene.

There is no reasonable probability that more timely disclosure of impeachment evidence pertaining to Frank would have affected the outcome of this case. Defendant accordingly has not demonstrated a *Brady* violation.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.