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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MAXIMILIANO MURILLO et al., Defendants and Appellants.	B275684 (Los Angeles County Super. Ct. No. TA134222)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed as modified.

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant Maximiliano Murillo.

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant Jose Antonio Valdes.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and William N. Frank, Deputy Attorney General, for Plaintiff and Respondent.

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Three gang members drove into rival gang territory in a caravan and gunned down a rival gang member who was walking down the street. After a joint trial, a jury convicted each of them of varying degrees of murder and found that the crime was gang related. On appeal, the defendants claim that the People's gang expert impermissibly offered an opinion on their guilt; that the trial court erred in not instructing the jury that two of the three defendants' incriminating statements to jailhouse informants needed to be corroborated; that the trial court misinstructed on the gang enhancement; that the trial court erred in imposing sentence on the gang enhancement; and that they are entitled to a remand for the trial court to consider whether to strike the 25-year firearm enhancement in light of the newly enacted Senate Bill (SB) 620. Only defendants' last two arguments have merit. Accordingly, we affirm their convictions and remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Maximiliano Murillo (Murillo), Jose Antonio Valdes (Valdes), and Ricardo Virgen (Virgen) (collectively, defendants) are members of the Village Boys gang. In late April 2012, Valdes and Virgen beat up a fellow Village Boys gang member, Michael Soto (Soto), for stealing $100 from Virgen's van. The next day, Soto saw Valdes and relayed that members of the Village Bloods, a rival gang, had just beat up Soto and his girlfriend. Incensed

that someone else would beat up Soto, Valdes got into his white van and drove off. Minutes later, all three defendants drove to Village Bloods gang territory in a caravan of vehicles—Virgen in a gray car and Valdes and Murillo in a white van. Surveillance video, Valdes's cell phone records, and the GPS anklet Murillo was wearing (because he was on parole) confirm defendants' movements. Defendants came upon Raymond Fuzee (Fuzee), a Village Bloods gang member. They fired 10 bullets at Fuzee from two different firearms—a .357 handgun and a Ruger Mini-14. Fuzee died from his wounds.

The day after the shooting, Valdes told Soto, "We killed a Hacie," slang for a Village Bloods member. The next month, Village Boys gang members sold the .357 handgun and the Ruger Mini-14 used to kill Fuzee to undercover police officers.

In July 2014, Murillo had a secretly recorded conversation with a fellow inmate. To the inmate, Murillo acknowledged that he was "there" when a Village Blood—one of his "enemies"—was "popped," but explained that he was merely driving a white van and never "touched" or fired any weapon. Murillo also said that there were two others with him, one "younger" and one "older." Valdes is younger than Murillo, and Virgen is older.

In February 2015, Virgen had a secretly recorded conversation with a fellow inmate. Virgen told him that "two" or "three years ago," Virgen drove into Village Bloods territory at "nighttime" with "two" "crimeys" who were in a vehicle behind his, which was a van; that Virgen's goal was "to get every nigger I could get"; that they had "a mini 14 and a 357"; and that he "drove up" to the victim and "blast[ed] his ass" "on the streets." Virgen also explained that he later "got rid of" the guns.

II. Procedural Background

The People charged all three defendants with a single count of murder (Pen. Code, § 187).[1] The People further alleged that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)); that a principal in the crime discharged a firearm (§ 12022.53, subds. (d) & (e)(1)); and that Virgen and Valdes personally discharged a firearm (§ 12022.53, subd. (d)). The People further alleged that Murillo had served four prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to a joint trial for all three defendants. A jury convicted Virgen of first degree murder, and found Valdes and Murillo guilty of second degree murder. As to all three defendants, the jury found the gang allegation and the principal's use of a firearm allegation to be true. The jury found that Virgen personally discharged a firearm, but that Valdes did not.

The trial court sentenced all three defendants to prison. The court sentenced Virgen to 50 years to life, comprised of 25 years to life for first degree murder plus 25 years to life for his personal use of a firearm. The court sentenced Valdes and Murillo to 40 years to life, comprised of 15 years to life for second degree murder plus 25 years to life for a principal's use of a firearm. As to all three defendants, the court imposed and stayed 10-year sentences for the gang enhancement.

All three defendants filed timely notices of appeal.

