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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY EDWARD HART,

Defendant and Appellant.

B277946

Los Angeles County

Super. Ct. No. MA066743

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed and remanded with instructions.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Anthony Edward Hart of assault by means of force likely to cause great bodily injury and two counts of dissuading a witness. The jury found true allegations that Hart committed the crimes for the benefit of or in association with a criminal street gang. At the conclusion of a court trial, the trial court found true Hart's three prior strikes for assault with a deadly weapon, robbery, and grossly negligent discharge of a firearm. The trial court sentenced Hart to a third strike sentence of 90 years to life. On appeal, Hart contends the prosecutor's gang expert testified to case-specific testimonial hearsay in violation of his confrontation clause rights. We find no error and therefore affirm. We remand the case for the trial court to correct sentencing errors.

FACTS AND PROCEDURAL BACKGROUND

1. *The events of August 15, 2015*

In August 2015, Dagoberto Valiente was living with his wife¹ and her son in an apartment complex on 35th Street in Palmdale. Around 7:00 p.m. on August 15, Valiente met up with his friend Josue Martinez Santos and Martinez's boss, a man named Rafael, in the parking lot at the complex to discuss possible employment. Valiente and Martinez both are from El Salvador. Hart then arrived in a Nissan Altima with two other men, one of whom later was identified as Robert Joseph Salas. Valiente had seen Hart two or three times and knew him as "Sporty." Hart lived in the same apartment complex, and Valiente's wife and Hart's wife were friends. Valiente had

¹ Testimony of various witnesses at trial referred to Valiente's partner as his wife and his girlfriend. For consistency and to avoid any unintended disrespect, we refer to her as his wife.

greeted Hart but not really spoken with him, because Valiente speaks Spanish and Hart speaks English.

Hart and his companions approached Valiente, Martinez, and Rafael. They said something to Martinez in English that Valiente did not understand. Hart then asked Valiente in English, "Where you from, man?" Valiente replied that he was from El Salvador. Hart began to "insult" Valiente; Valiente did not understand what Hart was saying, although he recognized the word "motherfucker." According to Martinez,² Hart asked Valiente, "Are you a fucking Salvadoran?" Valiente answered in English, "I don't want any problems, . . . my friend." Hart "[stood] right against [Martinez's] face" and said, "You're 18 son-of-a-bitch." Martinez understood this to be a reference to the 18th Street gang. Martinez said to Hart, "Take it easy, my friend."

Hart continued speaking to Valiente in English. According to Martinez, Hart said, "You is fucking Mara Salvatrucha." Valiente told Hart that he did not understand what he was saying. One of Hart's companions then hit Valiente in the jaw with his fist. Hart then punched Valiente in the eye with his fist, and Hart as well as both of his companions began beating Valiente. The threesome hit Valiente more than 10 times on his head, back, and stomach. Valiente heard Hart say, "18" or "18th Street." The threesome "mentioned it on many occasions" that night, first to Martinez and then to Valiente. Valiente did not know what the men meant but "thought it was from some gang."

Martinez pushed Hart in the chest. Valiente was able to get away briefly; he ran toward a garbage can, then grabbed a skateboard from his stepson. Valiente began swinging the

² Martinez testified at trial that he understands English but does not speak it.

skateboard toward the three assailants. Martinez got into his truck. He was too frightened to enter the passcode into his phone so he pretended to call the police. Martinez drove his truck forward and backward between Valiente and the three assailants. Hart went back toward the car he had come in, then came back toward Valiente and Martinez. Hart reached behind his back with his left hand, pulled out a black semiautomatic firearm, and held it at his side. Hart pointed his finger at Valiente and said, "Hey, don't call the police." He added, "I'll kill you." Hart and his two companions got back into the Nissan and the female driver drove off.

Martinez called the police and Valiente spoke with them when they arrived.

