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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR MARTIN PRIETO,

Defendant and Appellant.

B236206

(Los Angeles County
Super. Ct. No. TA106590)

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

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Hector Martin Prieto (Hector) is the brother of defendant Jose Prieto (Jose),¹ and a friend of defendant Jesse Robles (Robles); all three are members of the Barrio 13 street gang. Hector's appeal is the second appeal arising out of a robbery and triple murder committed, according to Hector in order to raise money to bail the Prieto brothers' mother out of jail.² In a joint trial, a jury found Hector guilty of three counts of first degree murder, one count of second degree robbery and found gang enhancements and special circumstances allegations true. On appeal, Hector contends: (1) There is insufficient credible evidence to sustain the jury's gang enhancement and special circumstance findings; and (2) The trial court abused its discretion by admitting excessively prejudicial evidence of witness intimidation. We affirm.

PROCEDURAL BACKGROUND

A third amended information charged Hector, Jose and Robles with three counts of murder (Pen. Code, § 187, subd. (a);³ counts 5–7), robbery (§ 211; count 8), and attempted murder (§§ 187, subd. (a), 664; count 9).⁴ As to counts 5 through 7, the information also alleged that the murders were committed during the commission of a robbery (§§ 190.2, subd. (a)(17), 211, 212.5), that Hector personally discharged a handgun that caused the death of all three victims (§ 12022.53, subd. (d)), and that a principal personally and intentionally discharged a firearm that caused the death of all three victims (§ 12022.53, subds. (d) & (e)(1)). As to counts 8 and 9, it was further alleged that Jose personally used a handgun. (§ 12022.53, subd. (b).)

As to all counts, it was alleged that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent

¹ When discussed individually, we refer to Hector and Jose Prieto by their first names to avoid confusion.

² Jose and Robles filed the first appeal; neither is a party here. (*People v. Prieto et al.* (Nov. 30, 2012, B233309) [nonpub. opn.])

³ All further statutory references are to the Penal Code unless otherwise indicated.

⁴ Count 9 was subsequently dismissed pursuant to a section 1118.1 motion.

to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).) The prosecution sought the death penalty only as to Hector. All three defendants pleaded not guilty and denied the special allegations.

A jury convicted Hector and his codefendants as charged, and found the special allegations to be true. The jury was unable to reach a verdict in the penalty phase of Hector's trial. The court declared a mistrial.

For each of the three murders, Hector was sentenced to consecutive indeterminate terms of life without the possibility of parole, plus consecutive terms of 25 years to life for the gun enhancements. The court imposed, but stayed, 25-year-to-life terms for the personal discharge of a firearm enhancements for each murder count. (§ 654.) The court also imposed a determinate term of three years for the robbery, plus 10 years for the gang enhancement. Hector was awarded custody credits and ordered to pay various fees and fines.

FACTUAL BACKGROUND

On March 29, 2009,⁵ Andrew Williams, Ronald Carter and Sinecia Miller were shot to death in Williams's apartment. At about the same time, Reginald Kemp was robbed at gunpoint in an alley near Williams's apartment.

The incarceration of the Prieto brothers' mother and plans to raise her bail

The Prieto brothers live with their mother, Beatrice Elias, in Compton. Elias was arrested on March 28, and was being held in jail at the Los Angeles Sheriff's Department (LASD), Century Station. Her bail was set at \$50,000.

Hector, Jose and Robles are members of the "Barrio 13" gang. Hector's moniker is "Little Dopey," Jose's gang moniker is "Dopey" and Robles's gang moniker is "Little Duende." Jesus Saldana was a friend of all three defendants and a member of Barrio 13. Saldana was 27 years old when he testified at trial under a grant of immunity. He has been a member of Barrio 13 since he was 11 years old. Saldana has known Robles since

⁵ All further unspecified date references are to calendar year 2009.

he was “a little kid,” and has known the Prieto brothers for three or four years. Saldana and his wife Mabel have five children between the ages of two and eight years old.

Hector, Saldana, Jose and Robles sat within a few feet of one another in the Prietos’ living room on the morning of March 29. According to Saldana, Hector and Jose discussed plans to commit a robbery to raise \$50,000 to bail their mother out of jail. Robles agreed to help and told Jose and Hector, “I got your back.” Saldana planned to participate in the robbery, but his wife later dissuaded him from doing so because he would not receive any of the proceeds. Saldana offered to give the Prieto brothers money for their mother’s bail from a legal settlement he was expecting, but they couldn’t wait.

