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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM RUIZ, Defendant and Appellant.	B233867 (Los Angeles County Super. Ct. No. LA063864)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barry A. Taylor, Judge. Affirmed.

Mark McBride for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant William Ruiz appeals from a judgment of conviction entered after a jury found him guilty of two counts of first degree residential robbery (Pen. Code, § 211), one count of residential burglary (*id*., § 459), two counts of false imprisonment by violence (*id*., § 236), one count of assault with a semi-automatic firearm (*id*., § 245, subd. (b)), one count of criminal threats (*id*., § 422), and two counts of home invasion robbery (*id*., § 211). The jury also found all firearm and gang allegations to be true (*id*., §§ 186.22, subd. (b)(1)(c), 12022, subd. (a)(1) & (2), 12022.5, subd. (a), 12022.53, subds. (b) & (e)(1)). Defendant was sentenced to a total indeterminate term of 36 years to life in state prison.

On appeal, defendant claims ineffective assistance of counsel and insufficient evidence to support the gang allegation. We affirm.

FACTS

A. *Prosecution Evidence*

On December 9, 2009 at 4:30 a.m., Samuel Rojas (Rojas), a maintenance worker, was awakened by a knock at the door and a bell ringing at the Movieland Motel in Tarzana. Rojas and his girlfriend, Laura Russo (Russo), lived on the property. Russo was the manager of the motel.

Rojas got up and went to the security window at the front entrance to the motel and asked the potential customer if he could help him. Defendant said he wanted to get a room, but wanted to view it first. Rojas gave him a key to Room 6. Defendant returned to the window a few minutes later and asked if he could see another room. He pointed a gun at Rojas and ordered him to open the door. Defendant had a handgun. Behind him was another man carrying a semi-automatic rifle.

Rojas let them in and they pushed their way into the private apartment. Rojas called out to his girlfriend. Defendant pistol whipped him and told him to get to his knees and put his head down. Rojas thought it was his "last day on earth."

Russo was in the bedroom, trying to get dressed. Defendant and his companion ransacked the apartment, asking Rojas and Russo where their belongings were and where the cash was located. Russo pointed out where she had hidden several hundred dollars in a closet. Defendant also asked where the jewelry was. Russo pointed to the jewelry case and said it contained jewelry. Defendant opened the case and said, "I know . . . there's a safe here."

Rojas said that they did not have the combination to the safe. Defendant threatened to shoot Rojas in the leg if he did not open the safe. He took Rojas' watch and wallet. He looked at Rojas' identification and warned him that he knew who he was now.

Russo was standing next to Rojas, pleading with defendant not to shoot Rojas. The intruders were going through the drawers in the bedroom. Defendant began talking to Russo, rubbing her chest, fondling it.

Defendant started talking to his partner in Spanish, saying "Hey, homey, just keep — you know keep watch for me. Just keep watch. . . . I'm going to spend a little time with this girl." Rojas asked defendant to not touch Russo and told him that he spoke Spanish and understood what he said to the other man.

Rojas was taken back to the living room and noticed there was a car outside. Defendant asked his partner, "How is everything going?" His partner responded, "It's cool. . . . Your homey's out there." Rojas heard them use the name "Teaser."

Rojas and Russo discovered a television missing from the motel room that defendant had initially viewed. They denied calling the police after defendant and his partner left. However, the police arrived at the motel several hours later.

Rojas was a daily marijuana smoker at the time the incident occurred and occasionally used methamphetamine. Sometime after the incident, he told an investigator that he was so high on the day of the incident, he almost blacked out. He retracted that claim on the witness stand. He also told the investigator that he had met Emerson Beltran

(Beltran) (the man outside who was called "Teaser") on a previous occasion when he talked to him about repairing a fence at the motel.

Los Angeles Police Detective Michael Tinker investigated the events that had taken place. When he interviewed Rojas, Rojas told him that when the two robbers were inside the residence, one of them said, "Don't worry. Teaser's out there." The police department's gang database linked the moniker "Teaser" to Beltran. Detective Tinker photographed a car parked across the street from Beltran's residence. Rojas was able to identify it as the car he saw in the parking lot of the motel in the early morning hours of December 9, 2009.

Rojas and Russo both told Detective Tinker that defendant was the man that entered the apartment and had a big "13" tattooed on his face—the number one on one side of his face, the number three on the other side.

Officer Ralph Brown of the Los Angeles Police Department testified as a gang expert. Since joining the LAPD, he had been involved in about 599 gang-related investigations and arrests. He had previously testified as a gang expert approximately 65 times and had testified against various gangs, including the "Barrio Van Nuys," or BVN, gang.

Officer Brown described the history of the BVN gang and was familiar with their claimed territory. The Movieland Motel was not in BVN territory. He explained that on September 9, 2009, a judge signed an anti-gang injunction and since then BVN gang members tended to operate "out of that area, out of their turf."

