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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

HERIBERTO NAVARRO,

Defendant and Appellant.

B291877

(Los Angeles County  
Super. Ct. No. BA455195)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed and modified.

Leonard J. Klaif, under appointment by the Court of Appeal, for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

A jury convicted appellant Heriberto Navarro of attempted murder, assault upon a police officer, possessing illegal firearms, and possessing methamphetamine. The jury also found Navarro's crimes were committed for the benefit of his gang and with the specific intent to promote and further criminal conduct by his gang. The trial court increased Navarro's sentence based on these findings.

Navarro appeals the imposition of the gang enhancements, arguing they are not supported by substantial evidence. The People concede, and we agree, substantial evidence does not support the enhancement with respect to the conviction for possessing methamphetamine. With respect to the remaining counts, we conclude there was substantial evidence upon which a reasonable jury could conclude Navarro committed his crimes for the benefit of his gang and with the specific intent to promote further criminal activity by his gang.

Accordingly, we strike the gang enhancement as to the methamphetamine count and affirm in all other respects.

## **FACTS AND PROCEDURAL BACKGROUND**

### **A. Substantive Offense**

In the early morning hours of October 31, 2015, Los Angeles Police Department Officers Bryan Schilling and Brian Cooney were patrolling the area of Toberman and 17th streets because they had been advised that a member of the 18th Street gang had been shot by a member of the Burlington Loco gang.

At approximately 1:20 a.m., the officers observed Navarro walking toward the corner of 17th and Toberman. Navarro made a gesture toward the front of his waistband, causing Schilling to

believe Navarro might be carrying illegal drugs or a gun. The officers pulled up next to Navarro; Schilling opened the door and asked Navarro what he was doing. Navarro turned, faced Schilling, put his right hand to his waistband, and began to run.

Schilling ran after Navarro, grabbed him by the shoulders, and pulled him to the ground. As Schilling took Navarro to the ground, Navarro pulled out a short rifle and shot at Cooney from about five feet away. Schilling pulled out his firearm as soon as he heard the gunshot, but by then Navarro did not have the rifle in his hand. After the officers secured Navarro, Schilling saw a sawed-off shotgun lying nearby.

A responding officer arrived on the scene, took custody of Navarro, and recovered a bindle containing 1.46 grams of methamphetamine from Navarro's front jeans pocket.

#### **B. Gang Evidence**

On several occasions between November 2010 and October 2016, Navarro was stopped by police and disclosed he was a member of the Burlington Loco gang with the moniker "Clever." Navarro also had the letters "B" and "N" tattooed on his stomach. The corner of 17<sup>th</sup> and Toberman streets is within Burlington Loco territory; at the time of the shooting, Navarro did not reside in the area.

According to the People's gang expert, Officer Alfredo Aguayo, Burlington Loco broke off from the 18th Street gang in the 1980's to sell PCP and heroin. Burlington and 18th Street were rivals, and Burlington had between 10 and 20 members. Burlington used the letters "BN" to represent Burlington and "LS" for Locos. Burlington's primary activities were murder, attempted murder, witness intimidation, robbery, and assault with deadly weapons, including firearms. Aguayo testified he

knew of Burlington members with prior convictions for these types of crimes.

The jury also heard evidence that a fingerprint from the shotgun recovered from the scene of the crime matched Carlos Calderon, another Burlington gang member with the moniker “Cricket.” Cricket had been involved in a 1994 homicide. Aguayo testified that a gun passed around among gang members is known as a “hood gun,” and that Burlington is known to have firearms.

The People gave Aguayo a hypothetical outlining the facts of the instant case. Aguayo opined that shooting at police officers (counts 1, 2, and 3) benefitted Burlington and would promote the criminal activities of the gang by elevating the gang’s violent image and reputation. Aguayo also opined shooting at officers would elevate the shooter’s status within the gang, and that shooting a police officer would place the shooter “in a very high regard” as a “very brazen person.” Aguayo also opined that the possession of firearms (counts 5 and 6) benefits Burlington because carrying weapons facilitates crimes, instills fear and intimidation in the communities dominated by gangs, and upholds the violent image and reputation of the gang within the community.

The People also asked Aguayo to assume an 18th Street gang member had been shot and killed in the area prior to the shooting. Aguayo testified Burlington would know who was killed and where, and that carrying a firearm would benefit the gang and the individual member carrying the weapon because it would indicate the gang was willing to retaliate.

