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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GRADY MONTGOMERY, Defendant and Appellant.	B231357 (Los Angeles County Super. Ct. No. BA360303)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald H. Rose, Judge. Reversed.

Tara K. Hoveland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Louis W. Karlin, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Grady Montgomery guilty of attempted murder, found true a firearm allegation and a gang enhancement, and also found Montgomery guilty of possession of a firearm by a felon. Montgomery appeals, arguing that insufficient evidence supported his conviction and the trial court erred in allowing improper expert opinion regarding the gang enhancement. We reverse.

BACKGROUND

A second amended information filed May 27, 2010 charged Montgomery with attempted willful, deliberate, and premeditated murder, in violation of Penal Code[1] sections 664, 187 subdivision (a), and with personally discharging a firearm causing great bodily injury, in violation of section 12022.53, subdivisions (b) through (e) (count 1). The information also charged that the offense was committed for the benefit of and in association with a criminal street gang, in violation of section 186.22, subdivision (b)(1)(C). Count 2 charged Montgomery with being a felon in possession of a firearm, in violation of section 12021, subdivision (a)(1). Montgomery pleaded not guilty.

At trial, 19-year-old Travion Braggs testified that late on June 27 and in the early morning of June 28, 2009 (when he was 18), he attended a party of about 70 people in the backyard of a house on West 37th Street in Los Angeles, in Rolling 30's gang territory. Braggs's father was a Rolling 30's member. Braggs knew Montgomery from Hamilton High School, and Montgomery had told Braggs he was a member of the Rolling 30's gang. Braggs was not a member of any gang, although he hung out with members of several gangs. When they were in high school, Montgomery had asked Braggs why he was not in Rolling 30's like his father; Braggs did not respond.

Montgomery (who was then 20 years old) was at the party, and he approached Braggs in the driveway and aggressively asked, "Where [are you] from," which to Braggs meant "[w]hat gang am I from." Braggs answered, "I don't bang." Montgomery asked Braggs, "'Why are you getting extra'ed in my hood?'" "Getting extra'ed" meant "getting

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[1] Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

disrespectful." Montgomery then said, "'This is 30's hood.'" Braggs replied, "'This is my daddy's hood, too,'" and walked away into the backyard.

Later, when Braggs was again in the driveway, Montgomery approached him accompanied by an older man Braggs recognized as a Rolling 30's member. The other man said that he knew who Braggs was, and told Braggs and Montgomery "everything was going to be good." Towards the end of the party (still in the driveway, where the party was spilling out), Montgomery challenged Braggs to a fight, saying, "'Come outside,'" meaning the street. Braggs tied his shoes and tightened his belt and walked down the street, in the same direction as Montgomery. Braggs was getting ready to fight.

Braggs called to Montgomery, "'I'm not walking down that far.'" Montgomery turned around and came back toward Braggs, who was unarmed. Montgomery stopped walking about three to four feet away from Braggs, pulled a gun from his waist, and fired the gun. When Braggs felt the first shot hit him in his chest, he started running away, but was still getting shot. He was hit seven times, in his heart, his stomach, and his back. As a result of the shooting, Braggs was testifying from a wheelchair. He still felt pain, and took medication that caused memory loss and sleepiness. After the shooting, he was in the hospital for five months.

When the police came to interview him in the hospital, Braggs told them what happened the night of the shooting and described the shooter, but did not tell them the shooter's name; he was afraid of being labeled a snitch, "[a] person that tells," because "[t]hey get hurt." In a later meeting with police, he named the shooter as "Grady." Braggs rejected two six-pack photographic lineups, because they did not contain photographs of the shooter or the older man at the party. When the police showed him other six-packs, Braggs initialed a photograph of Montgomery, said, "That's the person who shot me," and initialed a statement, "'I know him from Hamilton High School and know him on the streets as Infant Bucca Trucc or Grady.'" Braggs had a clear look at Montgomery's face each of the three times they spoke at the party. Braggs also initialed a statement describing another photograph as the man "'talking to me right before Grady shot me.'" The parties stipulated that the second photograph was of Kenneth Rhone.

Braggs knew both men but had not seen them together before the shooting, and he was certain he had made the right identification of both photographs.