The crimes

Later that afternoon, Jose went to the Compton apartment shared by Rosa Avila and her husband and children. Avila’s husband is a friend of the defendants and their apartment building was a hangout for Barrio 13 gang members. Jose asked Avila’s husband to drive him somewhere, but he was drunk so Avila agreed to do it. Jose told Avila they were going to Robles’s house. Avila drove Jose in her black Volvo, and Robles drove with Hector in a white pickup truck. Jose wore a black hooded jacket. When Avila asked Jose why they needed a ride if Robles had a truck, Jose said it was low on gas. Avila followed the truck, passing gas stations, and both vehicles stopped about a block from Robles’s house. Hector and Jose left the vehicles, walking toward Rosecrans and out of Avila’s sight. Robles and Avila stayed behind in their cars.

Andrew Williams was a marijuana dealer who sold marijuana from his apartment on East Rosecrans in Compton, from a nearby barbershop and in the driveway next to the barbershop. Reginald Kemp was Williams’s friend and customer. On March 29 at about 7:00 p.m., Kemp parked and headed to Williams’s apartment with \$90 to buy marijuana. As Kemp walked toward the driveway near Williams’s apartment, he saw a bald male wearing a black hoodie leaning against a wall near Williams’s apartment. Kemp later identified the man as Jose. The hood covered Jose’s head at first. As he walked past Jose, Kemp heard what he thought were four firecracker sounds or gunshots. Jose approached Kemp and pointed a revolver at him. He asked Kemp “What do you got?”

and, as he did so, Jose's hood came down for an instant. Jose grabbed Kemp's money; Kemp ran away as Jose counted the cash.⁶

Kemp went to the barbershop for help. He told the employees and patrons he had just been robbed. One barber, who heard three shots before Kemp arrived, went to a nearby apartment to check on his friends who lived there. Upon entry, the barber saw three dead bodies later identified as Williams, Carter and Miller.

Meanwhile, about five minutes after they left, Hector and Jose returned to the cars, walking briskly. After Jose got back into Avila's car she asked him what had happened. He said nothing had happened, everything was fine and told her to leave. Both vehicles went back to Avila's apartment complex. Once there, Avila watched Hector, Jose and Robles "high-fiving" several other men in a congratulatory fashion. She also saw Hector pull a wad of paper money from his pocket and asked him where the cash came from. Hector said he got it from "the Blacks [sic] guys." Later that night, Avila drove down Rosecrans and saw police activity and yellow tape along the street. When Avila came home she watched the news and learned three people had been killed in the area where she had seen the police activity.

That evening, Detective Paul Fournier and other members of the LASD arrived at the scene of the triple murder in Williams's apartment. Williams's body was on the ground near the front door, Carter's was a few feet away on the floor and Miller's body was slumped over a chair. One of Carter's pants pockets had been turned inside out. All three victims had been shot in the head. Miller suffered a gunshot wound that went

⁶ Kemp had driven to Williams's house with his girlfriend, Coty Arceneaux, who waited for Kemp in the car. While she waited, Arceneaux saw a male Hispanic pacing in the driveway near Williams's apartment. The man wore plaid shorts, a white T-shirt, and a black hooded sweatshirt and had both hands in the pockets of his sweatshirt. As Kemp walked down the alleyway, Arceneaux heard loud "pops" or bangs. When Kemp walked past the male Hispanic, the man walked in Kemp's direction and Arceneaux lost sight of them. Moments later, she saw two Hispanic men in black hoodies run past her. One was the same man she saw earlier; he was shorter than the other man. The taller man grabbed the shorter one by the jacket as they ran past. Arceneaux could not identify either man.

through her wrist and another gunshot wound to the top of her head. When he entered the apartment, Detective Fournier smelled a strong odor of unburnt marijuana, and he saw small amounts of marijuana scattered around.

Information released by the police to the public was very general; it said only that three people had been murdered at the scene. Detective Fournier did not recall that the police statement to the media revealed either the victims' gender or the nature of their injuries. The press release did not contain specific information about the number of bullets fired, the type of gun used or the injuries to Miller's wrist and head. The press release did not mention that a white truck or a black Volvo were involved in the murders, that the suspects were male Hispanics or that they wore black hooded sweatshirts.