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

DISCUSSION

I. Convictions

A. *Propriety of Gang Expert's Testimony*

Defendants argue that the People's gang expert impermissibly offered an opinion on whether they were guilty of the underlying murder. We review a trial court's evidentiary rulings for an abuse of discretion (*People v. Clark* (2016) 63 Cal.4th 522, 597), and whether those rulings violate any constitutional guarantees de novo (*People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 22-23).

1. *Pertinent facts*

Among other things, the People's gang expert testified that each of the defendants was a member of the Village Boys gang. With regard to Murillo, the expert offered four reasons for his opinion: "[1] He's admitted and documented. [2] He has tattoos consistent with that gang. [3] He's been seen openly associating with members of that gang. [4] *And for the crime that we're here for today, murder of a rival gang member*." (Italics added.) With regard to Valdes, the expert offered five reasons: "[1] Again, the [field identification] cards, [2] openly associating with other members of the gang, [3] the tattoos on his body, [4] hanging out in the area, and [5] *the crime for which we're here today, going into the rival gang neighborhood and committing murder*." (Italics added.) With regard to Virgen, the expert offered a slightly different set of reasons: "Again, [1] openly associating with other members of the gang, [2] having tattoos consistent with that gang, [3] hanging out in that gang area, and [4] *again, for what we're here for today, murder of a rival gang member, with other members of his own gang*." (Italics added.) None of defendants' attorneys objected to any of this testimony.

2. *Analysis*

An expert witness may offer an opinion if it is: (1) "[r]elated to a subject that is sufficiently beyond common experience that the opinion of [the] expert would assist the trier of fact"; and (2) "[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject." (Evid. Code, § 801.) Because "evidence of gang sociology and psychology is beyond common experience" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550), experts may permissibly offer opinions on a variety of topics related to gangs, including "an individual defendant's membership in, or association with, a gang" and "whether and how a crime was committed to benefit or promote a gang." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657, disapproved in part on other grounds by *People v. Vang* (2011) 52 Cal.4th 1038, 1045.) Moreover, when offering these opinions, experts may rely upon the circumstances of the charged crime: In *People v. Castenada* (2000) 23 Cal.4th 743, 752-753 (*Castenada*) and *Vang*, respectively, our Supreme Court held that gang experts may cite to the facts of the charged crimes to offer opinions on whether the defendant was actively participating in a criminal street gang and on whether the charged crime benefitted a gang.

The gang expert's testimony in this case fits comfortably within these parameters. The expert was explaining the basis for his opinion that each of the defendants was a member of the Village Boys, and one of those reasons was that they were engaged in behavior that only a member of a gang would undertake—namely, driving with fellow gang members into a rival gang's territory to take out a rival gang member. The expert's reliance on the facts of the charged crime to prove each

defendant's membership in a gang is indistinguishable from the testimony of the expert in *Castenada* who relied on the facts of the charged crime to prove the defendant's active participation in the gang. (*Castenada*, *supra*, 23 Cal.4th at pp. 752-753.) Both are permissible.

Defendants' primary assertion is that the italicized language could be read as offering an opinion that each defendant was guilty of the charged murder. To be sure, "[a] witness may not express an opinion on a defendant's guilt" for the simple reason that such an opinion is "'of no assistance'" to the jury, who is just as able as any expert to make that determination. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77; *People v. Leonard* (2014) 228 Cal.App.4th 465, 493; *People v. Torres* (1995) 33 Cal.App.4th 37, 47.) However, the gang expert in this case did not offer any opinion on defendants' guilt. Defendants' argument seeks to convert one of the expert's many reasons supporting his opinion that defendants are gang members into an ultimate opinion about each defendant's guilt, and does so by ripping the italicized language out of context. Not only does this argument ignore the maxim that we must view the record in context (see, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 60-61; *People v. Bozigian* (1969) 270 Cal.App.2d 373, 376-377), but it also ignores that no one at the time—including the three defense attorneys and the trial court—understood the expert's testimony to be objectionable, a result that seems highly unlikely if the expert's testimony were reasonably susceptible to

interpretation as passing judgment on the ultimate question of all three defendants' guilt.[2]

B. *Failure to Instruct That Accomplice Testimony Requires Corroboration*

Defendants assert that the trial court erred in not instructing the jury that they may only credit Murillo's and Virgen's secretly recorded statements to other inmates if they find some corroboration of those statements. We independently review a trial court's jury instructions. (*People v. Posey* (2004) 32 Cal.4th 193, 218 (*Posey*).)