Braggs did not want to come to court and testify that day, and had asked to be relocated. He was afraid for his family, partly because Montgomery was a gang member.

On cross-examination, Braggs denied having an orange bandanna that night, or telling the police that he had an orange bandanna. He did not drink at the party. Braggs said the first time he spoke to police was July 13, 2009. The police told Braggs that "Infant Bucc" was Grady's aka; Braggs gave the police the name "Grady" the second time they talked to him.

Braggs knew someone named Brandon King, and had seen him at the party and greeted him briefly. King testified that he knew Braggs, had invited him to the party (a birthday party for King's friend, who was not a gang member), and was at the party at the same time that Braggs was there. King heard five or six shots and saw Braggs bleeding on the ground, but denied telling the police anything or seeing an orange bandanna. He did not see Montgomery at the party. King testified that orange was the color of the Hoover gang.

Los Angeles Police Department (LAPD) Officer Brian Thayer testified that he was a member of a gang impact team and was called to the shooting scene. Braggs was lying on the front sidewalk, with an orange bandanna close to his body, as seen in a photograph Officer Thayer took with his camera (and which was shown to the jury). The bandanna was booked into evidence. Officer Thayer also found nearby six bullet casings from an automatic weapon, as well as two bullet fragments.

Officer Thayer interviewed King at the scene. King told Officer Thayer that he noticed Rolling 30's gang members arrive at the party, and saw them confront Braggs, who seemed to know them. The Rolling 30's members called Braggs out front to fight, and Braggs wrapped an orange bandanna around his fist in possible preparation for a fist fight. King then heard six gunshots and saw Braggs lying on the ground. Officer Thayer's conversation with King was accurately memorialized in a police report, which he reviewed before testifying. His experience with crime witnesses in gang territory was

that they did not want to talk to police, out of fear and intimidation, and of the hundred or so people the officers approached to ask for witness statements, the general response was that they had seen and heard nothing. King was the only witness who gave a statement.

LAPD Officer Brian Zavala testified that on April 15, 2009 (over two months before the shooting) he made contact with Montgomery, who was with Rhone about a mile from the party location and in Rolling 30's territory. Montgomery told Officer Zavala he was with the Rolling 30's, with the moniker Infant Bucc. Rhone said he was also with the Rolling 30's, with the moniker Dirt.

LAPD Officer Paul Fedynich testified that he was assigned to investigate the shooting. He first interviewed Braggs on July 8, 2009, in the hospital intensive care unit, with Braggs's mother present. Braggs was in critical condition, wheezing and speaking in a whisper. He told Officer Fedynich that he went to the party on 37th Street and got into a confrontation with somebody (Braggs did not give a name), who asked him where he was from, demanded "why are you getting extra'd out in my hood," and then challenged Braggs to a fight by "stating step outside for a fade," which Braggs took to mean for a fist fight. Braggs also described an older individual who got involved, a Rolling 30's gang member like Braggs's father, who told Braggs everything would be okay, put his arm around the other man, and walked down the street with him. Braggs told Officer Fedynich that he took an orange bandanna from his pocket and wrapped it around his hand to prepare for the fight, and squared off in a fighting position. The two men began to walk back, and the younger man took a handgun out of his waistband, yelled "fuck Hoover," and shot Braggs seven times. Braggs did not identify either of the two men in photographic six-packs, although he commented that one of the faces resembled the shooters.

Officer Fedynich interviewed Braggs in the hospital again on July 13, 2009; Braggs was alone. Braggs told Officer Fedynich he wanted to tell him who shot him, and stated, "the person who shot me is someone I know from Hamilton High School and I know him as Grady or Infant Bucca Trucc," from the Rolling 30's gang. Braggs did not provide a physical description of Montgomery. Braggs explained that Montgomery had

approached him in high school to ask why he hung around with gangs other than the Rolling 30's, since his father was in that gang. Braggs had responded that he did not have a good relationship with his father.

