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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. FRED SALAZAR and SERGIO MADRIGAL, Defendants and Appellants.	B265431 (Los Angeles County Super. Ct. No. BA378151)

APPEAL from judgments of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed as modified.

Law Offices of Michael R. Kilts and Michael R. Kilts for Defendant and Appellant Fred Salazar.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Sergio Madrigal.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Kenneth C. Byrne, Scott Taryle and Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

Fred Salazar and Sergio Madrigal (collectively appellants) were convicted by jury of attempted premeditated murder (Pen. Code, §§ 664/187, subd. (a))[1] and mayhem (§ 203). Madrigal also was convicted of possession of a firearm by a felon (§ 12021, subd. (a)(1)).

Madrigal contends the trial court's imposition of a restitution fine based on the amount authorized at the time of sentencing rather than the time of the offense violates ex post facto laws. He argues, and respondent concedes, that he is entitled to additional custody credits, and he requests that we review the transcript of his *Pitchess* hearing. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) Salazar challenges the sufficiency of the evidence to sustain his convictions for attempted murder and mayhem and to support the imposition of a gang enhancement. Salazar also contends his Confrontation Clause rights were violated by the admission of testimonial hearsay by the gang expert. As to Madrigal, we order the restitution fine to be reduced to $200 and order the abstract of judgment modified to reflect more days of custody credit and otherwise affirm. As to Salazar, we affirm in all respects.

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1 Unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

A. *Attempted Murder of Celica Pompa*

Celica Pompa lived in El Sereno and was friends with members of the El Sereno gang. She attended parties with El Sereno gang members and dated a member of the gang for four years. She had known Madrigal for about 10 years and knew that he was a member of the El Sereno gang, with the gang moniker of "Player." Pompa met Salazar in 1997 and knew that his gang moniker was "Rascal." Pompa knew that Salazar was a member of the El Sereno gang and had previously been a member of the City Terrace gang.

Around 9:00 p.m. on November 6, 2010, Pompa attended a birthday party at the home of her friend Wendy in El Sereno. Wendy picked up Pompa from the drug and alcohol rehabilitation center where Pompa was living and drove her to the party. There were 20-25 people at the party, including Madrigal. Madrigal and Pompa spoke for about half an hour and then they left together to attend another party. Madrigal drove Pompa in his car.

Madrigal asked Pompa if she minded if they picked up Salazar. Pompa said she did not mind, so they drove to Salazar's apartment in Alhambra, and Madrigal went inside to get Salazar. The three of them drove to the party, a baby shower in El Sereno for Pompa's friend Jesse.

After they arrived at the party, Pompa saw Madrigal and Salazar talking to each other. She saw Madrigal lift his shirt and show Salazar a gun in his waistband.

After spending a short time at the baby shower, Pompa and appellants went to the car to return to the party at Wendy's house. Appellants told Pompa they wanted to smoke marijuana, but Pompa said she could not be around marijuana because of her rehabilitation program, so they told her they would go to a nearby park to smoke. Pompa agreed because she wanted to use the restroom at the park.

Madrigal drove them to Guardia Park, and they all exited the car. Pompa was walking slightly ahead of appellants with her back toward them when they suddenly jumped her and started hitting her. They hit and kicked her for several minutes, and Pompa fell to the ground. Pompa asked why they were attacking her, and one of them said, "This is for your faggot ass brother."[2] After that she was shot repeatedly. Pompa pretended she was dead until she heard appellants run to the car and drive away.

Pompa called for help, and some people came to help her. Someone asked Pompa who had done this to her, but she did not tell them because she was afraid of "being a rat." Pompa passed out and was taken to the hospital, where she stayed for a month. Pompa was still suffering from the effects of the attack at the time of trial.

B. *Police Investigation*

Los Angeles Police Officer David Manriquez responded around 12:10 a.m. to Guardia Park. He found Pompa on the ground suffering

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[2] Pompa was not sure which one of them made the statement.

from multiple gunshot wounds. He also found eight nine-millimeter bullet casings on the ground, all of which were subsequently determined to have been fired from the same firearm.

