Filed 7/18/12 P. v. Sisneros CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH SISNEROS, Defendant and Appellant.	B227912 (Los Angeles County Super. Ct. No. BA315862)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Veals, Judge. Affirmed as modified.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven E. Mercer and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Two "validated Mexican Mafia associates" were housed next to each other in single-person cells in the high security unit of the Los Angeles County jail. When deputies found one of these inmates trying to clean up the blood pouring from two deep slices in his forearm, neither the injured inmate nor anyone else would say what had happened. There was blood in the adjacent cell, however, and Joseph Sisneros, known as the "shot caller" on the row, said the other inmate "must have fell."

Sisneros was convicted of assault with a deadly weapon and custodial possession of a weapon with gang, prior strike, great bodily injury and personal use of a deadly weapon allegations found true. He was sentenced to a term of 44 years plus 50 years to life in state prison. Sisneros appeals, claiming the gang allegation should have been dismissed, the trial court should have bifurcated the gang allegation, the gang expert's testimony was improper, the trial court abused its discretion in admitting evidence of a subsequent attack on the victim, and the trial court improperly imposed a consecutive sentence and deadly weapon enhancement. In addition, we asked the parties to brief the issue of whether imposition of the 10-year gang enhancement was improper in this case.

As the People concede, the deadly weapon enhancement must be stricken, and we conclude imposition of the 10-year gang enhancement was improper, but in all other respects, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

Inmates at the Los Angeles County Jail who pose high security risks for various reasons are housed in the Denver Row of 1700 module. Denver Row is the "high-power, high-security module." The inmates are primarily gang members. Unlike the general population, inmates in 1700 module are housed in single-person cells. "It's for the worst of the worst."

The Mexican Mafia is a violent prison gang that controls criminal activity within the prisons, including murder, robbery, extortion, and narcotics trafficking. At the jail, it is important for deputies to know whether an inmate is a member or associate of the

Mexican Mafia as these inmates are "approached . . . differently than most other inmates." The difference is in the manner of "communication[--]in terms of respect."

Mexican Mafia associates are necessarily members of criminal street gangs as well. When a member of a Hispanic criminal street gang enters jail or prison, he is "schooled" about how to conduct himself in custody and with whom he may associate. The Mexican Mafia operates under a "strict secrecy code." Unlike members of street gangs who are "very proud" of their gang affiliation and will tell you "where they're from," the Mexican Mafia is "considered a secret organization" and associates are not allowed to tell anyone they are with the Mexican Mafia.

In January 2007, Joseph Sisneros and Richard Trujillo were housed in cells next to each other on Denver Row. Both Sisneros and Trujillo were "validated" active Mexican Mafia associates. Validation is a three-point system used to document Mexican Mafia associates and members. Validation requires three independent sources providing a direct link to Mexican Mafia association or membership. Sources include tattoos, written material, drawings and monitoring of phone calls and mail, and validation information must be updated through a review process to confirm continuing membership or association. Sisneros was validated at Folsom State Prison in 1993. He was revalidated during a review in 2000 at Tehachapi State Prison. In January 2007, he was awaiting trial on crimes relating to Mexican Mafia business.

Sisneros was known as the "shot caller" on Denver Row, meaning he "had a lot of respect" and was the representative who made decisions for the row. Sisneros had authority over all of the other inmates on the row, and they would have to get permission from him for anything they wanted to do. For example, he would decide whether the row would have the television on or whether the inmates would come out for showers or abide by the rules. If the row was getting loud, one of the deputies (Deputy Love) would say, "Hey, Jojo.[1] You need to let the row know they need to calm down. It's getting a

---

1 Sisneros's moniker or gang name is "Jo Jo."

little loud." If Sisneros said, "All right, Love. No problem," "There would be no more problems." Before an inmate would allow deputies to handcuff him in order to remove him from his cell to escort him to another location, he called out, "Hey Camarada, should I hook up?"[2] Sisneros responded, "Go ahead."

Sisneros "ran a very orderly row"—"very strict," "very disciplined," very quiet." He got along with staff at the jail, and he was "able to keep everyone in line to act accordingly." Trujillo who occupied the cell next to Sisneros, however, was "brash," "a little cocky," and had an "attitude with a chip on his shoulder at times." He was "always very confrontational, very controversial." Other inmates would "go along with the program," but Trujillo was "constantly, always, always challenging everything."

On January 12, 2007, at about 5:50 p.m., Deputy Love was conducting a security check on the row. He could tell the row had been drinking because he could smell the alcohol. He knew there was a problem when he saw inmates in the backs of their cells as that was unusual. He saw the inmate in cell 14 looked "frightened, like he didn't want any part of what had just happened." It was quiet. When he got to Trujillo's cell (cell 13), it was covered with a sheet and a red substance was flooding the floor. When Deputy Love peeked around the sheet to see into the cell, he saw Trujillo at his sink, and he was "frantic[]." He was trying to wash his arm and trying to clean up. There was "a lot of red," "some substance, resembling blood," on towels and the wall. Usually when an inmate is injured or sick, the other inmates yell "man down" to let deputies know something is wrong, but no one called out for Trujillo.