Aguayo was not asked to testify whether possessing methamphetamine (count 4) would benefit a gang.

The jury also heard a recording of a telephone call Navarro made while in custody to an unnamed female two weeks after the shooting. During the conversation, Navarro said, “there are not many of us. There’s not a lot of . . . us out there, baby.” The woman replied, “I know there isn’t [*sic*], baby. You’re all in there. All of you, and now, it’s you, too.” Navarro then said, “I just want to know who keeps the street safe for all these fucking drug addict alcoholic mother fuckers?” The woman replied, “You, baby.” The woman asked Navarro whether he was the “one that partied,” to which he replied, “I was the one [that] partied, but I took care of the streets and all that shit.” The woman asked whether Cricket was “out there looking” as well, to which Navarro replied, “Cricket, yeah, he does a little bit.” Navarro then stated, “I was trying to fucking bring us up,” and “I had put money aside for, for a fucking something like this other situation.” When the woman asked to what situation he was referring, Navarro replied, “[l]ike pistols and stuff like that.”

### **C. Charges, Verdict, and Sentence**

Navarro was charged via information with: one count of attempted premeditated, deliberate, and willful murder (Pen. Code, §§ 664, 187, subd. (a))<sup>1</sup> (count 1); two counts of assault with a firearm on a police officer (§ 245, subd. (d)(2)) (counts 2 and 3); one count of possession of methamphetamine while armed with a firearm (Health & Saf. Code, § 11370.1) (count 4); possession of a firearm by a felon (§ 29800, subd. (a)(1)) (count 5); and possession of a short-barreled rifle (§ 33215) (count 6). As to all counts it was alleged the crimes were committed to benefit a criminal

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<sup>1</sup> All further references are to the Penal Code unless otherwise indicated.

street gang (§ 186.22, subd. (b)). It was also alleged as to the attempted murder and assault charges that Navarro personally used a firearm (§ 12022.53, subds. (b), (c).)

The jury found Navarro guilty on all counts and found true all the enhancement allegations. Navarro personally admitted the prior felony conviction for the count charging him with possession of a firearm by a felon.

The trial court sentenced Navarro to an aggregate term of 74 years to life. On count 1, the attempted murder, Navarro received 15 years to life, the minimum term required under the section 186.22, subdivision (b) gang enhancement, plus a consecutive 20 years for the section 12022.53, subdivision (c) firearm enhancement; the court also imposed and stayed an additional 10 years for the section 12022.53, subdivision (b) firearm enhancement. On count 3, the court imposed a consecutive term of 39 years, comprised of nine years for the assault, 20 years for the section 12022.53, subdivision (c) firearm enhancement, and 10 years for the section 186.22, subdivision (b)(1)(C) gang enhancement; the court also imposed and stayed an additional 10 years for the section 12022.53, subdivision (b) firearm enhancement. The court imposed but stayed the same 39-year sentence on count 2. Navarro was sentenced on count 4 to a total of eight years, comprised of four years for possession of amphetamine, and four years for the section 186.22, subdivision (b)(1)(A) gang enhancement. On counts 5 and 6, the court sentenced Navarro to a total of seven years on each count, comprised of three years for the substantive offenses, plus four years for the section 186.22, subdivision (b)(1)(A) gang enhancements. The court ordered the

sentences on counts 4, 5, and 6 to run concurrently with the sentence of 74 years to life on counts 1 and 3.

Navarro timely appealed.

## **DISCUSSION**

### **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.” (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.) We view the evidence and adopt all reasonable inferences in the light most favorable to the prosecution. (*People v. Vazquez* (2009)

178 Cal.App.4th 347, 355.) “We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Albillar, supra*, at p. 60.) “‘Unless it is clearly shown that “on no hypothesis whatever is there sufficient substantial evidence to support the verdict” the conviction will not be reversed.’ ”

(*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329.)