Los Angeles Police Detective Hector Salas interviewed Pompa at the hospital, but she initially was reluctant to cooperate with him. Later that day, Detective Salas received a call from Pompa's brother, Alex Villa, who said his sister was shot because of a dispute between himself and someone named Angel Sanchez.

Pompa testified that, when she heard appellants say, "this is for your faggot ass brother," she thought of a woman with whom Villa had been romantically involved. When Villa was 14 or 15 years old, he became involved in a relationship for five to six years with someone named Esmerelda. After that relationship ended, Esmerelda was in an eight-year relationship with Sanchez, an El Sereno gang member. Villa became involved with Esmerelda again after Sanchez was incarcerated.

When Pompa learned her brother was cooperating with the investigation, she decided to speak with Detective Salas. Pompa identified appellants as the perpetrators and told Detective Salas their gang affiliation and gang monikers. She also identified them in photographic lineups.

C. *Gang Evidence*

The parties stipulated that Salazar was an El Sereno gang member with the moniker "Rascal," and that he had been arrested with Sanchez in 1997 and 2004. The parties also stipulated that Madrigal suffered a felony conviction prior to November 6, 2010.

Los Angeles Police Officer Aaron Skiver testified as a gang expert. Officer Skiver testified that he was familiar with the El Sereno gang, which claimed Guardia Park as part of its territory. He stated that El Sereno gang members could commit crimes inside the park with little fear of being reported because gang members lived in houses on every side of the park.

Officer Skiver had known Madrigal for nine to ten years; he identified Madrigal's tattoos as gang tattoos and believed that Madrigal was an El Sereno gang member, based primarily on Madrigal's own admission. Madrigal had admitted he was an El Sereno gang member in every contact with Officer Skiver.

Officer Skiver was not familiar with Salazar until this case. Salazar did not have any tattoos, although Officer Skiver testified that Salazar admitted being a City Terrace gang member in 1999.

Officer Skiver testified that he researched Angel Sanchez as part of his investigation for this case by examining Sanchez's field identification (FI) card. In 2003, Sanchez was "documented and stopped with several El Sereno gang members" and was identified as an El Sereno gang member. The FI card indicated that Sanchez was an associate of the El Sereno gang. He had been seen with numerous people whom Officer Skiver personally recognized as El Sereno gang members.

Given a hypothetical based on the facts of this case, Officer Skiver opined that the offense was committed for the benefit of the gang. He explained that the offense was committed by two active El Sereno gang members; they took the victim to a "stronghold" in their territory; and

the attack sent a message to Pompa and her family "regarding an ongoing conflict that's been going on for years." Officer Skiver testified that the offense benefits the gang "by raising the level of fear and intimidation, not only among rival gangs," which makes it easier for the gang to commit crimes in the future.

II. *Defense Evidence*

A. *Madrigal's Evidence*

Elsa Deras testified that around 2:00 p.m. on July 28, 2009, she drove to pick up Madrigal to have lunch. Deras did not have a gun in her car and she did not see Madrigal put a gun in the car. While they were driving, they were stopped by police officers, who asked them to step out of the car and began searching her car, tearing out the back seat and the side panels. Officer Skiver was one of the officers; after searching the car, he showed them a gun that he said he found in the car. Deras was arrested, but she said she had never seen the gun before. Deras testified that the officers who interviewed her told her she would be blamed for the gun if she did not blame Madrigal. Officer Skiver later asked Deras if Madrigal ever told her it was his gun or if Madrigal had ever been violent with her.

Amada Hernandez testified that on November 2, 2010, Madrigal began living with her and her daughter Marcella, who was Madrigal's girlfriend. Hernandez had not met Madrigal before he moved in, but she knew that he recently had been released from prison. On November 6, 2010, Madrigal left Hernandez' house around 8:30 p.m. and returned around 11:30 p.m. She did not see him leave again after that.