Deputy Love called for Deputies Martinez and Clift. When they got to Trujillo's cell, it "looked like something out of a movie. It looked like a crime scene. There was blood everywhere," and Trujillo had "two very large cuts on his arm." He was bleeding profusely. One of the lacerations was about five inches long and an inch deep--so deep that Trujillo's tendons were visible. When Deputy Love asked Trujillo what had

---

[2] "Camarada" means "brother." A Mexican Mafia associate or member is referred to as a "camarada."

happened, "There was no response. It was just the look in his eyes . . . . It was fear. [Trujillo] was like he didn't want any part of it. He wasn't going to get involved." Deputy Love had worked on Denver Row in module 1750 for over four years. At that point, Deputy Love knew he "wasn't going to get a witness on the row. There was going to be no cooperation."

Trujillo was "extremely agitated, really upset" and pacing back and forth. Deputy Love told Trujillo he needed to get him to the hospital "because [he was] bleeding out." Trujillo insisted he did not need any help. He was reluctant, but ultimately the deputies were able to get Trujillo's arm wrapped up so he could be handcuffed in his cell and escorted out.

Unlike the other inmates who looked like they were hiding in the backs of their cells, Sisneros was sitting on his desk with his arms and legs crossed, with his feet up on the bars, "relaxing" with a "smirk on his face." When Deputy Love asked Sisneros what had happened, Sisneros said, "He must have fell." His tone was "sarcastic," his demeanor was "laid back," and he was "smirking."

When deputies later examined Sisneros's cell, there was blood spatter on the bars next to the wall between Sisneros's and Trujillo's cells. In addition, there was blood on the desk, a bag and other small items within Sisneros's cell. No weapons were found. Sisneros smelled of fresh soap and he was "very clean." When he was asked if he had washed his hands and his arms, Sisneros said, "Yes." Asked why, he said, "Because I was dirty." He said Trujillo and he had been talking and drinking "pruno" earlier but said he did not know what had happened to Trujillo.[3]

At the hospital, Trujillo told deputies he had fallen off of his bunk.

Sisneros was charged with custodial possession of a weapon (Pen. Code, § 4502, subd. (a) [all further statutory references are to the Penal Code]) and assault with a deadly weapon (§ 245, subd. (a)(1)), with gang and prior strike allegations alleged as to both

---

3 "Pruno" is alcohol made from fruit.

counts.[4] (§ 186.22, subd. (b)(1)) [crime committed for the benefit of a criminal street gang]; §§ 667, subds. (a)(1), (b)-(i); 1170.12, subds. (a)-(d) [two prior serious or violent felony convictions].) In addition, as to the assault with a deadly weapon, it was further alleged Sisneros had inflicted great bodily injury (§ 12022.7, subd. (b)(1)) and had personally used a deadly weapon (§ 12022, subd. (b)(1)).

At trial, the People presented evidence of the facts summarized above. Asked if he knew Sisneros, Trujillo acknowledged "Joe" as "a friend of mine." Trujillo said he had known Sisneros for a couple of years. Asked whether Sisneros was a gang member, Trujillo said, "Oh, no, I wouldn't think so. [The] guy's a family man." Trujillo said the prosecutor was accusing "Joe," of "inflicting a cut on [his] arm that [he] inflicted on [his] own," on his cell door. He acknowledged that he would lean out of his cell with his arms through the bars talking to Sisneros, but said he had not done so on the date of his injuries. That day, he said, he got sentimental drinking "pruno" and decided to write a letter to his girlfriend. He had a razor blade in the bars of his cell to sharpen his pencil. His pencil needed sharpening so he went to get it. A corner of it was sticking out just a little bit. Trujillo said he was leaning against the door, with the back of his hand on top of his head, and cut himself the first time. He was drunk, he said; he "didn't even notice." He put his arm back up and cut himself again. He looked at the ground and saw "a drop of blood." Shown photographs of his injuries, he acknowledged they looked "pretty deep," but said "they weren't that bad."

Trujillo was shown a video of his jail cell taken shortly after the incident and acknowledged it "appeared" he had been "bleeding all over the cell." After cutting himself, Trujillo said he flushed one razor blade down the toilet and gave another one to a neighbor but could not remember which one. Then he tried to clean up his cell. He did

---

[4] An attempted murder count was alleged but later dismissed.

not call for deputies, he testified, because he "didn't think it was that bad."[5] He acknowledged he initially refused to go to the hospital, was uncooperative and refused to tell the deputies what happened and was later placed in a solitary cell for two weeks. At the time of trial, Trujillo had two scars on his forearm—one about four inches long and another about three inches long.

Asked if he was a member or associate of the Mexican Mafia, Trujillo said, "My goodness, no." Neither was Sisneros he said. Asked what the Mexican Mafia was, Trujillo said, "I don't know. . . . That's something out of my . . . understanding." He did not think he had heard the term before the prosecutor's question. Trujillo acknowledged he was known as "Gato," but said he was not and had never been a gang member. He acknowledged he had tattoos on his body, including "ES Longos" on his abdomen, but denied he was a member of the Eastside Longos street gang. He said the tattoo indicated he was from the east side of Long Beach. He acknowledged he was housed in a single-man cell on Denver Row as a "K-10 keepaway," but said it was as a "disciplinary measure" because he was "disruptive."

Trujillo testified at Sisneros's preliminary hearing on May 21, 2007. A couple of weeks later, on June 8, 2007, Trujillo was housed in the administrative segregation unit at North Kern State Prison, a lockup unit housing inmates who belong to a prison gang; inmates there are specifically classified individuals who are segregated from the general population because they endanger the life and safety of other inmates as well as staff. Upon arrival, inmates appear before a classification committee for placement in the appropriate "yard group," determined by prison gang. Trujillo was in the yard group for validated Mexican Mafia, Aryan Brotherhood and Nazi Low Riders; in the prison setting, members of these gangs get along with each other.