Beatrice Elias is bailed out

Hector posted bond for his mother at 11:54 p.m. on March 29. Saldana drove Hector to pickup Beatriz Elias at the sheriff's station the next morning after she was released from custody at about 9:00 a.m. Later on March 30, Saldana drove Hector, Jose, Robles and Elias to Aladdin Bail Bonds.

March 30: Hector and his brother boast about the crimes to Saldana

On March 30 Saldana saw an early morning news report about a local triple murder. He feared his friends had been killed. Saldana, his wife and their children drove to the Prietos' home where he encountered Jose and Robles sometime before 8:30 a.m. Saldana asked them what had happened. They said everything was cool. Jose asked Saldana to drive to the police station to get Hector and see if his mother had been released. Saldana dropped Jose at his girlfriend's house on the way, and took Robles to the station to meet Hector.

Hector got into Saldana's van at the police station. A television in the van was broadcasting a news story about the triple murder. Miller's mother was tearfully asking for help from anyone with information about her daughter's murder. Hector laughed at the broadcast and began to tell Saldana how he committed the murders.

Hector told Saldana that, the night before, he had gone to the victims' apartment and knocked on the door. When a man (Williams) answered, Hector asked him for a \$20

“sack,” and shot him in the head when he turned around. He shot another guy (Carter) on the couch, and then shot a girl (Miller) who had put up her hand and begged for her life. That shot went through the girl’s raised hand and hit her head. All three shots were “dome” (head) shots. Hector took about \$4,000–\$5,000 and some “weed,” wiped the door knob with his shirt or sweater and left the apartment. Jose had stood outside by the front door while Hector shot the victims, and Robles stayed at the corner. The gun Hector used had only three bullets. Hector showed Saldana his pants and white tennis shoes. Saldana saw a little bit of blood on them. Saldana and later, Jose, told Hector to “get rid of” his pants and shoes, but Hector said he would wash them. Hector told Saldana he left his pants in a bag in a garage and told Robles’s sister to get rid of them.

Saldana, Hector and Robles drove back to get Jose at his girlfriend’s house. When Jose got in the van he also began telling Saldana how the crimes had been committed. He told Saldana he was outside the door of Williams’s apartment, acting as lookout when the shootings occurred. He wore a black hooded sweatshirt. He planned to kill anyone who tried to get inside. While outside, Jose encountered a Black man at whom he pointed a gun. But the gun would not fire and the man ran away. Robles told Saldana he had driven a friend’s small white pickup truck to the scene of the robbery and murders, and parked around the corner. One of the Prieto brothers said the other getaway driver was a girl in a black Volvo. Saldana did not immediately report his friends’ involvement in the murders or robbery to the police. Saldana testified that he told his wife that Hector, Jose and Robles had told him Avila had known they planned to commit a robbery when she agreed to drive Jose to the area near Williams’s apartment.

The homicide investigation and subsequent events

On April 28, the LASD searched Saldana’s home in the course of a neighborhood sweep, and seized 51 baggies of marijuana. Saldana and his wife were arrested, and their children were detained by the Department of Children and Family Services (DCFS). Upset and angry about what had happened to his family and in his neighborhood, Saldana told LASD deputies he had information about the triple murders and wanted his wife released from jail. Saldana denied having told the LASD that he would not testify in this

case unless his wife and children were released from custody, or the charges were reduced. He sought no special benefit in exchange for the information he shared about the triple murders. Saldana's wife was released from custody within 30 minutes. The LASD requested that Saldana be charged with felony possession of marijuana for sale.

Saldana was interrogated by Detectives Fournier and Caouette on April 29, who immediately told him his wife had been released from custody. Saldana told the detectives what Hector and the other defendants told him about the robbery and triple murder. He also said a woman in a black Volvo was connected to the crimes. Saldana directed the detectives to his cell phone, which contained the defendants' phone numbers, and identified them in photo lineups. Saldana expressed concern for his family's safety and his own; as a gang member, Saldana knew that "[i]f you snitch you die."