Hernandez knew what time Madrigal returned because he went into her room to pick up his son.

B. *Salazar's Evidence*

On November 6, 2010, Martha De Leon held a birthday party at her home for her son, who was turning one. Salazar and his wife Cleotilde Calderon, known as "Sochi," arrived at the party around 4:00 p.m. According to De Leon, there were 30 to 40 people at the party, and Salazar did not leave until after 12:30 a.m. She was aware of the time because her daughter returned after her midnight curfew, and De Leon commented about her lateness to the party guests. De Leon recalled Salazar and Sochi being at the party throughout the evening, although Salazar was not in her presence all the time. Around 8:00 p.m., the men at the party went inside the house to watch a sporting event until 10:00 p.m., when they returned outside, where everyone else was gathered.

The outside area where the party was held was approximately 19 feet by 30 feet. The area was small enough that one generally could look around and see everyone else at the party.

Sochi testified that she and Salazar arrived at the party between 4:00 and 5:00 p.m. and left after midnight. Sochi had known Salazar for approximately 16 years and been married to him for 6 years. Sochi testified that Salazar was not a gang member.

Raul and Veronica Castillo also attended De Leon's party. They both testified that Salazar and Sochi were still at the party when they left between 11:45 p.m. and midnight. They both remembered because

they said good bye to Salazar when they were leaving. Raul Castillo, a Los Angeles County probation officer, testified that he had known Salazar approximately 20 years and did not think he was a gang member. Veronica Castillo had known Salazar approximately 16 years and did not believe he was a gang member.

Evelyn Espinoza also attended the party. She left the party around 1:00 a.m. and recalled Salazar leaving the party about half an hour before she did. She had known Salazar about five years and did not think he was a gang member.

III. *Rebuttal Evidence*

Los Angeles Police Officer Jose Hidalgo was involved in the July 28, 2009 search of Deras' car and discovery of the gun. Officer Hidalgo testified that when Madrigal was booked, he spontaneously stated, "I told that bitch to take off and hit some corners so I could throw the strap out of the window, but that bitch doesn't know how to drive."

Los Angeles Police Detective Martin Williams attempted to interview De Leon, Raul Castillo, Sochi, and Espinoza in January and July of 2013. De Leon agreed to be interviewed, but Detective Williams never interviewed her despite three attempts to set up the interview. Castillo, Sochi, and Espinoza did not want to be interviewed without Salazar's attorney being present.

IV. *Procedural Background*

Appellants were charged by amended information with count 1, premeditated attempted murder, and count 3, mayhem. Madrigal was

charged in count 2 with possession of a firearm by a felon, with allegations that he personally discharged a firearm causing great bodily injury. The information further alleged as to all counts that the offenses were committed for the benefit of a gang; as to counts 1 and 3 that a principal personally and intentionally discharged a firearm causing great bodily injury; and that Madrigal had suffered one prior strike.[3]

The jury found appellants guilty on all counts and found the gang and firearm allegations to be true. The trial court found the prior conviction allegation against Madrigal to be true. The court sentenced Madrigal to a term of 70 years to life. The court sentenced Salazar to a term of 32 years to life. Appellants timely appealed.

DISCUSSION

I. *Madrigal's Claims*

A. *Pitchess Hearing*

On October 6, 2011, Madrigal filed a *Pitchess* motion for discovery of personnel records of Officer Skiver regarding allegations of dishonesty and use of excessive force. The court held an in camera hearing but did not order any materials to be disclosed. Madrigal asks us to independently review the transcript of the *Pitchess* hearing, and respondent does not object to the request.

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[3] The trial court denied a *Marsden* motion on behalf of Madrigal. (*People v. Marsden* (1970) 2 Cal.3d 118.)

We have done so. The trial court's decision regarding the discoverability of material in police personnel files is reviewed under the abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.) We find no abuse of discretion.