---

[5] Deputy Love remembered the incident very well because he had "never seen lacerations on an arm like that from stabbings in jail," and he had "never seen blood gushing like that."

As recorded on prison video camera footage, as Trujillo was released into the yard with eight or nine other Mexican Mafia members and one Nazi Low Rider, the inmates began shaking hands before their daily workout. One validated Mexican Mafia member named Logan acted like he was going to shake Trujillo's hand but then started striking Trujillo with his fist. Two other validated Mexican Mafia members joined in. Then one of the inmates made a stabbing motion and the officer in the observation tower had to activate water cannons with pepper spray to quell the incident before it escalated further. On the videotape played for the jury, a weapon could be seen protruding from Trujillo's back. Another Mexican Mafia inmate pulled the weapon out of his back and threw it toward a fence. The weapon—a four-inch metal rod--was recovered at the location where it had been thrown.

Trujillo said he had not been injured, stabbed or assaulted; he said he had been settling an old, unrelated dispute when he got into a simple fistfight with "some old friends." He could not remember their names but Logan was not one of them; and he was sure none of them knew "Joe." He said he had never heard of the Aryan Brotherhood or the Nazi Lowriders.

Special Agent Daniel Evanilla with the California Department of Corrections and Rehabilitation testified he monitored the activities of the Mexican Mafia prison gang and parolees from the prisons and was an expert on the gang. He had known Sisneros for years and had arrested him "quite a few times" over the years; they had a "very professional relationship." Evanilla had his job to do as a special agent; Sisneros had his job to do as a gang member. Evanilla said Sisneros had been given his authority from Michael "Mosca" Torres who was "running" the Los Angeles County jail for the Mexican Mafia at the time of Trujillo's assault. The exchange in which another Denver Row inmate addressed Sisneros as "Camarada" and asked him for permission to "hook up" reflected Sisneros's status as "shot caller" on the row. In addition, in December 2006 (the month before Trujillo's assault), Torres was housed next to another inmate (David

Steinberg). Two "kites" addressed to Torres were recovered from Steinberg.[6] One had Sisneros's name ("Jojo") on it and said: "Tell JoJo to give the money to Old Boy so there won't be any misunderstanding in the future." This meant the Mexican Mafia leaders trusted Sisneros with money. Another kite found in Sisneros's cell was a "roll call" of inmates in the high-power unit which demonstrated his status as "shot caller" empowered by the Mexican Mafia to run the row; he is in charge and needs to know who is on the row and in his area.

Although he is a validated Mexican Mafia associate, Evanilla testified, Trujillo is "considered to be in bad standing with the Mexican Mafia" as evidenced by the January 2007 "slicing" incident as well as the June 2008 stabbing. Asked if a validated Mexican Mafia member or associate could acknowledge their association or membership in open court at trial, Evanilla said, "That's a death wish. . . . They would be killed."

Sisneros presented no testimony in his own defense.

Sisneros admitted the prior conviction allegations and was convicted of custodial possession of a weapon and assault with a deadly weapon with the gang, prior strike, great bodily injury and personal use allegations all found true.

The trial court sentenced Sisneros to a state prison term of 44 years plus 50 years to life, calculated as follow: on the custodial possession of a deadly weapon count, the trial court imposed a term of 25 years to life, plus 10 years pursuant to section 186.22, subdivision (b)(1)(C) (crime committed for the benefit of a criminal street gang), plus 10 years pursuant to section 667, subdivision (a), for a total term of 20 years plus 25 years to life; on the assault with a deadly weapon count, the trial court imposed a term of 25 years to life, plus 10 years pursuant to section 186.22, subdivision (b)(1)(C), plus 1 year

---

[6] The Mexican Mafia use "kites" to communicate what they want done inside or outside prison. "Kites" are cryptic, coded paper messages or notes, usually in very small writing, inmates pass to other inmates or to "mulas," like relatives or close friends of Mexican Mafia members. An inmate or a person just coming out of prison will hide the kite in their mouth or other orifice to get past prison security.

pursuant to subdivision (b) of section 12022, plus 3 years pursuant to section 12022.7, plus another 10 years pursuant to section 667, subdivision (a) for a total term of 24 years plus 25 years to life on this count.

Sisneros appeals.

DISCUSSION

Sisneros Has Failed to Demonstrate Prejudicial Error in the Trial Court's Denial of His Section 995 Motion to Dismiss the Gang Allegation at the Preliminary Hearing.

According to Sisneros, the trial court erred in denying his motion to dismiss the gang allegation because he says no evidence was presented at his preliminary hearing to provide "reasonable or probable cause" to believe he had committed the charged offenses "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"—apart from Agent Evanilla's improper testimony he believed Trujillo "most definitely disrespected [Sisneros] as the official representative on that row." (§ 186.22, subd. (b)(1).) Sisneros says there was no evidence Trujillo had actually disrespected Sisneros warranting retaliation on behalf of the gang; he says Trujillo was "generally cocky and disrespectful," but "even Detective Clift testified he knew of no prior tension between Sisneros and Trujillo." In Sisneros's view, the gang evidence was irrelevant and highly inflammatory, and without it, given the "equally plausible stories"—the prosecution theory that Sisneros reached through the bars of his cell to inflict two cuts on Trujillo's arm and Trujillo's claim that he accidentally cut himself with a hidden razor blade while drunk—"the jury likely would have had reasonable doubt as to whether Sisneros committed the charged offenses." Sisneros says the fact the jury deliberated for almost six hours over three separate days indicates this was "a close case." We disagree.