As a result of his April 28 arrest, Saldana, who was on probation at the time, was charged with possession of marijuana for sale and received a 16-month prison term. Apart from the relocation of his family, Saldana received no favors from the LASD or the District Attorney's office—either in the marijuana-related arrest, or in a case related to an October 2010 incident in which Saldana was arrested for carjacking—in exchange for his testimony in this case. Saldana did not "snitch" on any defendant in order to get his wife released from custody or to get his children returned. He did not consider the fact that his wife was released from jail a "benefit," and DCFS did not return the children for eight months. Detective Fournier did nothing to facilitate Saldana's wife's release from custody, and played no role in getting Saldana's children back from DCFS.

On May 4, Detective Fournier seized a white T-shirt and a pair of tennis shoes from Hector while he was in lockup. The shirt was used to prepare a K-9 scent discrimination lineup. The next day, Saldana told Detective Fournier that Hector told him the shoes the police took were not the ones he had worn during the murders. On May 12 police executed a search warrant at the Prieto brothers' home. They seized two hooded black sweatshirts and a pair of white tennis shoes. An LASD criminalist examined the shoes. The upper portion of the shoes appeared to have been cleaned or

white polished, but the soles were dirty. Tests for blood evidence were negative; blood can be washed off.

On May 5, Detective Fournier interviewed Kemp and showed him four six-pack photographic lineups. Kemp identified Jose as the man who robbed him. Kemp was “a hundred percent” certain of his identification.

On May 6, a K-9 scent discrimination lineup was prepared using Hector’s shirt, and the pants pocket of the murder victim that had been turned inside out. In the scent lineup, four boxes were placed in a specific formation, three of which contained scent pads from Hispanic men unconnected to the triple murder. The fourth contained Hector’s scent. A dog sniffed the pocket taken from the crime scene, and alerted to the box containing Hector’s scent.⁷

The defense dog scent expert didn’t necessarily disagree with the prosecution’s expert’s hypothesis that human scent is unique, but also was not convinced the hypothesis had yet been proven. He opined that additional research was necessary in order to learn how to properly train a scent dog. The defense expert also expressed concern about the medical treatment the scent dog in this case had received for his cancer, which the expert believed could affect his sense of smell, and expressed concern that the dog’s illness may have affected his ability to perform tasks.

A fingerprint analysis revealed that no fingerprints recovered from the crime scene belonged to any defendant.

A firearms specialist examined three bullets, one recovered from each victim. All three were fired from the same revolver, either a .38-caliber special or a .357-caliber magnum. A coroner testified that all three victims died of gunshot wounds to the head.

⁷ A few days after the murders had occurred (while Kemp was still a suspect), Detective Fournier had collected a T-shirt from Kemp for the same purpose. The dog did not alert to the box containing Kemp’s scent during the scent lineup. At the time the lineups were conducted, the scent dog was being treated with drugs for tumors. A veterinary oncologist opined that the dog’s medications did not impact his ability to smell.

As for Miller, a single bullet went through her wrist before striking her head, killing her. When she was shot, Miller's hand was most likely in front of her forehead.

An LASD detective testified as the prosecution's cell phone expert. He testified about calls made and received from cell phone number (323) 377-4216, on March 28-30. The calls were made to Aladdin Bail Bonds, using a cell phone tower near the Prietos's home.

Prosecution gang expert testimony

Deputy Salgado, a member of the LASD gang task force in Compton, testified as the prosecution's gang expert. He testified about his qualifications as a gang expert generally. Deputy Salgado had specific expertise as to the Barrio 13 gang because his "entire background" had involved that gang, and most of his patrol training had been conducted in the "Athens" area, which was the gang's territory. Deputy Salgado had actively gathered information on the Barrio 13 gang, which had about 115 documented members in March 2009. He had spoken with hundreds of gang members, including about 30 members of the Barrio 13 gang. Those conversations had yielded useful intelligence, including the gang's tattoos, hand signals, graffiti and information about criminal acts the Barrio 13 gang commits. Deputy Salgado has been involved in hundreds of investigations involving gang members, including about 30 involving Barrio 13 gang members. The "13" in Barrio 13 is significant in gang culture because it signifies the gang's association with the Mexican Mafia. Deputy Salgado is familiar with Hector, Jose and Robles, each is a member of Barrio 13, with gang tattoos and a gang moniker. Hector, Jose and Robles were all active members of Barrio 13 on March 29.