Officer Fedynich knew Montgomery as a Rolling 30's member. When Braggs said he knew the shooter as "Grady," Officer Fedynich had an idea it might be Montgomery. He went back to the department and put together six-packs which included Montgomery's and Rhone's photographs. Officer Fedynich returned to the hospital that same day and showed the six-packs to Braggs, who immediately identified Montgomery and Rhone and initialed statements Fedynich wrote (in his condition, it was difficult for Braggs to hold the pad and write). Braggs's comments about being shot by a member of his father's gang, having nightmares, and being afraid someone would come to the hospital and kill him (concerns shared by his mother), explained Braggs's failure to give Montgomery's name the first time Officer Fedynich interviewed him.

On cross-examination, Officer Fedynich testified that Braggs told him he used to be a member of the City Stone Bloods, and currently associated with the 94 Hoovers. On redirect, Officer Fedynich stated there was a difference between being a gang member and a gang associate.

Los Angeles County Sheriff's Department Gang Detective Richard Sanchez testified as an expert in cell phone technology. The records for the cell phone found in Montgomery's possession (and registered to "a G. M.") when he was arrested on August 11, 2009 showed 11 calls in 12 minutes beginning at 11:25 p.m. on the date of the shooting. All 11 calls accessed the Foshay cell phone tower at 35th Street and Normandie, the closest cell phone tower to the shooting location (half a mile away).

Hermin Ocampo, M.D., testified that he specialized in neurosurgery and worked in the emergency room of California Hospital, where he treated Braggs on June 28, 2009. Braggs arrived "in extremis meaning he's barely alive" with multiple gunshot wounds, and Dr. Ocampo intubated him (put a breathing tube in his chest), opened his chest to do cardiac resuscitation, and gave him a blood transfusion. Dr. Ocampo immediately took him to the operating room to stop the bleeding in Braggs's abdomen, and planned other

surgeries to his colon, intestine, and diaphragm when Braggs was more stable. There were seven bullet holes between Braggs's abdomen and chest. One bullet had gone into his spinal cord and left Braggs paralyzed below his belly button. In the next three weeks to a month, Braggs had seven or eight surgeries. Braggs's medical records indicated that his paralysis was permanent.

During the five months that Braggs was in the hospital, he was markedly depressed and had trouble speaking and swallowing. He was given pain medication intravenously while he was intubated, which heavily sedated him. He still took oral pain medication. Dr. Ocampo was not present when the police officers questioned Braggs. Braggs would have been unable to speak if he was still intubated. After two weeks, however, the tube was removed, and Braggs was taken off the heavy pain medication and given medication by mouth, so that he was no longer heavily sedated. Braggs was transferred to an acute rehabilitation center.

LAPD Officer James Moon testified as a gang expert. For three years, Officer Moon worked patrol in the area, and for the previous 18 months he had been on gang enforcement detail, assigned to monitor, suppress, document, and arrest Rolling 30's members. He had been in contact with 500 gang members (among whom were 200 Rolling 30's members), making 100 arrests. Gang members would talk to him but would not snitch on other gang members. To get into a gang, an individual would commit crimes (called "putting in work") for the gang to show they were "down for the hood" and increase their status in the gang. Gangs identified themselves by signs, symbols, tattoos, graffiti, hand symbols, and colors. Gang territory was very important, as crossing the border of your gang's territory into another gang's area could result in getting beaten or shot. Gang members used monikers to identify themselves and to hide from the police. An individual could have more than one gang moniker or several variations on the same moniker.

Officer Moon testified that respect was everything in gang culture. Higher-status gang members would discipline younger gang members who did not show them respect. Fear was also important, as community members within gang territory would not report

gang crime for fear of getting hurt. Witnesses to crimes in gang territory often recanted when testifying in court. Members of rival gangs showed disrespect for each other by shootings or assaults.

The area where Braggs was shot was in Rolling 30's territory. Because of the gang, area residents were afraid to come out at night or carry items on the street, for fear of being robbed. The gang's primary activities were drug sales, burglaries, street robberies, and shootings. The P-Stone gang and the Hoover gang were rivals of the Rolling 30's. The prosecution submitted evidence of two offenses, burglary and possession of firearm by a felon, committed by Rolling 30's gang members.