B. *Restitution Fine*

Madrigal contends the trial court erred in imposing a minimum restitution fine above the statutory minimum authorized at the time of the offense and in imposing restitution as to each count. He argues that the imposition of the incorrect amount violated the constitutional prohibition against ex post fact laws.[4] We agree with Madrigal and therefore modify the restitution fine to be $200.

During sentencing, the trial court stated: "[Madrigal] is to pay the minimum mandatory restitution fine to the state restitution fund in the amount of $300. [¶] He is to pay the same to a parole revocation fund

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[4] Respondent contends that Madrigal forfeited this issue by failing to raise it in the trial court. However, "an unauthorized sentence may be corrected at any time even if there was no objection in the trial court. [Citations.]" (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249; *People v. Smith* (2001) 24 Cal.4th 849, 854.) Moreover, we address the issue in order to foreclose Madrigal's ineffective assistance of counsel claim. (See *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1190 [trial counsel's "fail[ure] to object to the trial court's mistaken use of the minimum statutory fine that was in effect at sentencing to calculate appellant's restitution fund fine," in violation of ex post facto laws constituted ineffective assistance of counsel]; *People v. Butler* (2003) 31 Cal.4th 1119, 1128 [if "applying a forfeiture rule . . . would likely have the effect of converting an appellate issue into a habeas corpus claim of ineffective assistance of counsel for failure to preserve the question by timely objection . . . , we would be loath to invoke a rule that would proliferate rather than reduce the nature and scope of legal proceedings"].)

under [§ 1202.45, subd. (a)]. That is stayed. The stay to become permanent unless if he is released on parole, he violates parole, at which time the fine will be owed as to each count." The minute order states that Madrigal is to pay a restitution fee (§ 1202.4, subd. (b)) of $300 on each count and a parole restitution fine (§ 1202.45) of $300 on each count. The abstract of judgment indicates a restitution fine of $900 and a parole restitution fine of $900.

Madrigal argues that the trial court's statement that he is to pay the minimum restitution fine indicates the court's intent to impose the minimum amount, which was $200 at the time of the offense. He further contends that the court erred in imposing a restitution fine and a parole restitution fine as to each count. Madrigal also points out that the court erred in basing his restitution fine on his conviction for count 3, mayhem, because the court stayed that sentence under section 654.

The application of the law in effect at the time of a defendant's sentencing rather than the law applicable at the time of the offense violates the constitutional prohibition against ex post facto laws. (*People v. Souza* (2012) 54 Cal.4th 90, 143 (*Souza*).) "It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions. [Citations.]" (*Ibid.*)

At the time of the offense in November 2010, section 1202.4 provided in pertinent part: "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The

restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony." "Section 1202.45 similarly requires 'an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4,' '[i]n every case where a person is convicted of a crime and [the] sentence includes a period of parole . . . . This additional parole revocation restitution fine . . . shall be suspended unless the person's parole is revoked.'" (*People v. Soria* (2010) 48 Cal.4th 58, 62.)

Respondent contends that the trial court actually imposed a single $900 restitution fine and a single $900 parole revocation fine, despite "statements" to the contrary the court made during oral pronouncement of judgment. This reasoning is flawed and not supported by the record. "In a criminal case, it is the *oral pronouncement of sentence* that constitutes the judgment. [Citation.]" (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) Thus, "[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]" (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

Here, the trial court stated that Madrigal was to pay "the minimum mandatory restitution fine to the state restitution fund in the amount of $300." The court thus explicitly stated its intent to impose the minimum mandatory amount, which at the time of the offense was $200, not $300. The court never stated that it was imposing a restitution fine of $900.