2. *The charges and allegations*

The People charged Hart with assault with a semiautomatic firearm on Valiente (Count 1), assault on Valiente by means of force likely to cause great bodily injury (Count 2), criminal threats against Valiente (Count 3), dissuading a witness (Valiente) from reporting a crime (Count 4), and possession of a firearm by a felon (Count 6). As to Counts 1, 2, 3, and 4 the People alleged Hart had personally inflicted great bodily injury on Valiente. The People alleged Hart had committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang. The People alleged various firearms allegations as well. During trial, the People dismissed Count 1 and the great bodily injury enhancement as to all counts. The People also moved to amend the information to conform to proof to add a Count 7, dissuading a witness (Josue Martinez Santos) from reporting a crime. The People alleged gang and gun allegations as to Count 7 as well.

3. ***The trial testimony of the prosecution's gang expert***

The case proceeded to trial in June 2016. Los Angeles Sheriff's Department Deputy Anthony Delia testified as the prosecution's gang expert. Delia said he worked in the gang unit and had been in law enforcement for 16 years. Delia provided a general description of the 18th Street gang. Delia testified the gang's primary activities are vandalism, narcotics sales, robberies, shootings, assaults, and murders.

The prosecutor then asked Delia about two cases the People relied on as "predicates" to establish a "pattern of criminal gang activity" within the meaning of Penal Code section 186.22, subdivision (b)(1)(B),³ *People v. Fajardo*, Case No. MA062592, and *People v. Delgado*, Case No. MA061498. Delia said he had had several contacts with Fajardo, whose moniker was Mugsy. Delia testified Fajardo had admitted to him and to his partner Detective Thompson that he was an 18th Street gang member. Delia said Fajardo had several 18th Street gang tattoos, including one on his chin. Delia testified he was familiar with Delgado as well. Delia said he had arrested Delgado in a gun case and filed a second gun case against him. Delia testified Delgado had admitted 18th Street membership to him, had been arrested with another 18th Street gang member, and had 18th Street tattoos. The prosecutor marked as exhibits certified copies of the court records of Fajardo's conviction for "a shooting-related crime" and Delgado's conviction for possession of a firearm.

The prosecutor and Hart's counsel then stipulated that Salas had been involved in the alleged crimes charged in this case.⁴ Delia testified he had seen booking photographs of Salas

³ All statutory references are to the Penal Code.

⁴ Salas was charged as a codefendant. He did not proceed to trial and is not a party to this appeal.

showing 18th Street gang tattoos, including “18” on the top of his head and other 18th Street-related tattoos. The prosecutor showed these booking photos to the jury. Delia said he had read police reports in which Salas had admitted to 18th Street gang membership. Delia added he had read a number of field identification cards reflecting Salas’s admission to other officers of his gang membership.

Turning to Hart, Delia testified he had read a 2004 arrest report concerning Hart and a man named Pablo Cruz. Delia said he had seen booking photos of Cruz with 18th Street tattoos and read a police report mentioning the tattoos. The prosecutor showed jurors booking photos of Cruz with gang tattoos on the back of his head and his lower neck. Delia testified Hart had 18th Street tattoos as well, and the prosecutor showed the jury booking photos of Hart with a large “18” across his abdomen and an “18” on the side of his neck.

The prosecutor then gave Delia a hypothetical set of facts essentially tracking the facts of this case. Delia stated that, in his opinion, that hypothetical crime was done in association with the 18th Street gang and benefitted the gang. Delia went on to testify about gang-related photographs and a list of apparent monikers found in Hart’s home.

4. *The defense case*

Hart’s attorney also called a gang expert, Martin Flores, to testify. Flores stated that tattoos—especially tattoos that a person acquired years ago—do not necessarily mean that person is an active gang member.

Hart testified on his own behalf. Hart said he had joined the 18th Street gang when he was about 13 years old. He was

active in the 106 clique.⁵ Hart testified he got his first tattoo at age 13, then more tattoos as the years went on. Hart admitted these were 18th Street tattoos, including tattoos on his neck and chest. Hart said his moniker was “Sporty.”