Deputy Salgado had been charged with targeting Barrio 13 in Compton because the gang, which had historically not been a Compton gang, recently had committed a "spike" of crimes in the area of 137th Street and Wilmington. It was "claiming" the area on the north and south of those streets. Gang members claim territory by, among other things, committing crimes and conducting drug sales within the territory. Barrio 13's gang territory was "offset" in Compton, meaning the gang claimed that territory as their own. Since gangs claim territory unilaterally, there are frequent border disputes among

rival gangs. The crimes in this case took place on the 1200 block of East Rosecrans, territory which, historically, belonged to another gang.

According to Deputy Salgado, the primary activities of Barrio 13 gang members are vandalism, theft, criminal threats, robberies, assaults, burglaries, shootings, murder and attempted murder. Deputy Salgado based his professional opinion on his involvement in investigations of Barrio 13 gang members. To establish the gang enhancement allegations, the prosecutor presented Deputy Salgado with certified documents pertaining to predicate crimes committed by Barrio 13 gang members, including an attempted murder by one gang member in July 2005, and robberies committed by another member of the gang in October 2007.

Hispanic street gangs are divided into hierarchical levels of “wannabes,” “little homeys” and “big homeys.” Gang members answer to “shot caller[s]” who give orders and make the “ultimate decision[s].” Gang members commit crimes, or “put in . . . work,” to gain status within the gang and to demonstrate to other gang members that their heart is with the gang, and an individual gang member is “a hundred percent” behind it. The more violent or vicious the crime committed, the greater the status an individual member gains within the gang. A robbery or shooting will elevate one’s status more quickly than will stealing a car, and murder is the ultimate crime a gang member can commit. A murder will result in a member’s status “go[ing] . . . all the way to the top” within the gang. A gang member who commits a murder or other violent crimes is viewed by other gang members and fearful members of the community as a “big homey[.]”

Deputy Salgado explained that gang members want to be feared because it gives them heightened status, reputation and more respect from the gang. Crime, especially the type committed openly by a group, instills fear in the community—which deters people from reporting crimes to the police—and generates respect for the gang. That is why gang members don’t wear masks when committing crimes. Crimes are committed in broad daylight to instill fear within the community, which in turn helps deter members of the community from reporting crimes for fear of retaliation. Deputy Salgado opined that

gang members work together to commit crimes in groups of two to six for several reasons. First, doing so creates “fear by numbers” and intimidation. Second, having a group creates witnesses, so there is someone to report back to the gang that a crime was in fact committed. Third, it’s easier to commit a crime working as a group because each person can perform a different role such as robber, lookout, back-up and driver.

The prosecutor presented Deputy Salgado with a hypothetical explicitly patterned on the facts of this case. She designated the role of each defendant and gave them the fictional names Larry, Moe and Curly, in lieu of Hector, Jose and Robles, respectively. Deputy Salgado opined that Larry, Moe and Curly were gang members acting in association with one another, and had been “aiding and abetting each other” in committing the crimes. In Deputy Salgado’s opinion, the triple murder and robbery were committed to benefit the gang. Having committed the most violent crime of murder, Larry’s status within the gang would be elevated to the top. The gang itself would also gain prestige, as would the other two individual participants, Moe (the lookout) and Curly (the getaway driver). The gang itself benefited from the crimes, gaining respect and a reputation for violence which, in turn, instilled fear within the community. And, the fact that the victims were shot in the head would make rival gangs and the community fear the Barrio 13 gang even more.

The gang members’ reputations would increase and they would be known as violent members of the gang. “Moe’s” role as lookout benefited his status within the gang, and the fact that he talked about his participation in the crime increased his and the gang’s reputation. “Curly’s” actions as a getaway driver benefited the gang and himself, and showed he was not afraid to commit crimes. As a witness to the crimes, Curly also served an important function because he could verify the actions of Larry and Moe. The fact that Larry, Moe and Curly spoke openly about their crimes demonstrated how the gang “publicize[d]” their crimes.