### **B. Substantial Evidence Supports the Gang Enhancement as to Counts 1, 2, 3, 5, and 6**

Navarro’s sentence was enhanced under section 186.22, subdivision (b)(1), which allows for increased punishment upon a finding that the defendant committed a felony “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.” A crime may benefit a gang if its purpose was respect, status, or intimidation. (*People v Galvez* (2011) 195 Cal.App.4th 1253, 1261 [expert opinion that criminal conduct benefited gang by enhancing its reputation for viciousness sufficient to support enhancement]; *People v. Vazquez, supra*, 178 Cal.App.4th at p. 354 [reasonable jury could infer purpose of crime was to elevate status of gang and intimidate neighborhood residents].) As to specific intent, “the scienter element of the enhancement requires only ‘the specific intent to promote, further, or assist in *any* criminal conduct by gang members.’” (*People v. Albillar, supra*, 51 Cal.4th at p. 51.)

Navarro contends there were no facts supporting Aguayo’s opinion that the criminal conduct exhibited in Navarro’s crimes was committed for the benefit of the gang. Rather, he argues, Aguayo’s conclusion was pure speculation. Not so.

It is true an expert’s opinion “‘may not be based “on . . . speculative or conjectural factors.” ’” (*People v. Vang* (2011) 52 Cal.4th 1038, 1046.) Where, as here, an expert renders opinion testimony on the basis of facts given in a hypothetical question, such questions must “‘be rooted in facts shown by the evidence.’” (*Id.* at p. 1045.) In Navarro’s case, the facts presented to Aguayo in the hypothetical mirroring Navarro’s criminal conduct were based on evidence introduced through other witnesses.

First, Officers Schilling and Cooney testified a member of the 18th Street gang had recently been shot by a member of Navarro’s gang. Evidence was introduced that Navarro did not live in that area, yet he was observed in Burlington gang



territory at 1:20 a.m., armed with a sawed-off shotgun concealed under his clothing. This constitutes sufficient evidence upon which a reasonable jury could conclude Navarro was patrolling Burlington territory to demonstrate he was willing to retaliate should any member of the 18th Street gang seek revenge for the murder of one of their members.

Additionally, the jury heard evidence the shotgun Navarro used to shoot at Officer Cooney bore a fingerprint traced to “Cricket,” a fellow Burlington member. And the tape-recorded telephone call introduced at trial established that Navarro personally knew Cricket. It would therefore be reasonable for the jury to infer the shotgun Navarro used did not belong to him personally but was a “hood gun” passed among members of Navarro’s gang to be used by and for Burlington gang members.

Finally, the jury heard evidence that many Burlington gang members were incarcerated, leaving very few members out on the street. Navarro was one of the few members left taking care of the streets and, in his own opinion, keeping the area safe. Navarro also stated he was trying to “bring [Burlington] up” and put money aside to purchase firearms. These facts support Aguayo’s opinion that Navarro’s attempt to shoot Officer Cooney would promote Burlington’s criminal activities by enhancing its reputation for violence and promoting its continued viability as a legitimate gang despite its dwindling presence on the street.

Navarro relies on *People v. Perez* (2017) 18 Cal.App.5th 598 (*Perez*), *People v. Martinez* (2004) 116 Cal.App.4th 753 (*Martinez*), and *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*) to support his position that the evidence was insufficient to prove he engaged in criminal conduct to benefit his gang. We briefly set out the facts of each of these cases below to

highlight the significant distinctions between the evidence here and in situations where the evidence was insufficient to meet the statutory requirements for enhanced punishment.

In *Perez*, the only evidence connecting defendant's crime to his gang was that defendant was a tattooed, validated Hispanic gang member, and that there were four to 10 other Mexicans, some tattooed, at the party where the crime took place. (*Perez, supra*, 18 Cal.App.5th at p. 609.) The People's gang expert opined defendant was a gang member and offered a significant amount of evidence supporting his opinion. (*Id.* at p. 604.) He then gave the jury a "basic primer on the sociology and psychology of gangs" and opined defendant's shooting rampage was intended to benefit his gang because it would instill fear in the minds of the college students attending the party and thereby enhance the gang's reputation. (*Id.* at p. 605.)

The Third District noted there was no evidence that any of defendant's visible tattoos were gang related or that any of the other Mexicans at the party were present during the shooting; there was no evidence anyone threw gang signs or shouted gang names, or that anyone was wearing gang colors; there was no evidence any of the students at the party knew defendant was in a gang; there was no evidence rival gang members were present at the party, or that the shooting was done in retaliation for prior gang activity; there was no evidence the shooting took place in gang territory; and none of the students attributed the shooting to a gang. (*Perez, supra*, 18 Cal.App.5th at p. 609.) The Third District found the evidence insufficient to prove defendant committed the offense with the specific intent to benefit his gang, noting the mere fact the perpetrator was a gang member "leaves

the evidence woefully short of the sufficiency needed to sustain the enhancement.” (*Id.* at p. 613.)