Hart admitted he had been convicted of three felonies and committed to prison each time: in 1998 for discharging a firearm; in 2000 for robbery; and in 2005 for assault with a deadly weapon. Hart said he was sentenced to nine years on the third case and paroled in May 2013. Hart also admitted that, when he was arrested in 2004 for assault with a deadly weapon, he was with Pablo Cruz and that Cruz was an 18th Street gang member. Hart conceded 18th Street is a criminal street gang.

Hart testified he “tried to sort of gradually remove [himself] from the peers that [he] was hanging around with” in prison in about 2008 or 2009. Hart said he was on “two waiting lists” to have his tattoos removed.

Hart testified he had seen Valiente around his apartment complex; their wives were friends. Hart had greeted Valiente in passing, but they had not really spoken because Hart speaks no Spanish. Hart testified that in June or July 2015, Valiente’s wife Seire “tried to sleep with [Hart].” After that, one night when Valiente passed Hart at the apartment complex, Valiente “made like a real evil, angry look at [Hart] with the aggressive [*sic*].”

Hart testified that, on August 15, 2015, he and his friend Robert Salas had been to a barbecue at the home of Hart’s friend Tim Gonzalez. Salas’s wife Mia drove Hart back to the apartment complex; Robert Salas and Tim Gonzalez were with them. Hart said he walked through the pedestrian gate.

⁵ Deputy Delia testified the Tiny Winos is an 18th Street clique that uses the number 106, one of the streets within its neighborhood.

Valiente, who was with two other men, called to him: "Sporty." Hart walked over to Valiente, who spoke Spanish to him; the only word Hart recognized was "Seire." Hart testified Martinez then "made a comment" and he and Valiente "both were talking like aggressive -- aggressively towards me making aggressive body gestures towards me." Tim came through the gate and asked Hart if everything was alright. According to Hart, Valiente then hit Tim and Tim hit Valiente back. Valiente was swinging a skateboard. Hart testified he told Valiente, "You know what, man? You guys stay away from my family and we are going to stay away from your family." Hart said he, Salas, and Gonzalez then left. Hart testified he never threatened Valiente or Martinez, said or shouted "18," or asked Valiente where he was from, nor did Salas or Gonzalez. Hart testified he did not have a gun and never pulled out a gun, displayed a gun, or pointed with his hand at Valiente. Hart denied ever having told Valiente or Martinez not to call the police.

Hart also called Michael Spells as a witness. Spells testified he goes to the apartment complex on 35th Street from time to time to drop off his child support payments to his wife. Spells said he was there the evening of August 15, outside on his wife's patio. Spells testified he heard screaming, peeked over the wall, and saw three people under the carport. Spells said Hart pulled up; he and "his friend" came through the gate. The "three guys" under the carport "started screaming at him." Spells testified the "kind of skinny" guy told a child who had been skateboarding to give him the skateboard. Spells said the man was "screaming in Spanish" "over a woman." Spells testified the man ran toward Hart "using the skateboard, basically, as a weapon." A third person got out of the car Hart had arrived in and said, "let's just go." Spells said, "I didn't see nobody get hit. I just heard -- a lot of verbal abuse. And it was mainly towards

[Hart], but, for the most part, I would say he handled it . . . great” Spells testified one of Hart’s companions then said, “Let’s go. They gonna call the police. If they ain’t calling the police, these camera⁶ [*sic*] will call the police.” Hart and his two companions then got in the car and left. Spells said he never saw Hart or anyone else with a gun.

On cross-examination Spells testified he had seen Hart’s tattoos and knew they were gang tattoos.