"[O]n appeal defendants are required to establish not only that the denial of their section 995 motions was erroneous, but also that they were prejudiced by such error." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 140.) Sisneros cannot show that he

was prejudiced by the trial court's denial of his motion to dismiss the gang allegation because the jury convicted him of the charged offenses and found true the gang allegation following a trial in which the prosecution presented sufficient evidence of the charges and special allegations.[7] (*Ibid.,* additional citations omitted ["'Even "'"[i]f there is insufficient evidence to support the commitment, the defendant cannot be said to be prejudiced where sufficient evidence has been introduced at . . . trial"'" to support the jury's finding as to the charge or as to the truth of the allegation.'"].)

The Trial Court Did Not Abuse Its Discretion in Denying Sisneros's Motion to Bifurcate the Gang Allegation.

Even if the gang allegation was properly brought to trial, Sisneros says, the trial court erred in denying his motion to bifurcate the gang allegation from the substantive offenses because the gang evidence was not relevant to motive or witness bias and its probative value was substantially outweighed by its prejudicial effect. We disagree.

The trial court is vested with discretion to determine whether a gang allegation should be bifurcated for trial, and the trial court's ruling is reviewed for an abuse of that discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) "[T]he criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Ibid.*) "[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues

---

[7] We address the admission and sufficiency of the evidence in support of the gang allegation in connection with Sisneros's further argument that the trial court erred in denying his request for bifurcation of the gang allegation. As we will explain, we reject Sisneros's contention the gang evidence had "no legitimate purpose" at trial under *People v. Albarran* (2007) 149 Cal.App.4th 214, 230.)

pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.) "Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation. In the context of severing charged offenses, we have explained that 'additional factors favor joinder. . . .'" (*Id.* at p. 1050, citation omitted.)

As we noted in *People v. Albarran* (2007) 149 Cal.App.4th 214, "[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."'" (*Id.* at pp. 224-225, citations omitted.) Yet, Sisneros argues his case is similar to the facts presented in *Albarran*, where the defendant claimed he had been convicted of being a member of a dangerous street gang known as the 13 Kings and having a tattoo showing his allegiance to the Mexican Mafia despite being charged with an unrelated carjacking. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 220.) We disagree.

Here, as the Attorney General argues, Sisneros's assertion that there was no evidence of personal tension between Sisneros and Trujillo misses the point. The prosecution's theory of the case was that the attack on Trujillo was gang-motivated, *not* merely a personal dispute between inmates. Because Sisneros was obligated to act as the "shot caller" for the Mexican Mafia in "running the row" and had been successful in commanding respect and running an orderly row, the prosecution's theory was that Trujillo's disorderly and disrespectful behavior disrupted Sisneros's row and conflicted

with Sisneros's exercise of authority on behalf of the Mexican Mafia such that it precipitated Sisneros's "regulat[ion]" of Trujillo, to get him under control and in compliance with Sisneros's and in turn the Mexican Mafia's authority in the jail. Therefore, the gang evidence was properly admitted to show Sisneros's motive. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 [The People are entitled to "introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent"]; and see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551 ["The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible. . . . [F]ew among us know enough about the gang activities organized by the Mexican Mafia in Men's Central Jail to understand an inmate's cold-blooded attempt to murder a nearly naked defenseless fellow inmate who did nothing to provoke the attack"].) We find no abuse of discretion in the trial court's denial of Sisneros's motion to bifurcate the gang allegation. (*People v. Hernandez, supra,* 33 Cal.4th at p. 1051.) It follows that he was not deprived of a fair trial as a result of the denial.

Sisneros Has Failed to Demonstrate Prejudicial Error in Connection With Agent Evanilla's Expert Testimony.

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657-658, Sisneros says, even if the gang allegation was properly tried with the substantive offenses, there was no substantial admissible evidence to prove he committed his crimes for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members as required for purposes of section 186.22, subdivision (b)(1). According to Sisneros, the only evidence of his intent came from the prosecution's gang expert (Agent Evanilla) who, in response to a hypothetical based on a "fact scenario that exactly mirrored the facts of this case," impermissibly testified on the ultimate issue of his intent. We disagree.

The prosecutor told Agent Evanilla she was going to give him a hypothetical and that "for purposes of this hypothetical, I need you to assume that what I'm going to say in this hypothetical, that these things are true. Okay?

"[Agent Evanilla:] Yes.

"[The prosecutor:] Okay. So, at this point, I'll start the hypothetical with assuming that there are two validated Mexican Mafia associates that are being housed in Denver Row on the 1750 D Module, high-power security module, of the County jail.

"One of the validated Mexican Mafia associates, we will call him the shot caller; that he is the shot caller of that row. And that . . . in November of 2006, he had been referred to as 'Camarada' by one of the other inmates asking permission to be hooked up; that . . . this first individual that I'm talking about that we're going to call 'shot caller' for the purposes of the hypothetical; that he is in custody on a Mexican Mafia business-related crime and that he was referred to as 'Camarada' and was asked permission to even just hookup or be escorted out of his cell.

"This other Mexican Mafia associate, and we'll call him Mexican Mafia associate No. 2, he is known to be disobedient not only to staff but also to other inmates. And both of them are housed in single-man cells.

"The shot-caller Mexican-Mafia associate runs a very orderly row. He is well respected by all of the other inmates.