Montgomery had Rolling 30's tattoos, which a member of the gang would have to earn. He had been present at the arrest of one of the Rolling 30's gang members, along with other members of the gang. Officer Moon had been in contact with Montgomery five or six times, knew his monikers included Hucca Bucc, Bucca Trucc, Hucca Bucca Trucc, and Infant Bucc, and had found around six cards for Montgomery in the field identification system indicating that Montgomery claimed allegiance to the Rolling 30's. Montgomery had told Officer Moon that he attended Hamilton High.

Over defense objection, the court admitted into evidence three photographs downloaded from Montgomery's cell phone, showing him making Rolling 30's gang signs and wearing Rolling 30's colors. The jury also saw videos downloaded from Montgomery's cell phone showing him making gang signs. The prosecution showed photographs of Montgomery's tattoos, and Officer Moon testified that the tattoos displayed Rolling 30's symbols. Officer Moon testified that Rhone was a higher-ranking member of the Rolling 30's gang, and Braggs's father was a middle-ranking member.

Given a hypothetical mirroring the facts of the shooting (and, as elaborated upon below, using the gang monikers of Montgomery and Rhone) Officer Moon opined that the shooting was for the benefit of, in association with, or at the direction of the Rolling 30's. The Rolling 30's members perceived the victim as a P-Stone or Hoover gang member, and his presence in their territory was a disrespect to the Rolling 30's, especially since the victim's father was a Rolling 30's member and he was not. It was another sign

of disrespect to pull out an orange bandanna, a Hoover color, in front of the Rolling 30's members. The younger Rolling 30's member needed permission from the older member to shoot at the victim. The shooting benefited the gang by injecting fear into the community and showing rival gangs that they would take them out given the chance.

The parties stipulated that the six .40-caliber bullet casings recovered from the scene of the shooting were fired by the same semiautomatic handgun. The two bullet fragments were from different firearms, one of which was a .38-caliber firearm, and ballistics testing could not determine whether either matched the bullet casings.

Demarcus Holmes testified for the defense that Braggs was shot at a birthday party at Holmes's home. Most of the party took place in the backyard, and Holmes stood at the gate collecting money from each guest. Holmes was good friends with King, who had arrived around 11:00 p.m. He had seen Braggs at King's house, but never talked to Braggs before the party, and did not learn his name until the day of testimony. Holmes was not a gang member, and as far as Holmes knew, neither was King. Holmes's house was in the Rolling 30's neighborhood.

Montgomery and Rhone were not at the party, and Holmes did not recognize either of them. At some point, someone told him that there was an argument, and Holmes noticed eight to 10 people arguing in front of the garage. The only one he knew was "the guy I believe that is the victim." Some were wearing red, which was unusual, because red was a Blood color and this was a Crip neighborhood. He told them to leave, and walked them half-way to the gate. As they left, someone said "we could take this somewhere else, cous[in]." Three minutes later, Holmes heard gunshots that sounded close. His father told him to shut the party down and Holmes told everyone to leave. An ambulance arrived, and then the police came and blocked off the street, but Holmes did not talk to the police face to face.

In closing, the prosecutor argued: "In this case . . . , there's really only one question: Is this the right guy, is the defendant the one who committed the crimes . . . ." Braggs had gotten a good look at Montgomery, whom he knew from high school, and the identification of one credible witness was enough. Braggs was credible, even though he

downplayed his gang affiliation and denied pulling out the orange bandanna. The defense countered that Braggs's identification of Montgomery at the hospital was when he was under the influence of medication, Braggs had admitted his memory was poor, and Braggs was not credible. Admitting that Montgomery was a Rolling 30's member, defense counsel argued that it was unlikely that Montgomery would have shot Braggs, given that Braggs's father was also a Rolling 30's member. Counsel also emphasized that there was no DNA or fingerprint evidence.

The jury convicted Montgomery on all counts and found all allegations true. The trial court denied Montgomery's motion for new trial, and sentenced him to a life term for attempted murder, 25 years to life for the firearm enhancement, and 10 years for the gang enhancement, with a consecutive eight-month term for firearm possession by a felon. Montgomery filed a timely appeal.