5. *The verdicts, new trial motion, and sentence*

On June 21, 2016, the jury returned its verdicts. The jury was unable to reach agreement on Count 3, the criminal threats charge. The jury found Hart guilty on Counts 2, 4, and 7, assault on Valiente by means of force likely to cause great bodily injury and dissuading Valiente and Martinez from calling the police. The jury found the gang allegations true on those counts. The jury acquitted Hart on Count 6 (felon in possession of a firearm) and found the gun allegations on the other counts to be not true.

Nine days after the jury convicted Hart, our Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). On September 12, 2016, Hart’s trial counsel filed a motion for a new trial, arguing that Delia’s testimony “basing his opinions on his research of prior reports and statements” was inadmissible hearsay and, as “primarily testimonial,” violated Hart’s confrontation clause rights. At the hearing on the motion, counsel argued, “the jury heard that Mr. Hart was previously a gang member[;] he denies still being one.” Hart’s attorney did not specifically challenge Delia’s testimony about the predicates or any other particular statements other than the question of whether Hart remained an 18th Street member. The prosecutor

⁶ Video of at least part of the incident was played for the jury.

argued that, even if some of Delia’s testimony were hearsay, “the evidence in support of the gang enhancement was overwhelming.” The prosecutor cited Hart’s 18th Street tattoos, Salas’s 18th Street tattoos, the gang-related items found at Hart’s home when authorities executed the search warrant, and Hart’s own testimony about “his level of involvement with the 18th Street gang over the years.”

The trial court denied the new trial motion.⁷ The court also denied Hart’s motion to strike his prior strikes under *People v. Romero* (1996) 13 Cal.4th 497. The trial court sentenced Hart to life with a minimum eligible parole date of 90 years, calculated as follows: On each of the three counts, the court sentenced Hart to a third strike sentence of 25 years to life, to be served consecutively pursuant to section 1170.12, subdivisions (a) and (c)(2). The court imposed a five-year gang enhancement on each of those three counts, to be served concurrently with the life terms. The court also sentenced Hart to a determinate term of 15 years, consisting of the three serious felony priors under section 667, subdivision (a)(1). The court imposed and stayed three one-year prison priors under section 667.5(b).⁸

DISCUSSION

On appeal, Hart contends, “[u]nder *Sanchez*, the testimony of the prosecution’s gang expert, [Deputy] Delia, violated appellant’s right to confrontation under the Sixth Amendment to the United States Constitution in that the detective relied on testimonial hearsay as evidence admitted for the truth-of-the-

⁷ The prosecutor told the court the People would not seek to retry the criminal threats charge.

⁸ As discussed below, the parties agree the prison priors must be stricken, not stayed.

matter [*sic*] to establish that 18th Street gang members engaged in a ‘pattern of criminal gang activity.’” Hart also argues his trial lawyer was constitutionally ineffective for failing to object to Delia’s testimony.

To sustain a gang enhancement under section 186.22(b), the prosecution must prove the defendant committed the charged felony for the benefit of, at the direction of, or in association with a criminal street gang. One of the components of the statutory definition of a criminal street gang is “a pattern of criminal gang activity” engaged in by the gang’s members. The statute defines “pattern of gang activity” as two or more enumerated “predicate offenses” committed on separate occasions or by two or more gang members. (§ 186.22(e); *People v. Ochoa* (2017) 7 Cal.App.5th 575, 581 (*Ochoa*)). Typically, the prosecution proves the necessary “pattern” by introducing into evidence certified court records of two earlier convictions of members of the same gang for qualifying crimes, together with expert testimony about those earlier cases and their perpetrators.

1. ***Sanchez prohibits the introduction through expert testimony of case-specific testimonial hearsay***

In *Sanchez, supra*, 63 Cal.4th at p. 670, decided on June 30, 2016, our Supreme Court held that the confrontation clause “limits an expert witness from relating case-specific hearsay content in explaining the basis for his opinion.” “[T]he critical question under the confrontation clause is whether the out-of-court statements were ‘testimonial,’ as required to implicate the clause under *Crawford v. Washington* (2004) 541 U.S. 36, 51-52, 68.” (*Ochoa, supra*, 7 Cal.App.5th at 583.) Addressing the question of what constitutes “case-specific hearsay,” the *Sanchez* court said an expert may testify about “his general knowledge in his field of expertise.” (*Sanchez, supra*, 63 Cal.4th at p. 676.) By contrast, an expert may not testify about facts “relating to the

particular events and participants alleged to have been involved in the case being tried” “about which the expert has no independent knowledge.” (*Ibid.*) The *Sanchez* court gave this example: “That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang.” (*Id.* at p. 677.)