"The other second Mexican Mafia associate does not conduct himself in the way that the shot caller likes his row to be run.

"On a particular day, [i]n January 2007, the second Mexican Mafia associate is drinking pruno alcohol in jail and while he's very drunk he has tended on other occasions to stick his arms out of the jail cell. Other law enforcement officers, deputies, have seen him do this on occasion.

"And as he has his arms sticking out of the cell close to the shot caller's cell, the shot caller with some sort of weapon, that he gets rid of eventually, sticks his hand out of

his cell, slices the second Mexican Mafia associate's arm twice on the side that's closest to him. And at that time, the second Mexican Mafia associate does not complain, says nothing. Doesn't ask for help. Doesn't cry for help.

"All of the other inmates while—usually if someone has hurt themselves or has had an accident or inflicted an injury on themselves, usually those other inmates on that row will scream and ask for help. On this occasion, nothing is said. Nothing is spoken.

"At some point, one of the deputies during a catwalk check sees that the second Mexican Mafia associate has injured himself. When he goes onto the row, he notices that no one will go to the bars, no one greets him or says anything. They are all extremely silent and withdrawn into their cells.

"When he walks by the shot caller, the shot caller is the only one who is even close to the bars, has his feet up casually and smirking and says, 'He must have fell,' regarding the second Mexican Mafia associate.

"At that time, the deputy looks at him, the second Mexican Mafia associate, who is very volatile and defiant with him, will not cooperate in the beginning to get help, will not say what happened to him, but then finally as his arm is wrapped up he's escorted out.

"At that time, he goes to the hospital and on a videotape tells the detective that's videotaping him, 'I fell off my bunk.'

"At the preliminary hearing, that second Mexican Mafia associate comes on the witness stand and lies and says that he . . . cut himself. He sliced himself in his cell.

"That second Mexican Mafia associate, four months later when he's sent to Delano State Prison, is at that time stabbed and beaten by other Mexican Mafia associates on the yard.

"In addition, at the jury trial in front of a jury when he's escorted out again the second Mexican Mafia associate testifies that he's never heard of the Mexican Mafia. He

doesn't know what that means. He's never known a gang member. Even though he's in Pelican Bay and state prison, he's never belonged to a gang.

"He has the tattoo of 'Eastside Longos' tattooed across his abdomen and says that's not even a gang and it stands for Long Beach. And while he testifies, he persists that he sliced himself in his cell.

"Based on that hypothetical, do you have an opinion as to whether or not this crime was committed either in furtherance of, for the benefit of, or even in association with the Mexican Mafia?

"[Agent Evanilla:] Yes.

"[The prosecutor:] And what do you base that opinion on and what is your opinion first?

"[Agent Evanilla:] Well, Mr. Torres, who was the Mexican Mafia member running the County jail for the Mexican Mafia at that time, empowered Mr. Sisneros to run –

"[Defense counsel:] Your Honor, I'm going to object. This is outside the scope of the form of the hypothetical. It's going to ultimate facts.

"The Court: I'll sustain the objection.

"[The prosecutor:] Mr. Evanilla, just based on the hypothetical that I have given to you, and I'll include in that hypothetical that the Mexican Mafia member who was running the County jail at the time gave the shot caller status as the shot caller in Denver Row. And that is also part of that hypothetical.

"Based on that hypothetical, using the terms within that hypothetical, what is your opinion?

"[Agent Evanilla:] At that time, that shot caller had a responsibility to, as we call it, in prison talk, regulate Mr. Trujillo or the –

"[The prosecutor:] Second?

"[Agent Evanilla:] – Second Mexican Mafia member as indicated in your hypothetical because of his lack of respect for the first Mexican Mafia associate, Mr. Sisneros.

"[Defense counsel:] Again, Your Honor, it's going outside the scope of the hypothetical.

"[The prosecutor:] You mean the shot –

"[Defense counsel:] When the witness testifies in that manner.

"The Court: I think he may have misspoken though. Why don't you ask him another question.

"[The prosecutor:] So, yes, if you could just refer to that person as the shot caller instead of using any names.

"[Agent Evanilla:] Okay. So the shot caller has the responsibility to maintain the reputation of the Mexican Mafia within the Los Angeles County Jail. And if the shot caller doesn't take action against this other disrespectful second Mexican Mafia associate, the shot caller will be deemed weak, and weakness is not accepted by the Mexican Mafia.

"So ergo, the shot caller will probably be assaulted or killed because of his lack of authority and control of that particular row. So he has a responsibility to deal with that second Mexican Mafia associate who's out of line and does not show the respect that he should towards the shot caller.

"[The prosecutor:] Is there anything else that you base your opinion on?

"[Agent Evanilla:] Well, as I indicated earlier in my testimony, the Mexican Mafia . . . operates under the fear, auspices of fear and intimidation. And, again, if the shot caller doesn't do what he's supposed to do, then he is going to be deemed for assault or murder himself.

"[The prosecutor:] And what about the fact that the second Mexican Mafia associate persistently denies that anything happened to him other than he inflicted this

injury on himself? How does that in any way show you that this was done within Mexican Mafia business?

"[Agent Evanilla: T]hat's all part of the code not to cooperate with law enforcement in their investigation, and that's all part of the secrecy that they have. And sometimes inmates in this particular situation will try to clean themselves up and get back in good graces within the organization.

"But in the second Mexican Mafia associate's situation now, that person is not going to get back in the good graces.