Defense gang expert

Humberto Guizar, a civil rights and personal injury attorney, testified as the defense gang expert. Guizar is a former gang member. He has testified before as an

expert on criminal street gangs and regularly lectures on criminal street gangs and the gang enhancement statute. Guizar reviewed police and investigative reports, the preliminary hearing transcript in this case, Deputy Salgado's testimony and met with Hector in custody. Defense counsel presented Guizar with a hypothetical factual scenario patterned on the evidence in this case, and asked him if the attempt to steal money to bail out the hypothetical mother was committed for the benefit of, at the direction of and in association with the Barrio 13 gang. In Guizar's opinion, the crimes were not gang crimes. If the mother was not an active gang member, then it was not a gang crime. Not everything a gang member does is a gang crime. Guizar saw no evidence of gang activity and no evidence that the crimes benefited the gang. In Guizar's opinion, the crimes were committed in order to facilitate the mother's release from custody.

None of the defendants testified.

DISCUSSION

Hector maintains the judgment must be reversed because there is insufficient credible evidence to support the jury's gang enhancement and gang special circumstance findings. Hector also asserts that the trial court erred in admitting evidence of witness intimidation against Avila by several men unconnected to Hector. Neither contention has merit.

1. Substantial evidence supports the gang enhancement and special circumstance findings.

Hector contends the gang enhancement (§ 186.22, subd. (b)(1)(C)) and special circumstance (§ 190.2, subd. (a)(22)) findings must be reversed because the record lacks sufficient credible evidence from which a reasonable trier of fact could have found him guilty beyond a reasonable doubt of committing the crimes for gang-related reasons. He insists the evidence is clear that the sole reason for the crimes' commission was defendants' shared desire to raise bail money. This assertion fails. Even if Hector was motivated to raise money to bail his mother out of jail, that personal motive does not detract from or negate his additional motive of conferring a gang-related benefit.

a. Standard of review

In a criminal case, on review of a claim of insufficient evidence, “we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).) Substantial evidence includes circumstantial evidence and reasonable inferences drawn from that evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.) In applying the substantial evidence “test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] 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.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.” (*Zamudio*, at p. 357.) The same standard applies to determine the sufficiency of the gang enhancement evidence. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224; *In re Jose P.* (2003) 106 Cal.App.4th 458, 465–466.) “[E]vidence that allows a jury to find a felony was committed for the benefit of a gang within the meaning of section 186.22, subdivision (b)(1), also typically supports a finding the defendant knew of the criminal activities of the gang.” (*People v. Carr* (2010) 190 Cal.App.4th 475, 488.)

b. Analysis

Hector does not dispute that he and his codefendants are members of the Barrio 13 gang. But, he argues that familial ties dominated here and the defendants’ shared

commitment to their “single-minded” goal of getting the Prieto brothers’ mother out of jail ensured their cooperation and predominated over their gang affiliation. Thus, because the crimes were not committed with the specific and sole intent to aid the gang, Hector insists it “strains credulity to argue that the common gang membership [he] shared with his codefendants rendered the robbery and murders gang-related crimes.”

Hector’s argument conflates two distinct prongs of section 186.22, subdivision (b)(1). The enhancement requires the prosecution to prove two elements: “first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the specific intent to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members.” (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358, italics omitted.) The disjunctively worded subparts of each element provide separate and alternative means to satisfy the two statutory elements. (*People v. Leon* (2008) 161 Cal.App.4th 149, 162.)

The prosecution need not establish that the underlying felony benefits the gang. The jury can “reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).) *Morales* explains that “specific intent to *benefit* the gang is not required.” (*Ibid.*) Section 186.22, subdivision (b)(1) requires only the “specific intent to promote, further, or assist [in any] criminal conduct by gang members.” (*People v. Albillar* (2010) 51 Cal.4th 47, 62, italics omitted.) The enhancement only applies when the individuals involved associate “together as gang members.” (*Ibid.*, italics omitted.) But that association is permissibly inferred in circumstances in which the individuals rely on mutual gang affiliations or work together with other gang members. Citing coordination among gang members, the gang expert in *Morales* explained that the gang crimes there “involved three gang members acting in association with each other. The gang provided ‘a ready-made manpower pool’ That is, one gang member would choose to commit a crime in association with other gang members because he could count on their loyalty. They would ‘watch his back’ In

addition, the very presence of multiple gang members would be intimidating. The crime would benefit the individual gang members with notoriety among the gang, and the gang with notoriety among rival gang members and the general public.” (*Morales*, at p. 1197.)