2. ***Delia’s testimony about the predicate crimes that constituted a pattern of gang activity was not case-specific and therefore did not violate Hart’s confrontation clause rights***

In the nearly two years since *Sanchez* was decided, courts have continued to try to determine what sorts of expert testimony constitute impermissible case-specific hearsay. The *Sanchez* court defined case-specific facts as “those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Sanchez, supra*, 63 Cal.4th at p. 676.)

Hart contends “Delia relied on case-specific hearsay . . . to establish the requisite predicate crimes,” referring to Delia’s testimony about Fajardo’s and Delgado’s admissions of 18th Street membership, their gang tattoos, and Delgado’s association with another 18th Street member when arrested on a gun charge.

Sanchez did not specifically address whether gang expert testimony about the predicate crimes necessary to establish a “pattern” of criminal gang activity was case-specific. The court noted the gang expert in that case had testified “about convictions suffered by two [members of Sanchez’s gang] to establish that [that gang’s] members engage in a pattern of

criminal activity.” (*Sanchez, supra*, 63 Cal.4th at p. 672.) But the court did not return to the “predicates” issue; instead, it focused on the confrontation clause violation arising from the testimony of the gang expert—who had never met Sanchez—based on police reports the expert had read about Sanchez’s own gang membership and activities. (*Id.* at pp. 685-686.)

In *People v. Meraz* (2016) 6 Cal.App.5th 1162, review granted Mar. 22, 2017, S239442 (*Meraz*),⁹ Division Eight of this court held that a gang expert’s recitation of permissible general background information “plainly includes the general background testimony [the gang expert in that case] gave about [the defendant’s gang’s] operations, primary activities, and pattern of criminal activities.” (*Id.* at p. 1175.) The court there noted such testimony “was unrelated to [the *Meraz*] defendants or the current shooting and mirrored the background testimony the expert gave in *Sanchez*.” (*Meraz*, at p. 1175.) The court stated, “Thus, under state law after *Sanchez*, [the gang expert] was permitted to testify to non-case-specific general background information about [Meraz’s gang], its rivalry with [the victim’s gang], its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers.” (*Meraz*, at p. 1175.)

The Third District Court of Appeal reached the same conclusion in *People v. Blessett* (2018) 22 Cal.App.5th 903 (*Blessett*). The court, quoting *Sanchez*, noted “a gang expert may testify concerning general background information relating to

⁹ On March 22, 2017, the California Supreme Court granted review in *Meraz*. The high court ordered that the court of appeal’s opinion published at 6 Cal.App.5th 1162 “remain precedential” pending review. (*People v. Meraz* (2017) 390 P.3d 782; Cal. Rules of Court, rule 8.1115(e)(3).)

gang culture and the ‘*history* and general operations’ of a specific gang.” (*Blessett*, at p. 943.) The *Blessett* court stated, “The expert’s testimony on the predicate offenses here included the gang membership of the people involved in those prior offenses. . . . [D]efendant asserts that the facts necessary to prove a pattern of criminal gang activity pursuant to section 186.22 are case-specific facts within the meaning of *Sanchez* because they are facts used to prove the gang enhancement which is charged in the particular case. . . . We disagree. [¶] *Sanchez* did not address facts underlying predicate offenses; rather, the court’s focus was on facts used by the gang expert to establish the defendant’s gang membership. . . . The predicate offenses used in this case do not fall within this definition; they did not involve the particular events or participants involved in the case being tried.” (*Blessett*, at p. 944; see also *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411 (*Vega-Robles*).)¹⁰

In sum, under *Meraz* and *Blessett*, Deputy Delia’s testimony that Fajardo and Delgado, the defendants in the two predicate cases, were 18th Street gang members was not impermissible case-specific hearsay.