"[The prosecutor:] And is that based on that second incident up at Delano State Prison?

"[Agent Evanilla:] Yes."

According to Sisneros, there are two problems with this testimony. First, he says, there was no evidence Trujillo had disrespected Sisneros. To the contrary, the record included evidence that Sisneros was the shot caller on the row--that he ran an orderly row and that he commanded respect, with other inmates deferring to Sisneros's authority such that an inmate would even ask for permission before allowing deputies to place him in handcuffs to be escorted out of his cell. The record contained considerable circumstantial evidence that Trujillo's disrespectful and disruptive behavior was at odds with Sisneros's authority as the Mexican Mafia's shot caller on the row and his manner of exercising that authority.

Next, citing *In re Frank S.* (2006) 141 Cal.App.4th 1192, Sisneros argues, the "thinly veiled" hypothetical permitted the expert to improperly testify that Sisneros possessed a specific intent. We disagree.

In fact, in *People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*), our Supreme Court specifically concluded the Court of Appeal had "erred in condemning the hypothetical questions [in that case] because they tracked the evidence in a manner that was only 'thinly disguised.'"

"'[C]onsiderable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question,'" but "the questions must be rooted in the evidence of the case being tried . . . ." (*Vang, supra,* 52 Cal.4th at p. 1046.) As the *Vang* court explained, "'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citations.] Rather, the reason for the rule is similar to the reason expert testimony regarding the defendant's guilt in general is improper. 'A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt."' [Citations.]" (*Id.* at p. 1048.)

In *Vang,* the court observed, "[the detective who testified] had no personal knowledge whether any of the defendants assaulted [the victim] and, if so, how or why; he was not at the scene. The jury was as competent as the expert to weigh the evidence and determine what the facts were, including whether the defendants committed the assault. So he could not testify directly whether they committed the assault for gang purposes. But he properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose. 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. (*People v. Albillar* [(2010)] 51 Cal.4th [47,] 63.) It is true that [the detective's] opinion, if found credible, might, together with the rest of the evidence, cause the jury to find the assault was gang related. 'But this circumstance makes the testimony probative, not inadmissible.'" (*Vang, supra,* 52 Cal.4th at pp. 1048-1049, citation omitted.)

As the quoted testimony demonstrates, Agent Evanilla testified in a permissible manner, that is, he "answered hypothetical questions based on other evidence the prosecution presented," in a manner "quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, citing *People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1551, further citation omitted ["'It [is] difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes "respect"'"].) "[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided. (Evid. Code, § 805.) The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang, supra,* 52 Cal.4th at pp. 1049-1050.)

Here, when Agent Evanilla mentioned Sisneros by name, the trial court sustained defense counsel's objection and the prosecutor redirected Agent Evanilla to testify only with respect to the facts he was *asked to assume for purposes of the hypothetical*. It was up to the jury to decide whether the underlying facts on which Evanilla's opinion was based had been proven to their satisfaction, and the jury so concluded. For the reasons addressed in *Vang, supra,* 52 Cal.4th 1038, we find no error and, in any event, no prejudice. (*Id.* at p. 1051 ["The jury must still find the facts after considering all of the evidence, the court's instructions, and the parties' arguments. Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence."].)

Imposition of the 10-Year Gang Enhancement under Subdivision (b)(1)(C) of Section 186.22 Was Improper.

We asked the parties to brief the issue of whether the imposition of the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) was improper in light of subdivision (b)(5).

Section 186.22, subdivision (b)(1)(C) provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, 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 as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

Subdivision (b)(5) provides: "Except as provided in paragraph (4) [addressing specified felonies not relevant here], any person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served." (Italics added.) The phrase "punishable by imprisonment in the state prison for life" includes both a straight life term as well as a term expressed as a number of years to life. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007, citation omitted ["the Legislature intended section 186.22(b)(5) to encompass both a straight life term as well [as] a term expressed as years to life (other than those enumerated in subdivision (b)(4)) and therefore intended to exempt those crimes from the 10-year enhancement in subdivision (b)(1)(C)"]; and see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

In this case, Sisneros was convicted of assault with a deadly weapon (§ 245, subd. (a)(1))[8] and possession of a weapon while in a penal institution (§ 4502, subd. (a)).[9] Standing alone, subdivision (a)(1) of section 245 provides for imprisonment in the state prison for a maximum term of four years and subdivision (a) of section 4502 provides for imprisonment for a consecutive term of up to four years. However, because it was alleged and proven that Sisneros had two prior "strikes", the trial court sentenced him to a term of 25 years to life under the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12) on each of these two offenses, instead of sentencing him pursuant to the terms set forth in sections 245 and 4502, before adding the 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C) on each count, in addition to the other increases in his sentence.

Relying primarily on *People v. Montes* (2003) 31 Cal.4th 350, 352, the Attorney General says section 186.22, subdivision (b)(5) does not apply to life sentences imposed under the Three Strikes Law because "[subdivision] (b)(5) applies only where the felony *by its own terms* provides for a life sentence." (Italics added.)

However, citing *People v. Jones* (2009) 47 Cal.4th 566, 578 (*Jones*), Sisneros says the determination of whether a felony is "punishable by imprisonment in the state prison for life" under subdivision (b)(5) of section 186.22 depends on the penalty provision applicable to the underlying offense; therefore subdivision (b)(5) does apply in this case

---

8 "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." (§ 245, subd. (a)(1).)