In *Frank S.*, a minor was charged with possession of a knife and a small bindle of methamphetamine and false representations to a police officer. (*Frank S., supra*, 18 Cal.App.5th at p. 1195.) He was carrying a red bandana when he was stopped on his bicycle. (*Ibid.*) The minor told police he had been jumped two days before and was carrying the knife for protection against “ ‘the Southerners.’ ” (*Ibid.*) He described himself as an affiliate of the Nortenos gang. (*Ibid.*) A gang expert testified defendant possessed the knife to protect himself, and a gang member would carry a knife to protect himself and assault rival gangs. (*Ibid.*) She also testified carrying the knife benefitted the Nortenos because it would provide protection if they were assaulted by rival gang members. (*Ibid.*) The Third District noted there was no evidence defendant was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang related offense. (*Id.* at p. 1199.) The Third District stated the gang expert’s testimony about the defendant’s intent, without any evidence supporting the opinion, was insufficient to show that the defendant harbored the intent to promote, further, or assist crimes by gang members. (*Ibid.*)

The issue in *Martinez* pertained to a requirement that the defendant register as a gang member under section 186.30. (*Martinez, supra*, 116 Cal.App.4th at p. 758.) There the evidence only had to establish that the defendant’s offense was “gang-related,” a standard far less stringent than that required to impose a gang enhancement under section 186.22. (*Martinez*, at pp. 758–759.) To support registration, the People proffered only defendant’s history of gang membership and his criminal record.

(*Id.* at p. 759.) The First District noted none of the evidence suggested defendant's commission of an auto burglary was anything other than a crime to benefit him personally. (*Id.* at p. 762.) Accordingly, the Third District found there was no substantial evidence supporting the gang registration requirement. (*Ibid.*)

These cases firmly establish that a defendant cannot be punished simply for being a gang member. Even possession of a gun added to gang membership is insufficient to support the enhancement. (*People v. Rios* (2013) 222 Cal.App.4th 542, 573.) There must be additional evidence that connects the defendant's particular criminal conduct to his gang and, in the case of the gang enhancements at issue here, the evidence must establish that the crime was committed for the gang and that the defendant specifically intended his conduct to promote, further, or assist his gang. These cases also establish that an expert witness's opinion as to a defendant's intent or motive in committing a crime, without more, is insufficient to support the imposition of a gang enhancement. Rather, the expert's opinion must be supported by additional evidence connecting the crime to a gang-related purpose. (See also *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 [gang expert's opinion must be supported by evidence other than defendant's prior record and past gang offenses and affiliations].)

Unlike *Perez*, *Frank S.*, and *Martinez*, Navarro was not subjected to enhanced punishment simply for being a member of a gang with a gun. As discussed above, the People met their burden here by introducing evidence from which a reasonable jury could infer that 1) even though Navarro did not live in the neighborhood, he was patrolling and protecting Burlington

territory that night after Burlington was exposed to retaliation by a rival gang; 2) Navarro carried a firearm that belonged not to him personally, but to the gang; and 3) Navarro engaged in violent conduct specifically intended to promote Burlington's viability and enhance its reputation for brutality.

"Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference" that the conduct was committed to benefit the gang. (*People v. Albillar, supra*, 51 Cal.4th at p. 63.) Contrary to Navarro's assertions, Aguayo's expert opinion, based on independent facts introduced at trial, including Navarro's own statements, was sufficient to convince a reasonable jury that Navarro committed his crimes with the specific intent to benefit his gang.

**C. Substantial Evidence Does Not Support the Gang Enhancement as to Count 4**

Respondent concedes the People did not produce evidence with respect to count 4 proving Navarro possessed methamphetamine for the purpose of benefiting or promoting a gang. Our review of the record also reveals no such evidence. Accordingly, the gang enhancement as to count 4 is stricken.

### **DISPOSITION**

The section 186.22, subdivision (b)(1)(A) gang enhancement as to count 4 is stricken. The trial court is directed to prepare an amended abstract of judgment reflecting this change and to forward a copy to the Department of Corrections and Rehabilitation.

The judgment is affirmed in all other respects.

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STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.