¹⁰ In *Ochoa*, *supra*, 7 Cal.App.5th 575, the First District suggested some expert testimony about the gang membership of predicate crimes defendants might be testimonial and impermissible. However, *Ochoa*’s failure to object to the expert’s testimony had left the record unclear and insufficient for review. (*Id.* at pp. 584-585.) *Ochoa* predated the First District’s decision in *Vega-Robles*. Moreover, one of the predicates in *Ochoa* involved the defendant *Ochoa* himself. The *Blessett* court specifically noted it was not “address[ing] . . . a situation where a predicate offense was committed by a defendant charged in the case being tried.” (*Blessett*, *supra*, 22 Cal.App.5th at p. 944, fn. 20.)

3. ***Any error in admitting Delia’s testimony about the predicate crimes was harmless under Chapman***¹¹

In any event, any error in admitting Deputy Delia’s testimony was harmless beyond a reasonable doubt. As noted, Delia had personally observed the 18th Street tattoos on Fajardo and Delgado, the defendants in the predicate crimes. Hart himself admitted he had joined the 18th Street gang at an early age (though he claimed to have tried to extricate himself from the gang in later years). Hart has 18th Street tattoos, including a large and visible tattoo on the front of his neck, going onto his chest. Hart testified that, when authorities arrested him in 2004 for assault with a deadly weapon, he was with Pablo Cruz, a fellow 18th Street member. Hart stipulated that Robert Salas—his cohort that night in August 2015—had been involved in the altercation with Valiente, and the jury viewed photographs of Salas’s gang tattoos, including an “18” on the top of his head. Hart himself admitted in his testimony at trial that 18th Street is a criminal street gang. As the trial court noted in denying Hart’s motion for a new trial, the evidence supporting the gang allegation was overwhelming.¹²

4. ***Hart’s sentence must be corrected***

Finally, the parties agree the trial court should have stricken, rather than stayed, the three one-year prison priors it imposed under section 667.5, subdivision (b), because those prison terms were served in the same cases that constituted Hart’s five-year serious felony priors. (*People v. Perez* (2011) 195

¹¹ *Chapman v. State of California* (1967) 386 U.S. 18.

¹² Because we conclude that Delia’s testimony about the predicates and the defendants who committed them was properly admitted, we need not reach the Attorney General’s forfeiture argument or Hart’s ineffective assistance of counsel argument.

Cal.App.4th 801, 805; *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1094, fn. 3.)

The People also note the trial court erred in sentencing Hart to concurrent five-year gang enhancements on each count. When a defendant is sentenced to an indeterminate term based on the Three Strikes Law, the sentence on the gang enhancement is not a determinate term, but a requirement that the defendant serve a minimum of 15 years to be eligible for parole. (*People v. Williams* (2014) 227 Cal.App.4th 733, 744-745.)

In addition, errors appear in the abstract of judgment. The trial court sentenced Hart to a consecutive term of 25 years to life for each of the three underlying offenses (Counts 2, 4, and 7). But the abstract of judgment does not reflect whether these sentences were consecutive or concurrent. We order the trial court to prepare an amended abstract with the box checked for “consecutive” in the line listing each count. Also, the abstract incorrectly shows the sentence for each of these counts is both life with the possibility of parole (box 5 is checked) and 25 years to life (box 6b is checked). Because the sentence for each count is 25 years to life, box 5 on the amended abstract should *not* be checked. Box 6b should be checked.

DISPOSITION

Hart's conviction is affirmed. We remand the case to the trial court to correct sentencing errors and the abstract of judgment. We direct the trial court to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.