DISCUSSION

I. Substantial evidence supported the identification of Montgomery as the shooter.

Montgomery argues that the evidence was insufficient to identify him as the man who shot Braggs. He characterizes Braggs's identification of him as inconsistent, because Braggs did not give the police Montgomery's name during the first interview in the hospital. He claims Braggs was under heavy sedation when he later identified Montgomery as the shooter, named him as "Grady" or "Infant Bucca Trucc," a Rolling 30's member, and selected Montgomery's photograph in a six-pack lineup. He also points out that neither Holmes (the host) nor King testified that they saw Rhone at the party. We disagree that the evidence was insufficient.

We apply the substantial evidence standard, examining the evidence in the light most favorable to the judgment, and determining whether the evidence is reasonable, credible, and of solid value so as to allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) We do not ask whether *we* believe that the evidence establishes guilt beyond a reasonable doubt, but view the evidence favorably to the prosecution to determine whether any

rational jury could have reached the verdict that it did. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) "'If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed.'" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) We examine only the bare legal sufficiency of the evidence, not its weight. (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

In-court eyewitness identification alone is sufficient evidence to sustain a conviction. (*In re Gustavo M.*, *supra*, 214 Cal.App.3d at p. 1497.) "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*Ibid.*) In addition, "the evidence of a single witness is sufficient for proof of any fact. [Citations.]" (*Ibid*.; see Evid. Code, § 411.)

Braggs, the shooting victim, identified Montgomery in court as the shooter. While this alone would have been substantial evidence that Montgomery committed attempted murder, there was additional direct evidence in the form of Braggs's statement to the police that the shooter was "Grady," and his selection of Montgomery's photograph in a six-pack lineup. Further, Braggs testified that he had a clear look at Montgomery's face several times at the party, and knew Montgomery from high school. The jury believed his identification, and that determination binds us. (See *People v. Cooks* (1983) 141 Cal.App.3d 224, 278.)

II. The trial court abused its discretion in allowing testimony about one of Montgomery's gang tattoos.

Montgomery next argues that the trial court abused its discretion when it admitted into evidence the photographs and videos from Montgomery's cell phone. Montgomery also challenges the court's decision to allow Officer Moon to testify that Montgomery was present during the arrest for one of the predicate crimes, and to opine about the significance of Montgomery's tattoos. Montgomery objected to each of these items of evidence at trial. We reverse a conviction based on an evidentiary ruling only if "'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner

that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.) We conclude that the trial court abused its discretion in allowing Officer Moon's testimony about one of Montgomery's tattoos.

A. Photographs and videos from Montgomery's cell phone

Three photographs downloaded from Montgomery's cell phone showed a pile of cash with a hand (unidentified) above it making a gang sign, and two images of Montgomery with a bandanna around his neck making a gang sign. The trial court excluded a fourth photograph showing Montgomery wearing a bandanna as a mask around his face, and displaying $100 bills. Three downloaded videos, all brief, showed a woman with a man who was a Rolling 30's member (and had committed one of the predicate crimes), and two showed Montgomery flashing gang signs. The court overruled Montgomery's objections to the three photographs and the three videos.

Montgomery argues that the images in the photographs and videos were irrelevant, cumulative and unduly prejudicial. We disagree. All the images tended to show Montgomery's close association with the gang and the extent of his involvement, which was relevant to whether he committed the offenses in this case for the benefit of a gang. While Montgomery's gang tattoos and his self-admission as a Rolling 30's member also were evidence of his gang-related motive, the photographs and videos showed further identification with the gang, and the gang enhancement requires "active participation in a criminal street gang, in the sense of participation that is more than nominal or passive." (*People v. Abillar* (2010) 51 Cal.4th 47, 56.) The trial court excluded the fourth photograph, which showed Montgomery masked by a bandanna with a pile of money, as too prejudicial. The court did not abuse its discretion in concluding that the remaining photographs and videos were more probative than prejudicial under Evidence Code section 352, which "requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect." (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.)