Respondent relies on *People v. McElroy* (2005) 126 Cal.App.4th 874 (*McElroy*), but *McElroy* is distinguishable. There, the trial court imposed restitution as follows: "'A restitution fine per 1202.4(b) of [$]600; [$]300 for each felony count. A restitution fine suspended—I have to address—let[']s make it [$]200 for each felony count, [$]100 each for misdemeanor [*sic*] for a total [$]600. Also a restitution fine suspended per 1202.45 in the same amount.'" (*Id.* at p. 884.) The defendant argued that his parole revocation restitution fine under section 1202.45 needed to be reduced because "the trial court specifically assigned $200 of the restitution fine to the misdemeanor counts, and defendant will not be placed on parole for either misdemeanor offense." (*Id.* at pp. 884-885.) The appellate court disagreed, stating: "Regardless of the trial court's reasoning in setting the restitution fine at $600, the court imposed and [§ 1202.4] authorizes only a single restitution fine in each case. Thus, there was *one* fine of $600 imposed pursuant to section 1202.4. Defendant was sentenced to state prison and, therefore, his sentence allows for parole. Since the parole revocation fine must be in the same amount as the section 1202.4 restitution fine, it was properly set at $600." (*Id.* at p. 885.)

Unlike *McElroy*, the trial court here did not specify that the total amount of restitution was $900. Instead, the trial court specifically stated that Madrigal "is to pay the minimum mandatory restitution fine to the state restitution fund in the amount of $300." The court's reliance on the minimum mandatory amount at the time of sentencing violates the ex post facto laws. (See *Souza*, *supra*, 54 Cal.4th at p. 143.)

After imposing the minimum mandatory restitution fine, the trial court imposed and stayed the parole revocation restitution fine, stating that if Madrigal violates parole, "the fine will be owed as to each count." At the time of the offense, section 1202.4, subdivision (b)(2) permitted the court to set a felony restitution fine "as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." The court's statement that the parole revocation fine would be owed as to each count if Madrigal violates parole indicates that the court may have been relying in part on this subdivision in deciding the amount of the parole revocation fine. However, the court did not indicate its intent to do so in imposing the restitution fine, and the parole revocation fine is to be imposed in the same amount as the restitution fine. (§ 1202.45.)

Even if the trial court intended to rely on this subdivision to determine the amount of Madrigal's fine, the $900 amount set forth in the abstract of judgment would be incorrect for two reasons. First, it incorrectly relies on the minimum mandatory amount at the time of sentencing ($300), not the time of the offense. Second, by multiplying $300 by three, the amount of the fine relies on all three counts of conviction. However, the trial court stayed the sentence as to count 3, mayhem. "[T]he section 654 ban on multiple punishments is violated when the trial court considers a felony conviction for which the sentence should have been stayed pursuant to section 654 as part of the court's calculation of the restitution fine under the formula provided by section

1202.4, subdivision (b)(2)." (*People v. Le* (2006) 136 Cal.App.4th 925, 934.)

Respondent argues that the $900 fine was authorized because it was below the statutory maximum, which was $10,000 at the time of the offense, citing *People v. Sencion* (2012) 211 Cal.App.4th 480 (*Sencion*), *People v. Schoeb* (2005) 132 Cal.App.4th 861 (*Schoeb*), and *People v. Enos* (2005) 128 Cal.App.4th 1046 (*Enos*). However, those cases are inapposite. None of them involved a violation of the ex post facto laws. The issue in *Schoeb* and *Enos* was whether the trial court properly imposed restitution fines for separate cases that were resolved by one plea agreement. In both cases, the courts held that "the imposition of multiple restitution fines spread over several cases that cumulatively did not exceed the $10,000 statutory maximum could never constitute prejudicial error. [Citation.]" (*Schoeb*, *supra*, 132 Cal.App.4th at pp. 864-865 [discussing and following *Enos*, *supra*, 128 Cal.App.4th at p. 1049].) Because *Schoeb* and *Enos* did not address the imposition of a restitution fine in violation of ex post facto laws, they do not support respondent's position.