A trial court has a sua sponte duty to instruct a jury that "[a] conviction [of a defendant] can not be had upon the *testimony* of an accomplice"—that is, someone "who is liable to prosecution for the identical offense"—"unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." (§ 1111, italics added.) For these purposes, "testimony" means an accomplice's in-court testimony for the People and any "'out-of-court statements . . . used as substantive evidence of guilt which are made under suspect circumstances.'" (*People v. Williams* (1997) 16 Cal.4th 153, 245, quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218; cf. *People v. Guiuan* (1998) 18 Cal.4th 558, 567 [corroboration not required when accomplice testifies for the defense].) Corroboration is required in the above specified circumstances

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[2] In light of this conclusion, we have no occasion to reach the People's argument that the defendants forfeited the claim or defendants' arguments that their counsel was constitutionally ineffective for not objecting or that any error was harmful. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 931 ["Counsel is not ineffective for failing to make a frivolous motion."].)

because those circumstances are the ones where the accomplice has the "motive . . . to dissemble" by minimizing his own guilt while maximizing his cohorts'. (*Williams*, at p. 246; *People v. Brown* (2003) 31 Cal.4th 518, 555 (*Brown*).)

In *Brown*, *supra*, 31 Cal.4th 518, our Supreme Court held that an out-of-court statement that qualifies as a declaration against penal interest is not "made under suspect circumstances" because such a declaration "is itself sufficiently reliable to be allowed in evidence" without corroboration. (*Id.* at pp. 555-556, italics omitted.) To qualify as a declaration against penal interest, the People must prove: (1) "'the declarant is unavailable'"; (2) "'the declaration was against the declarant's penal interest'"; and (3) "'the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 462; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*); Evid. Code, § 1230.)

The jailhouse statements of Murillo and Virgen were not "made under suspect circumstances" (and thus did not require corroboration) because their statements are declarations against penal interest. The trial court so ruled, and we independently agree with its reasoning. Both Murillo and Virgen were unavailable as witnesses due to their invocation of their privilege against self-incrimination. Their statements were also against each defendant's penal interest and sufficiently reliable: Murillo admitted that he was driving the white van in the caravan that traveled into Village Bloods territory at the time Fuzee was "popped," although he was not the shooter; and Virgen admitted to "blast[ing]" Fuzee. Both of these statements is "'specifically disserving'" to them. (*Duarte*, *supra*, 24 Cal.4th at pp. 611-612.) Defendants argue that Murillo's statement is not disserving

because he ascribed to himself a minimal role (as driver, not shooter), but this ignores that Murillo's role *was* minimal. Indeed, the fact that he did not *falsely inflate* his role makes his statement more trustworthy, not less. Defendants also assert that only the portions of Virgen's statement incriminating *to him* are admissible, but Virgen's statement that his "two crimeys" were following him in the caravan is incriminating to him because it shows the crime was committed en masse with his fellow gang members, which supports the gang enhancement.[3]

C. *Cumulative Error*

Murillo argues that his murder conviction is invalid due to the cumulative effect of both of the above discussed errors. Because his individual claims lack merit, there is no error to cumulate. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

II. Sentencing

A. *Instructional Error Underlying Gang Enhancement*

Defendants argue that the trial court erred in instructing the jury, with respect to the gang enhancement, that "possession of [an] assault weapon" is a predicate offense that may underlie a finding that the Village Boys gang has engaged in a "pattern of

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[3] Although defendants only obliquely mention it on appeal, the trial court's determination that Murillo's and Virgen's statements were not "testimonial" under the Sixth Amendment's confrontation clause is also correct because "statements from one prisoner to another" or "statements made unwittingly to a [g]overnment informant" are not testimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 825; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1214; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402.)

criminal gang activity." As noted above, we review instructional errors de novo. (*Posey*, *supra*, 32 Cal.4th at p. 218.)

A defendant may be subject to sentencing enhancements if he is convicted of "a felony committed for the benefit of, at the direction of, or in association with a[] criminal street gang." (§ 186.22, subd. (b).) A "criminal street gang" is "any ongoing organization, association, or group of three or more persons" that, among other things, has "members [who] individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) And a "pattern of criminal gang activity" exists when gang members have been convicted of "two or more" statutorily enumerated predicate offenses within three years of each other. (§ 186.22, subd. (e).)