B. Montgomery's presence at a gang member's 2007 arrest

Officer Moon testified that Montgomery was present, along with other Rolling 30's members, at the April 2007 arrest of a gang member for being a felon in possession of a firearm.[2] The court overruled Montgomery's objections to the testimony, and instructed the jury that the testimony was only relevant to Montgomery's membership in the Rolling 30's gang for the purpose of the gang enhancement. Montgomery argues that this testimony was evidence of uncharged conduct and should have been excluded as character evidence under Evidence Code section 1101. Again, we disagree.

"[B]ecause the prosecution is required to establish the defendant was an active participant in a criminal street gang and had knowledge of the gang's criminal activities, the jury inevitably and necessarily will in any event receive evidence tending to show the defendant actively supported the street gang's criminal activities. That the defendant was personally involved in some of those activities typically will not so increase the prejudicial nature of the evidence as to unfairly bias the jury against the defendant." (*People v. Tran, supra,* 51 Cal.4th at p. 1048.) In *People v. Tran,* the Supreme Court concluded that the trial court did not abuse its discretion in admitting evidence that the defendant had committed a separate, gang-related offense on a previous occasion, to establish a predicate offense to establish a "pattern of criminal gang activity" under section 186.22, subdivision (b). (*Tran*, at pp. 1046, 1050.) The evidence was "highly probative" that the defendant actively participated in the gang and knew the gang engaged in a pattern of criminal activity. (*Id.* at p. 1050.) The prior conviction had taken place several years before the defendant's arrest on the current charges, enhancing its probative value "because the evidence emanated from independent sources that could not have been influenced by knowledge of the charged offenses." (*Ibid.*)

Here, the evidence was less inherently prejudicial, as Officer Moon testified only that Montgomery was present at the arrest of *another* gang member for a predicate offense; it was not evidence of uncharged conduct by Montgomery. Montgomery's

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[2] The offense was one of the predicate offenses for the gang enhancement.

presence was probative of active involvement in the gang's criminal activities, and tended to show that he knew other gang members engaged in a pattern of criminal activities. The arrest at which Montgomery was present occurred in 2007, more than two years before the party in June 2009 at which Braggs was shot. Further, the arrest was for being a felon in possession of a firearm, an offense which is "less inflammatory" than the testimony regarding the charged offense, the attempted murder of Braggs. (*People v. Tran*, *supra*, 51 Cal.4th at p. 1050.) And although Montgomery argues that the evidence was merely cumulative, it showed that Montgomery was physically present when other gang members were arrested for criminal activities, while the other evidence (the photos and videos, Montgomery's self-admission as a gang member, and his gang tattoos) showed only that he presented himself as an active gang member through gang signs and symbols. Finally, the court gave a proper limiting instruction. (See *ibid.*)[3]

The probative value of Montgomery's presence at the 2007 arrest outweighed its prejudicial effect, and the trial court did not abuse its discretion in admitting it.

C. Significance of Montgomery's gang tattoos

Officer Moon testified that not every associate or member of the Rolling 30's could get tattoos like Montgomery's, and it would be "offensive and disrespectful" to the gang if someone who had not put in work was tattooed like Montgomery, agreeing that "one has to earn [his] tattoos when you're a member of the gang." Montgomery objected before and during the testimony, and the trial court overruled the objections while limiting the prosecution from arguing that he had committed other crimes for the gang. On appeal, Montgomery argues that the trial court abused its discretion in admitting the testimony that the tattoos represented "putting in work," as that constituted evidence of previous uncharged criminal conduct.

This portion of Officer Moon's testimony regarding the tattoos, like his testimony about the photos and videos from Montgomery's cell phone and the evidence of his

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[3] Montgomery also challenges the admission of Officer Moon's testimony that Montgomery was arrested for a probation violation, but the court struck that testimony and ordered the jury to disregard it.

presence at the 2007 arrest, was relevant to the extent of Montgomery's involvement in the Rolling 30's. The testimony showed that the tattoos signified Montgomery was an active participant in the gang which, as we explained above, was an element of the gang enhancement. As limited by the court, the testimony did not unduly prejudice Montgomery as evidence of uncharged criminal conduct.