Analogously, in *People v. Soto* (2016) 245 Cal.App.4th 1219 (*Soto*), the trial court imposed restitution fines for counts that arose from the same act under section 654. On appeal, the People argued that, although it was "technical error to impose a separate restitution fine for the two convictions and defendant should have been subject to only one fine . . . , defendant was not prejudiced by the imposition of the two fines, because the total restitution fine imposed was $450, well within

the statutory range of $300 to $10,000 for felony convictions. [Citation.]" (*Id.* at pp. 1234-1235.) The appellate court disagreed, explaining that "[d]efendant . . . is not claiming that he was prejudiced by the trial court's order of restitution. He is arguing that the restitution fine was unauthorized and an act in excess of the court's jurisdiction because it violated section 654. 'An unauthorized sentence is just that. It is not subject to a harmless error analysis. Nor does it ripen into a sentence authorized by law with the passage of time.' [Citation.]" (*Id.* at p. 1235.) Similar to *Soto*, Madrigal is not contending he was prejudiced by the court's restitution order but that the fine was unauthorized under ex post facto laws.

Sencion also is inapposite. There, the court held that "the trial court erred in two respects." (*Sencion*, *supra*, 211 Cal.App.4th at p. 483.) First, by imposing a restitution fine and a parole revocation restitution fine as to each count, and second, by basing the restitution fines on counts that were stayed under section 654. (*Ibid.*) *Sencion* does not address the imposition of a restitution fine in excess of the authorized statutory minimum at the time of the offense and, in fact, supports Madrigal's contentions that the trial court erroneously imposed a fine as to each count and based the fine on the stayed count. We therefore modify the judgment to reduce the restitution and parole revocation fines from $900 to $200.

C. *Custody Credits*

The parties agree that Madrigal is entitled to additional custody credits. "Calculation of custody credit begins on the day of arrest and

continues through the day of sentencing. [Citation.]" (*People v. Denman* (2013) 218 Cal.App.4th 800, 814.) Madrigal was arrested on November 15, 2010 and sentenced on May 15, 2015. Respondent correctly states that Madrigal is entitled to 1,643 days, not the 1,620 days calculated by the trial court. He also is entitled to receive good time/work time conduct credits up to a maximum of 15 percent of the actual period of confinement, which is 246 days. (*People v. Chism* (2014) 58 Cal.4th 1266, 1336-1337; *People v. Jackson* (2013) 221 Cal.App.4th 1222, 1241.) We therefore will order the abstract of judgment modified to reflect a total of 1,889 days of custody credit.[5]

II. *Salazar's Claims*

A. *Sufficiency of the Evidence to Sustain Attempted Murder and Mayhem*

Salazar contends the evidence is insufficient to sustain his convictions. He argues that Pompa was not a credible witness because she had a compelling motive to lie and that he "put forth a strong, unimpeached defense case."

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most

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[5] Respondent further argues that the abstract of judgment should be modified to reflect that the firearm enhancement on count 1 was not stayed. However, as Madrigal points out, the abstract of judgment correctly notes that an additional term of 25 years to life was imposed consecutively on count 1 under section 12022.53, subdivision (d). The abstract of judgment notes that the other gun allegations, under subdivisions (b) and (c), were stayed, which correctly reflects the court's pronouncement of sentence.

favorable to the judgment to determine whether it contains 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.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585 (*Elliott*).)

Salazar sets forth numerous reasons that Pompa's testimony should not have been believed, such as her history of drug use, her prior conviction, her initial lack of cooperation with the police, and an arrest for shoplifting after the shooting. Salazar also argues that Pompa's story regarding her brother was not credible. Finally, Salazar argues that his alibi witnesses were credible, citing their employment, their lack of gang ties, and their lack of any prior felony convictions.