Officer Brown described the gang's primary activities as robbery, possession of illegal weapons, assault with a deadly weapon, assault on police officers and murder. He also testified about the robbery conviction of a BVN gang member named Steve Hernandez. He also identified a robbery, resulting in a conviction, that was committed by an admitted BVN gang member, Felipe Sanchez.

Officer Brown indicated that he knew defendant, and defendant had admitted to him several times that he was a member of BVN. He testified that defendant had tattoos associated with Hispanic gangs. Defendant had "VN" tattooed on the back of his head,

"BVN" tattooed on his chest, a "V" and "Van" tattooed on his left hand, an "N" and "Nuys" tattooed on his chest, and a "V" and "Van" tattooed on his right hand. He also testified that defendant had the number "1" tattooed on the left side of his face and a number "3" tattooed on his right check. The number 13 identifies gang members with the Southern Hispanic gangs and the Mexican Mafia. Defendant had two gang "monikers": "Yeska" and "Chilly Willy."

With regard to Beltran, a BVN member whose moniker was "Teaser," Officer Brown indicated that he knew him through one contact and one arrest and believed he was a gang member.

When presented with a hypothetical based on the facts of this case, Officer Brown opined that the crime was committed for the benefit of and in association with—but not necessarily at the direction of—the BVN gang.

B. ***Defense Evidence***

The defense called a single witness, Ashley Fauria (Fauria), an investigator, who had worked on the case for Beltran's attorney.

Fauria interviewed Rojas in February 2010, while Rojas was incarcerated in the North County Correctional Facility, in Castaic. Rojas told Fauria that he was so intoxicated during the crime that he almost blacked out. He said he was so "high" that he did not remember if he saw a man standing outside the car, or if he saw someone in the car. He said he personally believed that he would not be a credible witness in the case. He said police had pressured him to identify someone in the photographic six-pack. He said it was dark outside when the men forced their way in on the morning of the incident and he was not wearing his glasses.

DISCUSSION

A. *Defense Counsel's Failure to Object to Gang Testimony*

Defendant contends that his defense counsel provided ineffective assistance at trial when he failed to object to Officer Brown's testimony that the offenses at the Movieland Motel were committed for the benefit of the BVN gang. We disagree.

When a defendant raises a claim of ineffectiveness of counsel, he must establish that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) "'"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."'" (*In re Cudjo*, *supra*, at p. 687; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d. 674].)

Officer Brown testified, based on assumed facts in the prosecutor's hypothetical, that the offenses were committed for the benefit of, and in association with (but not necessarily at the direction of) the BVN gang. It is well-established that a gang expert properly may give testimony regarding the culture and habits of criminal street gangs and may render an opinion in response to a hypothetical question based on facts the expert was asked to assume. (Evid. Code, § 801; *People v. Gonzalez* (2006) 38 Cal.4th 932, 946; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) "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 pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) In a case such as this one, involving the gang enhancement, various types of evidence related to gang membership are relevant to the charged offense and

admissible, in that they have greater probative value than prejudicial effect. (Evid. Code, § 352; *Hernandez, supra*, at p. 1049.)

A gang expert may base an opinion upon hearsay, including conversations with gang members, as well as "'the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies.'" (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) If asked to explain the basis for his opinion, the gang expert may relate the information and sources the expert relied on in order to form his opinion. (*Id*. at p. 1209.) A gang expert may base an opinion on matter that is of a type that reasonably may be relied upon by experts in forming their opinion upon the subject of their testimony because the culture and habits of gangs are deemed matters which are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Gardeley, supra*, 14 Cal.4th at p. 617.)

It is proper to allow a gang expert to give an opinion that the crime would benefit a criminal street gang. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 928, 930-931.) Simply stated, because Officer Brown's testimony was admissible, defense counsel was not ineffective for failing to object to its admission. (*Id*. at pp. 934-935.)

Defendant's reliance on *People v. Albarran* (2007) 149 Cal.App.4th 214 is misplaced. In *Albarran*, a shooting occurred at a birthday party held for the cousin of a Pierce Boys Gang member, but the gang officer testified that the Pierce Boys Gang had no known or relevant gang rivalries, and he knew of no reason for the shooting. Additionally, there was nothing inherent in the facts of the shooting to suggest any specific gang motive. (*Id*. at p. 227.) The court found "insufficient evidence to support the contention that [the] shooting was done with the intent to gain respect." (*Ibid*.) Here, however, there was a tangible benefit to the BVN gang from the commission of the crime—the proceeds of the robbery could be used to fund the gang's activities.

In addition, the potential for prejudice from the gang evidence admitted in this case was nothing like that in *Albarran*. In *Albarran*, the gang expert's testimony consumed the better part of an entire trial day (in a six-day trial) and was 70 pages of the

reporter's transcript. (*People v. Albarran*, *supra*, 149 Cal.App.4th. at p. 227, fn. 10.) In the instant case, the gang expert's testimony took only part of a morning and consisted of only 19 pages.