9 "Every person who, while at or confined in any penal institution, . . . possesses or carries upon his or her person or has under his or her custody or control . . . any dirk or dagger or sharp instrument, . . . is guilty of a felony and shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, to be served consecutively." (§ 4502, subd. (a).)

and imposition of the 10-year enhancement pursuant to subdivision (b)(1)(C) was improper. We agree with Sisneros.

In *Jones*, the defendant was convicted of shooting at an inhabited dwelling (§ 246). "By itself, that felony carries a maximum sentence of seven years in prison. But when, as here, the crime is committed to benefit a criminal street gang, the punishment is life imprisonment, with a minimum parole eligibility of 15 years. (§ 186.22(b)(4).) And when, as here, a defendant personally and intentionally discharges a firearm in the commission of '[a]ny felony punishable by … imprisonment in the state prison for life' (§ 12022.53, subd. (a)(17)), section 12022.53(c) requires imposition of an additional 20-year prison term." (*Jones, supra,* 47 Cal.4th at p. 572.) In *Jones*, "At issue [wa]s whether defendant committed a 'felony punishable by . . . imprisonment . . . for life' (§ 12022.53, subd. (a)(17)), thus triggering application of the 20-year sentence enhancement under section 12022.53(c)." (*Id.* at p. 569.)

In *Jones*, the defendant argued "the trial court's finding [he] shot at an inhabited dwelling (§ 246) to benefit a criminal street gang (§ 186.22(b)(4)) does not transform the section 246 violation and its seven-year maximum prison term into a felony punishable by life imprisonment [with a minimum parole eligibility of 15 years], because section 186.22(b)(4) sets forth a penalty, not a substantive offense." (*Jones, supra*, 47 Cal.4th at p. 572.) The *Jones* court noted, "Defendant is correct that section 186.22[, subdivision] (b)(4) is a penalty provision. A penalty provision 'sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.' (*People v. Jefferson* (1999) 21 Cal.4th 86, 101 [86 Cal. Rptr. 2d 893, 980 P.2d 441].) In *Robert L. v. Superior Court* (2003) 30 Cal.4th 894 [135 Cal. Rptr. 2d 30, 69 P.3d 951], this court held that another subdivision of the same statute (§ 186.22, subd. (d)) was a penalty provision, explaining: 'Section 186.22(d) is not a sentence enhancement because it does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence when it is proven that the underlying offense has been committed for the benefit of, or in association with, a

criminal street gang. Neither is it a substantive offense because it does not define or set forth elements of a new crime.' (*Robert L., supra*, at p. 899.) This is also true of section 186.22(b)(4), the provision at issue here. [Citation.] [§ 186.22 (b)(4) 'is an alternate penalty provision that provides for an indeterminate life sentence for certain underlying felony offenses that are gang related'].)" (*Jones, supra,* 47 Cal.4th at p. 576, original italics.)

As the Attorney General notes, in *Montes*, *supra*, 31 Cal.4th 350, the court stated, "[subdivision] (b)(5) applies only where the felony *by its own terms* provides for a life sentence." As the *Jones* court explained, "In *Montes*, the defendant was convicted of attempted murder; the trial court found that he caused great bodily injury by personally and intentionally discharging a firearm (§ 12022.53, subd. (d)) and that he committed the crime to benefit a criminal street gang (§ 186.22). A defendant falling within the reach of subdivision (d) of section 12022.53 must be given, as additional punishment, a consecutive sentence of 25 years to life; subdivision (b)(5) of section 186.22 provides that a defendant who commits 'a felony punishable by imprisonment in the state prison for life' to benefit a criminal street gang must serve at least 15 years before becoming eligible for parole. At issue in *Montes* was whether a crime subject to the additional punishment provided for in subdivision (d) of section 12022.53 is 'a felony punishable by imprisonment for life' within the meaning of subdivision (b)(5) of section 186.22.[] We held that it was not, explaining that subdivision (b)(5) of section 186.22 'applies only where the felony by its own terms provides for a life sentence.' (*Montes, supra*, at p. 352.)" (*Jones, supra,* 47 Cal.4th at p. 577, fn. omitted.)

More particularly, the *Jones* court emphasized, the issue in *Montes*, *supra*, 31 Cal.4th 350, "was in some respects the reverse of the issue [in *Jones*]." "[T]he life term imposed in *Montes* under section 12022.53 was a sentence *enhancement*, whereas in [Jones] the life term was imposed under section 186.22(b)(4), a *penalty provision* . . . . [*T*]*his is an important distinction*." (*Jones, supra,* 47 Cal.4th at p. 578, fn. 5, italics in original & added.) "Unlike the life sentence of the defendant in *Montes, supra,* 31

Cal.4th 350, which was imposed as a *sentence enhancement* (a punishment added to the base term), here defendant's life sentence was imposed under section 186.22(b)(4), which sets forth the penalty for the underlying felony under specified conditions. The difference between the two is subtle but significant. 'Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself*, when the jury has determined that the defendant has satisfied the conditions specified in the statute.' (*People v. Jefferson, supra*, 21 Cal.4th at p. 101, italics added & omitted.) Here, defendant committed the felony of shooting at an inhabited dwelling (§ 246), he personally and intentionally discharged a firearm in the commission of that felony (§ 12022.53(c)), and because the felony was committed to benefit a criminal street gang, it was punishable by life imprisonment (§ 186.22(b)(4)). Thus, imposition of the 20-year sentence enhancement of section 12022.53(c) was proper." (*Jones, supra,* 47 Cal.4th at p. 578, original italics.)