Despite any alleged inconsistencies in Pompa's story and the alleged credibility of Salazar's alibi witnesses, "[w]e do not reweigh the evidence or reassess the credibility of witnesses. [Citation.] 'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there substantial evidence to support'" the jury's verdict. [Citation.]' [Citation.]" (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1425.) The jury's verdict indicates that the jury simply believed the prosecution's evidence, not Salazar's. Salazar has

not shown that Pompa's testimony "describes facts or events that are physically impossible or inherently improbable." (*Elliott*, *supra*, 53 Cal.4th at p. 585.) Her testimony that Salazar was one of her attackers therefore is sufficient to sustain the convictions. (See *ibid.* ["the testimony of a single witness is sufficient to support a conviction."].)

B. *Sufficiency of the Evidence to Support Gang Enhancements*

Salazar contends the evidence is insufficient to support the gang enhancements. "'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We conclude the evidence is sufficient to support the jury's gang enhancement finding.

"[S]ection 186.22(b)(1) . . . provides: '[A]ny 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, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 59 (*Albillar*).)

Salazar relies on language in *Albillar* stating that "[n]ot every crime committed by gang members is related to a gang." (*Albillar*,

supra, 51 Cal.4th at p. 60.) Although this is true, there is sufficient evidence here that the offense here was related to the gang.

Salazar and Madrigal were both members of the El Sereno gang. They committed the crime in a park claimed by the El Sereno gang, where gang members could commit crimes with little fear of reprisal. While committing the crime, they told Pompa the offense was because of her brother, who told the police he had a dispute with Sanchez, another El Sereno gang member. Pompa testified that she was afraid to identify appellants, and Officer Skiver testified that the crime benefitted the gang by causing fear and intimidation. Pompa further testified that she had lived with her brother in Orange County for several months instead of returning to El Sereno after her drug rehabilitation program because she was afraid of retaliation for her testimony against El Sereno gang members. This evidence is sufficient to support the gang enhancement. (See *Albillar*, *supra*, 51 Cal.4th at pp. 61-62 [finding sufficient evidence to support gang enhancement where the defendants "not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together," and "[t]hey relied on the gang's internal code to ensure that none of them would cooperate with the police and on the gang's reputation to ensure that the victim did not contact the police."].)

C. *Confrontation Rights under People v. Sanchez*

Salazar filed a supplemental brief raising a Confrontation Clause challenge to the gang expert testimony pursuant to *People v. Sanchez*

(2016) 63 Cal.4th 665 (*Sanchez*), in which the court held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes experts from "rely[ing] on case-specific hearsay to support their trial testimony. [Citation.]"[6] (*People v. Williams* (2016) 1 Cal.5th 1166, 1200.) "'Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.' [Citation.]" (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 406.)

"In *Sanchez*, *supra*, 63 Cal.4th 665, the Supreme Court considered whether several different categories of out-of-court statements were testimonial. First, the court considered statements in written police reports referenced by the gang expert in testifying about the defendant's prior police contacts. [Citation.] *Sanchez* concluded the statements at issue in the reports were testimonial, reasoning that, although the reports were not as formal as an affidavit, they 'relate[d] hearsay information gathered during an official investigation of a completed crime.' [Citation.] Second, *Sanchez* considered a 'STEP' (California Street Terrorism Enforcement and Preservation Act; § 186.20 et seq.) notice the gang expert referenced in opining the defendant was a gang member. [Citation.] A STEP notice "'informs

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[6] Respondent contends that Salazar forfeited the Confrontation Clause claim by failing to object at trial on those grounds. However, trial counsel objected to Officer Skiver's testimony about the FI card on hearsay grounds. The trial court overruled the objection on the basis of the law at the time, stating, "This man is qualified as an expert. He can rely on hearsay for offering opinions." We conclude that Salazar sufficiently raised the issue.

suspected individuals that law enforcement believes they associate with a criminal street gang.'" [Citation.] *Sanchez* concluded the statements in the portion of the STEP notice at issue were testimonial because the notice was a formal record of information about the subject of the notice, including 'biographical information, whom he was with, and what statements he made.' [Citation.] The purpose of the record was 'to establish facts to be later used against him or his companions at trial' and 'to prove that the recipient had actually been made aware that he was associating with a criminal street gang and that he might receive an enhanced punishment should he commit a future crime with members of that gang.' [Citation.] . . . Finally, *Sanchez* concluded that a field identification card describing a police contact with the defendant would be 'akin' to a police report and, thus, testimonial '[i]f the card was produced in the course of an ongoing criminal investigation.' [Citation.]" (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 584 (*Ochoa*).) *Sanchez* "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. omitted.)