Hector claims the evidence shows the crimes were intended to benefit his mother, and that the desire to bail her out precludes a conclusion that the defendants had an additional motive to benefit the gang. But, “to presume, as defendants urge, that family ties necessarily predominate over gang affiliation when gang members who are related commit crimes together would substantially eviscerate the gang enhancement.” (*People v. Albillar*, *supra*, 51 Cal.4th at p. 62.) The evidence that Hector and his codefendants committed three murders and a robbery in collaboration with one another, and that all three defendants were members of the Barrio 13 gang was sufficient to satisfy the specific intent element of the gang enhancement, irrespective of whether those crimes were also committed in order to raise bail money.⁸ Further, Deputy Salgado explained that, by committing crimes, especially when the crimes are particularly vicious, such as murders, gang members gain respect and an elevated status, both as individuals and for their gang at large among other gangs and by instilling fear in members of the community.

The evidence that gang members Hector, Jose and Robles committed the crimes in collaboration with one another, combined with Deputy Salgado’s expert opinion that the defendants acted in association with one another based on gang membership, was sufficient to support the jury’s finding that the crimes were committed with the specific

⁸ Hector points out that Saldana, another member of Barrio 13, testified that he chose not to participate in the crimes because he anticipated no personal gain from doing so. He also notes that Avila, a non-gang member, drove one getaway car, and that no gang graffiti was found at the scene and no defendant made gang signs or wore gang clothing. He notes correctly that this evidence might have militated against a finding by the jury that the robbery and murders were gang related. However, the standard of review dictates that we disregard such evidence unless it appears “““that upon no hypothesis whatever is there substantial evidence to support the jury’s verdict.””” (*Zamudio*, *supra*, 43 Cal.4th at p. 357.) This is not such a case.

intent to promote, further, or assist in criminal conduct by fellow gang members. (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–626 [prosecution may prove elements of § 186.22 through expert witness]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047–1048.) This is true irrespective of the possibility that Hector may also have been motivated to commit the crimes to raise his mother’s bail. He and fellow gang members simply chose to raise the bail money in a way that also benefited their gang. Substantial evidence supports the jury’s gang enhancement and special circumstance findings, and Hector’s challenge to those enhancements fails.

2. *Admission of evidence of witness intimidation*

Hector contends the trial court abused its discretion by admitting highly prejudicial evidence of threats of violence made against Avila by three unknown assailants. He insists there was no evidence of a link between himself and the men who made the threats and that, even if the evidence was relevant, its prejudicial value outweighed its relevancy and it should have been excluded under Evidence Code section 352, and the court’s failure to exclude the evidence deprived him of a fair trial. Respondent maintains Hector forfeited this argument by failing specifically to challenge the evidence at trial on Evidence Code section 352 grounds.

a. *Relevant facts*

When Avila began to testify at trial about an assault and threat in her home in 2009, Jose’s attorney made a relevance objection, which was overruled. The court granted a sidebar. During that colloquy, Jose’s counsel objected to Avila’s testimony on multiple grounds, including hearsay, due process and the right of confrontation, arguing there was no nexus between Jose and the threats. Hector’s attorney joined Jose’s objections, but conceded that the evidence that Avila had been intimidated was relevant to her credibility.⁹ The court overruled the objections. But, before Avila resumed

⁹ The following colloquy occurred during the sidebar conference:

“Mr. Brewer [Jose’s attorney]: . . . I just wanted to make an objection for the record.

“What the prosecutor is going into now is this particular witness—three individuals came into her house and said that they had heard she had made statements about Dopey [Jose] and, you know, that they were talking to the police. They threatened her, told her they would kill her, that they would put caustic chemicals in her face and things like that.

“I’m objecting that there is no nexus between that and my client, that this evidence should not come in because it seems to suggest that he was the one that put them up to doing it.

“And I don’t think there has been a sufficient basis that there will be any evidence that he, in fact, had any nexus to their behavior.

“Obviously, the court may feel it’s relevant for her demeanor and mental state and stuff like that so if the court does rule that it comes in I’d ask that it be limited just to her credibility or demeanor or things like that but I’m objecting to it entirely under due process, equal protection and the confrontation of the U.S. Constitution as well as it being hearsay. [¶] . . . [¶]

“Mr. Sepe [Hector’s attorney]: I join also.

“When I read the report regarding that incident I don’t remember any of the people here—I don’t recall their names being mentioned. I just remember individuals saying we hear you’ve been talking to the police.

“And I would also join [Jose’s] objections and his argument based on all of the objections made behind federal and state constitution [sic].