As the People concede, the trial court in this case committed instructional error when it instructed the jury that "[a] pattern of criminal gang activity" could be established by showing "[t]he commission [of] possession of [an] assault weapon and murder." Murder is a statutorily enumerated predicate offense (§ 186.22, subd. (e)(3)), but possession of an assault weapon is not (*People v. Fiu* (2008) 165 Cal.App.4th 360, 387).

However, this instructional error is harmless beyond a reasonable doubt. The trial court also instructed the jury, "If you find the defendant guilty of a crime in this case, you may consider that crime in deciding . . . whether a pattern of criminal gang activity has been proven." This instruction is proper. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401 ["The charged offense or offenses . . . may be considered in determining a pattern of criminal street gang activity."].) Because the People proved a murder by Village Boys gang member Victor Garabay in 2012, and the jury in this case found defendants guilty of Fuzee's

murder in 2016, the People have proven "two or more" predicate offenses, and the instructional error is harmless.

Defendants assert that it violates due process to uphold the gang enhancement based upon the murder charged in this case. For support, they cite *People v. Mancebo* (2002) 27 Cal.4th 735 and *Cole v. Arkansas* (1948) 333 U.S. 196.[4] There is no due process violation. The law allows the People to rely upon the charged offense in proving a pattern of criminal street gang activity, and the jury was so instructed; this provided defendants ample notice and opportunity to be heard—the hallmarks of due process. *Mancebo* dealt with our One Strike law, which requires its statutory provisions for enhancements to be pled and proven (*Mancebo*, at p. 749); the gang enhancement statute does not require the specific predicate offenses to be pled, and the charged murder was proven beyond a reasonable doubt. And *Cole* held that an appellate court could not uphold a sentence on the basis of a crime that was never charged or proven. (*Cole*, at pp. 201-202.) We are upholding a jury's finding on a factual theory actually presented to the jury.

B. *Sentencing Errors*

1. *Imposition of stayed sentence for gang enhancement for Valdes and Murillo*

Valdes and Murillo assert that the trial court erred in imposing and staying a 10-year prison sentence for the gang enhancement. They are right. Where, as here, a defendant is subject to the enhancement for a *principal's* use of a firearm in the midst of a gang crime (rather than *personal* use), a court may

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[4] Defendants also cite *Turner v. United States* (1970) 396 U.S. 398 and *People v. Salas* (2001) 89 Cal.App.4th 1275, but those cases are irrelevant to this issue.

not impose *both* the firearm enhancement *and* the gang enhancement. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.)

2. *Imposition of stayed sentence for gang enhancement for Virgen*

Virgen argues that the trial court erred in imposing and staying a 10-year prison sentence for the gang enhancement. He is also right. Where, as here, a defendant is convicted of "a felony punishable by imprisonment in the state prison for life," the gang enhancement provides for a 15-year parole minimum, not an additional 10-year sentence. (§ 186.22, subd. (b)(5); accord, *People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)

C. *Remand for SB 620 Hearing*

Defendants have asked for a remand for the trial court to consider whether to strike the 25-year-to-life enhancement it imposed. SB 620 amended section 12022.53 to grant trial courts the discretion to strike its firearm enhancements "in the interest of justice." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Although the effective date of this amendment is January 1, 2018, it applies retroactively to any defendant whose conviction is not yet final because it mitigates punishment by granting a trial court the discretion to strike the previously mandatory firearm enhancement. (*In re Estrada* (1965) 63 Cal.2d 740, 748-750; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

DISPOSITION

The case is remanded for resentencing to allow the trial court to consider whether the enhancements under sections 12022.53 should be stricken pursuant to section 1385.

The judgments are modified as follows:

As to Murillo, the portion of the judgment imposing and staying a 10-year enhancement pursuant to section 186.22,

subdivision (b)(1)(C) is stricken, and the trial court is ordered to prepare and forward to California's Department of Corrections and Rehabilitation an abstract of judgment modified accordingly.

As to Valdes, the portion of the judgment imposing and staying a 10-year enhancement pursuant to section 186.22, subdivision (b)(1)(C) is also stricken, and the trial court is ordered to prepare and forward to California's Department of Corrections and Rehabilitation an abstract of judgment modified accordingly.

As to Virgen, the portion of the judgment imposing and staying a 10-year enhancement pursuant to section 186.22, subdivision (b)(1)(C) is stricken, and replaced with the 15-year minimum term for parole eligibility required by section 186.22, subdivision (b)(5). The trial court is ordered to prepare and forward to California's Department of Corrections and Rehabilitation an abstract of judgment modified accordingly.

In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