In *Albarran*, in addition to the gang expert's testimony, two sheriff's deputies testified that the defendant was a gang member. There were references to the Mexican Mafia. (*People v. Albarran*, *supra*, 149 Cal.App.4th. at pp. 220, 228.) Additionally, "[t]he prosecution presented a panoply of incriminating gang evidence, which might have been tangentially relevant to the gang allegations, but had no bearing on the underlying charges." (*Id*. at p. 227.) In the instant case, there was only one brief mention of the Mexican Mafia, when the gang expert was explaining a tattoo. The expert did not dwell on the crimes committed by the BVN gang but stated the gang's primary activities and made only two references to other gang members who had been convicted of crimes.

In *Albarran*, the court determined, given the nature and amount of the gang evidence, the number of witnesses who testified to the defendant's gang affiliations, and the role that the gang evidence played in the prosecutor's argument, the admission of gang evidence was prejudicial. (*People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 227-228.) In the instant case, the gang evidence and testimony was clearly less than in *Albarran* and was relevant to prove the substantive offenses or the gang enhancement.

Moreover, even if defense counsel arguably should have objected to the gang evidence, defendant has failed to demonstrate prejudice. Reversal for ineffective assistance of counsel is not required unless defendant shows a reasonable probability that, but for counsel's unprofessional errors and/or omissions, he would have obtained a more favorable outcome. (*In re Cudjo*, *supra*, 20 Cal.4th at p. 687; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.) Here, the gang evidence was properly introduced. In addition, the evidence against defendant was compelling, even without the gang evidence. Both Rojas and Russo told Detective Tinker that defendant was the individual who entered the residence and had a "13" tattooed on his face. Rojas was also able to identify the car he saw in the parking lot of the motel in the early morning hours on the

day of the incident. It is not reasonably probable defendant would have been acquitted had the gang evidence not been introduced.

B. *Defense Counsel's Failure to Object to Gang References*

In addition to defendant's contention that trial counsel was ineffective for failing to object to gang evidence, defendant submits that counsel was also ineffective for not attempting to bar expert testimony as to "similar" gang activity by BVN members. We disagree.

Defendant claims defense counsel should have objected to the evidence of two "similar" robberies for which BVN members were convicted. These were introduced to establish the commission of two or more of the predicate criminal acts by gang members, which establishes a pattern of criminal gang activity, necessary for a true finding on the gang enhancement. (Pen. Code, § 186.22, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 9.)

Defendant also claims Officer Brown "was permitted to establish his 'credentials' by further inflaming the jury by discussing hundreds of gang crimes known to him committed by scores of gangs . . . ." Defendant fails to explain, however, how Officer Brown could have established his credentials without testifying as to his gang experience.

"A witness is qualified to testify as an expert if the witness has special knowledge, skill, experience, or education pertaining to the matter on which the testimony is offered. (Evid. Code, § 720.)" (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.) Expert opinion testimony is admissible if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Such testimony must be "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (*Id*., subd. (b).)

The value of an expert's opinion rests upon the material on which the opinion is based and the reasoning leading from this material to a conclusion. (*People v. Coogler* (1969) 71 Cal.2d 153, 166; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) Unless Officer Brown testified as to his experience with and knowledge of gangs and gang culture, his opinion would be of no value to the jury.

Inasmuch as the evidence to which defendant objects was admissible, his counsel was not ineffective in failing to object to it. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1450.)

C. *Sufficiency of the Evidence*

Defendant contends the evidence was insufficient to support the gang allegation. We disagree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]['] [¶] 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224 [same test applies to a challenge to a gang enhancement].)

Substantial evidence is that which is reasonable, credible, and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) "[A]lthough [all] reasonable inferences must be drawn in support of the judgment, [the] court may not 'go beyond inference and into the realm of speculation in order to find support for a judgment. A

finding . . . which is merely the product of conjecture and surmise may not be affirmed.'" (*People v. Memro* (1985) 38 Cal.3d 658, 695, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; accord, *People v. Waidla* (2000) 22 Cal.4th 690, 735.)

An expert may testify as to "'whether and how a crime was committed to benefit or promote a gang.'" (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 18-19; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) "A gang expert's testimony alone is insufficient to find an offense [is] gang related." (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) Rather, the expert testimony must be accompanied by "some substantive factual evidentiary basis" (*id*. at p. 661) from which "the jury could reasonably infer the crime was gang related" (*People v. Ferraez, supra*, 112 Cal.App.4th at p. 931).

Such a factual basis existed here. Defendant had prominent gang tattoos, including a "13" tattooed on his face. This identified his as a gang member, making it unnecessary for him to announce his gang membership as in *People v. Albarran*, *supra*, 149 Cal.App.4th. at page 227. While defendant and another man engaged in the robbery, another gang member, known by his gang moniker Teaser, waited outside, inferably standing watch for the other two. Additionally, during the robbery, defendant and his crime partner referred to each other as "homey." Homey is a gang expression that refers to a gang associate. (See, e.g., *People v. Baldwin* (2010) 189 Cal.App.4th 991, 997; *People v. Ramirez* (2010) 189 Cal.App.4th 1483, 1486.) In sum, there was sufficient evidence for the jury to reasonably infer that the crimes were gang related.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.