Salazar contends the FI card relied on here by Officer Skiver is similar to the STEP notice found to constitute testimonial hearsay in *Sanchez*. We agree. The FI card regarding Sanchez was produced in the course of the criminal investigation. Officer Skiver did not personally know anything about Sanchez until he began researching him as part of his investigation in this case. Based on information gleaned from the FI card, Officer Skiver testified that Sanchez was stopped with El Sereno gang members in 2003, was seen with people Officer Skiver knew to be El Sereno gang members, and admitted he was an associate of the Locke Street gang.[7]

One of the facts used in the hypothetical given to Officer Skiver was that "[t]he female victim's brother at one point had a relationship with a female [who] also at one point had a relationship with an El Sereno gang member or an associate." Thus, Sanchez's status as an El Sereno gang member was "treat[ed] as true and accurate to support the expert's opinion" that the offense was committed for the benefit of the gang. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) This evidence thus constitutes case-specific hearsay in violation of *Sanchez*. (See *Ochoa*, *supra*, 7 Cal.App.5th at p. 589 ["that someone admitted being a gang member is also a case-specific fact."].)

Nonetheless, we conclude that the admission of the testimony was harmless beyond a reasonable doubt. (See *Sanchez*, *supra*, 63 Cal.4th at pp. 698-699 [considering whether the improper admission of

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[7] According to Officer Skiver, the Locke Street gang was a clique of the El Sereno gang.

testimonial hearsay was harmless beyond a reasonable doubt]; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1176 [same].) Unlike *Sanchez*, in which the testimonial hearsay was relied upon to establish the defendant's gang membership (*id.* at p. 698 [noting that the gang expert "recounted facts contained in the police reports and STEP notice to establish defendant's [gang] membership"]), the FI card here was used to establish that an unrelated party was a gang member in order to support the prosecution's theory regarding appellants' motive, which in turn supported the imposition of the gang enhancement. However, there was other evidence supporting the gang enhancement.

Officer Skiver based his opinion that the offense was committed for the benefit of the gang on various facts, not solely on Sanchez's alleged gang membership. Officer Skiver explained that the crime was committed by "two active gang members, El Sereno gang members. Obviously, they have a history together of committing crime. They take this victim . . . deep[] within the boundaries, a stronghold within the territory of El Sereno, a place that is safe to them, basically the female is taken or lured inside this stronghold where she is attacked, and a message is sent to her regarding an ongoing conflict that's been going on for years, and basically retaliates against the female, sending a message to not only her, but the rest of her family, which creates the basic – we're back to the basics again of fear and intimidation. [¶] Basically, that's how the gangs function. They are sending a message."

In addition, Officer Skiver's was not the only testimony that Sanchez was an El Sereno gang member. Pompa stated that Sanchez

was an El Sereno gang member when she testified about her brother's involvement with Esmerelda.

Because Officer Skiver's expert opinion was based on facts other than Sanchez's gang membership, and Pompa testified that Sanchez was an El Sereno gang member, we conclude the erroneous admission of the testimonial hearsay regarding Sanchez was harmless beyond a reasonable doubt.

DISPOSITION

The judgment as to Salazar is affirmed in all respects. As to Madrigal, the judgment is modified by reducing the $900 restitution and parole revocation fines to $200. In addition, we order the clerk of the court to amend the abstract of judgment to reflect that Madrigal is entitled to 1,643 days of actual custody credit and 246 days of conduct credit for a total of 1,889 days of custody credit and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment against Madrigal is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. COLLINS, J.