Similarly, in this case, Sisneros was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) and possession of a weapon while in a penal institution (§ 4502, subd. (a)). Because it was alleged and proven that Sisneros had two prior "strikes", his current felonies were "punishable by imprisonment in the state prison for life." (§§ 667, subds. (b)-(i), 1170.12; and see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 527, italics added ["The Three Strikes law, like the older 'Habitual Offender Law' (§ 667.7) construed in *People v. Jenkins* (1995) 10 Cal. 4th 234 [40 Cal. Rptr. 2d 903, 893 P.2d 1224], articulates *an alternative sentencing scheme for the current offense rather than an enhancement*"].) Therefore, imposition of the 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C) was improper; instead, the 15-year minimum parole term applies to each count (in addition to the other increases in Sisneros's sentence).

To the extent the Attorney General argues this construction will thwart legislative intent, we disagree. As our Supreme Court stated in *People v. Lopez, supra*, 34 Cal.4th 1002, 1006, "We turn first to the statutory language, giving the words their ordinary meaning," and "[i]f the statutory language is not ambiguous, then the plain meaning of

the language governs." Therefore, as the *Lopez* court determined, where as here "the plain language of section 186.22(b)(5) governs," it is error to apply the 10-year gang enhancement under subdivision (b)(1)(C). (*Id.* at p. 1011.) "Proposition 21 recognized that not all of its provisions necessarily established the greatest possible punishment" and the "fact that [another statute] fixes a parole eligibility date equal to or greater than that provided by section 186.22(b)(5) is neither an absurdity nor an anomaly but rather the type of contingency contemplated by . . . the initiative." (*Id.* at p. 1009.)

Sisneros Has Failed to Demonstrate Prejudicial Error in the Trial Court's Admission of Evidence of the Subsequent Attack on Trujillo by Mexican Mafia Associates.

According to Sisneros, the trial court abused its discretion in allowing the admission of evidence of Trujillo's attack by Mexican Mafia associates at North Kern State Prison shortly after he testified at Sisneros's preliminary hearing because the probative value of this evidence was substantially outweighed by its prejudicial effect and he was deprived of a fair trial as a result. We disagree.

The evidence was relevant to explain Trujillo's testimony, conduct and standing with respect to the Mexican Mafia, particularly in light of Trujillo's denials he had been stabbed or had ever even heard of the Mexican Mafia. We reject Sisneros's repeated claim the jury was otherwise presented with two "equally plausible stories," find no abuse of discretion in the admission of this evidence (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124), and further find Sisneros has failed to establish that he was deprived of a fair trial as a result.

The Trial Court Acted Within Its Discretion in Imposing Consecutive Sentences.

Sisneros was convicted on one count of custodial possession of a deadly weapon and one count of assault with a deadly weapon. The trial court sentenced him to a state prison term of 44 years plus 50 years to life, calculated as follow: on the custodial

possession of a deadly weapon count, the trial court imposed a term of 25 years to life, plus 10 years pursuant to section 186.22, subdivision (b)(1)(C) (crime committed for the benefit of a criminal street gang), plus 10 years pursuant to section 667, subdivision (a), for a total term of 20 years plus 25 years to life; on the assault with a deadly weapon count, the trial court imposed a term of 25 years to life, plus 10 years pursuant to section 186.22, subdivision (b)(1)(C), plus 1 year pursuant to subdivision (b) of section 12022, plus 3 years pursuant to section 12022.7, plus another 10 years pursuant to section 667, subdivision (a) for a total term of 24 years plus 25 years to life on this count.

According to Sisneros, the trial court's imposition of consecutive terms violates section 654 in this case. We disagree. Section 654 prohibits multiple punishment for conduct that violates more than one statute but constitutes an indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Whether a defendant's conduct amounts to a single act or separate acts is a factual matter for the trial court to resolve. (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Perez, supra,* 23 Cal.3d at p. 552, fn. 5.) The trial court need not explicitly state that it is considering and rejecting section 654 and its implicit finding that section 654 does not bar consecutive sentencing will not be reversed on appeal if there is substantial evidence to support such a determination. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585; *People v. Coleman* (1989) 48 Cal.3d 112, 162.)

According to the record, Sisneros was alone in his cell and there was no evidence he obtained the weapon used to slice Trujillo at the moment of the assault; rather, the record supports the conclusion Sisneros was in possession of the weapon prior to the attack on Trujillo and possession prior to the assault supports the imposition of consecutive terms. (See *People v. Jones* (2002) 103 Cal.App.4th 1139, 1145 ["section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm"].)

As the Attorney General Concedes, the One-Year Deadly Weapon Enhancement on Count 3 Must Be Stricken.

To the extent Sisneros argues the trial court erred in imposing a deadly weapon use enhancement on a sentence for an assault with a deadly weapon, he is correct and the Attorney General concedes the point. (See *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1069-1070; *People v. McGee* (1993) 15 Cal.App.4th 107, 115. It follows that the judgment should be corrected by striking the one-year deadly weapon enhancement pursuant to section 12022, subdivision (b)(1) in connection with count 3.

DISPOSITION

The judgment is modified to strike the one-year deadly weapon enhancement added to the assault with a deadly weapon count (count 3). In addition, the 10-year gang enhancements imposed under Penal Code section 186.22, subdivision (b)(1)(C) as to each count are deleted and replaced with the 15-year minimum term for parole eligibility pursuant to subdivision (b)(5) for each count. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly and to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**