“The Court: But you agree with Mr. Brewer there is a long line of cases saying it’s relevant to the witness’ credibility?

“Mr. Sepe: Yes.

“The Court: Were you here at the start of her testimony—

“Mr. Sepe: No, Your Honor.

“The Court:—where she broke down and cried?

“Mr. Sepe: I agree with him on that but I would also ask the court to give them a limiting instruction that it’s only relevant—

“The Court: Okay. I wanted to make sure because she broke down and was in tears and we had to take a recess and I don’t think you were here so I just wanted to make you aware of that because I do think having observed her reluctance and crying and

testifying, the court instructed the jury that the evidence that Avila had been subjected to intimidation was relevant only to evaluate her credibility. The court also instructed the jury the evidence was not being “admitted as evidence of guilt against any of the defendants,” and there was “no evidence that is attributable to the defendants or any of them.”

Avila then testified that after she spoke to the police about the events she participated in and others she witnessed on March 29, she had been home alone one day in May 2009 when three Hispanic men, with whom she was unfamiliar, appeared at her door and forced their way inside. One of them asked Avila “what happened to Dopey [Jose]?,” pushed her onto a couch and smeared hair removal cream on her face. The men held her down, kept her from removing the cream, and warned her not to talk to the police about the shootings. They told her that, if she said anything, “they were going to do something to [her] kids and [her] husband.” One man told her not to move away “or this is going to happen to you,” and dragged his finger across his throat mimicking a slicing motion. When Avila asked what he meant, the man said she would be killed. As they were leaving, one man told Avila, “You know how we run things out here so you should stay quiet if you want to live. See what you see. Hear what you hear. Whatever happens you stay quiet.”

Avila believed the men belonged to the Barrio 13 gang, members of which often visited her apartment complex. The men had forced Avila to keep the hair removal

everything that it is relevant to her credibility so I will instruct the jury unless the People indicate there is some nexus—

“Ms. Magno [prosecutor]: No, Your Honor.

“The Court: Okay.

“Ms. Magno: Our position is the case law is very clear, that there could be two bases for it. One is that there is a connection between the defendants and we can argue consciousness of guilt, which we’re not going to be doing, but, rather, that it’s relevant as to her credibility.

“The Court: Yes.”

cream—which is typically left on for two or three minutes—on her face for 10–15 minutes; the chemicals burned her skin. Avila was afraid, but a few days later she reported the men’s threats to the LASD. This stipulation was read to the jury: “[O]n May 26, 2009, Rosa Avila reported the May 23, 2009 incident involving being threatened and assaulted in her home to . . . the [LASD].” As the court observed during the sidebar conference, and as the prosecutor noted during closing argument, Avila broke down, trembled and cried incessantly during her testimony. Avila was given use immunity for testifying at the preliminary hearing, and she and her family were relocated.

b. Forfeiture

Respondent argues that Hector forfeited his Evidence Code section 352 argument by his failure to raise the objection at trial. We agree.

Questions regarding the admissibility of evidence are generally not reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground urged on appeal. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186; see also Evid. Code, § 353.) “[T]o the extent [appellant] asserts a different theory for exclusion than he asserted at trial, that assertion is not cognizable [on appeal].” (*People v. Partida* (2005) 37 Cal.4th 428, 438.) “In the absence of an objection based on Evidence Code section 352, or a specific request for the court to exercise the discretion granted it by that section, . . . the trial court was not required ‘to make sua sponte an affirmative finding on the record to the effect that the probative value of the proffered evidence outweigh[ed] its prejudicial effect.’” (*People v. Smith* (1984) 151 Cal.App.3d 89, 97.) A relevance objection alone will not preserve a challenge under Evidence Code section 352. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1130.) The requirement that a trial court weigh relevance against prejudice is “triggered only if defendant either expressly invokes Evidence Code section 352 as a ground for objection, or at least affirmatively argues that the risk of prejudice outweighs the relevance of the proffered evidence.” (*People v. Anderson* (1990) 52 Cal.3d 453, 477.)

Here, counsel for Jose and Hector did object to the evidence of witness intimidation on various bases. At no time, however, did either attorney assert an

Evidence Code section 352 objection or argue that the risk of prejudice outweighed the relevance of the proffered evidence. Accordingly, Hector's claim of error is forfeited on appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.