D. Prejudicial testimony regarding the bag of money tattoo

The prosecution's exhibit 36 showed a tattoo on Montgomery's neck, depicting a bag with a large dollar sign on the front and tied at the neck, with dollar bills protruding from the top and from a hole in the side of the bag. Asked what this symbolized, Officer Moon stated that it represented a Rolling 30's record label known as "Cash Me Out." Officer Moon added, "But they go by the motto of Money Over Everything or Money Over Bitches. And so sometimes you'll see this with M.O.B. or M.O.E. tattooed underneath it." The prosecutor asked, "And is that something—is Money Over Bitches something that's specific to the Rollin' 30's or is that specific to most gangs?" Officer Moon answered, "Most gangs, money is everything. Women are property, and that's why they call them bitches. They don't refer to them as women. Usually women, when they're talking about women, they're talking about their mom, someone in their family that they actually care . . . about." Defense counsel objected to the answer as irrelevant "and another motion I'd like to make at the side-bar," and the court overruled the objection.

We agree with Montgomery that the testimony about "Money Over Bitches" was improperly allowed. Exhibit 36 shows only a tattoo of a money bag. It does *not* show the initials "M.O.B." or "M.O.E.," or the phrase "Money Over Bitches" or "Money Over Everything." The meaning of "M.O.B." was thus entirely irrelevant, as the initials did not appear in the exhibit. The prejudicial impact of Officer Moon's testimony that "Money Over Bitches" was a gang motto was compounded by his explanation that the motto meant gang members viewed women as property and so were called bitches rather than women, unless they were family members the gang members cared about. This testimony about "[m]ost" gang members generally was irrelevant to what Montgomery's

Rolling 30's tattoo signified, and to male and female jurors alike would have labeled Montgomery a misogynist on the basis of a gang slogan that did not even appear in the photograph of a tattoo of a money bag. There was thus no probative value in Officer Moon's testimony, and considerable prejudice. The trial court abused its discretion in overruling the defense objection to the testimony regarding exhibit 36. In combination with the improper gang hypothetical we discuss below, this requires the reversal of Montgomery's conviction.

III. The hypothetical posed to the gang expert and the expert's opinion exceeded the bounds of permissible expert testimony.

Officer Moon testified that a hypothetical offense with facts essentially identical to the shooting of Braggs would be for the benefit of, at the direction of, or in association with a criminal street gang. In framing the hypothetical and eliciting Officer Moon's testimony, the prosecutor used Montgomery's and Rhone's gang monikers, and in response, Officer Moon also used the monikers. On appeal, Montgomery argues that this exceeded the scope of expert testimony and violated his Fifth, Sixth and Fourteenth Amendment rights.

We evaluate the erroneous admission of gang testimony for harmless error under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 228–229.) This standard requires reversal only if "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Prieto* (2003) 30 Cal.4th 226, 247.) We conclude that the error was not harmless under *Watson*.[4]

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[4] Montgomery also argues that the testimony violated federal due process and rendered his trial fundamentally unfair. Under that claim, we will find an error harmless only if after a review of the record, we determine beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Because we conclude the error was not harmless under *People v. Watson*, *supra*, 46 Cal.2d 818, we do not need to address whether *Chapman* applies.

We present the challenged testimony in detail to establish the context, italicizing each use of the gang monikers. The prosecutor began: "I'd like to give you a hypothetical. The victim of a shooting, his father is a Rollin' 30's gang member that, based on his age, is a mid-level gangster. The victim himself is not a Rollin' 30's gang member but has instead, at a minimum, associated with or had a former membership with both the P-Stone gang and the Hoover gang. That same victim attends a party in Rollin' 30's territory. While at that party, a documented Rollin' 30s gang member who has earned several Rollin'30's gang tattoos *and goes by the moniker Infant Bucca Trucc or Bucca Trucc or Bucc* approaches the victim and says to him where are you from. The victim and this documented 30's gang member *Bucca Trucc* engage in a verbal confrontation about the fact that the victim is in 30's hood, he's not a 30's, et cetera. The documented Rollin' 30's gang member challenges this victim to a fight. Victim accepts the challenge to the fight and as he walks outside to prepare for the fight, the victim pulls out an orange bandanna from his pocket and wraps it around his fist. Another documented Rollin' 30's gang member *who goes by the moniker of Dirt* tells the victim don't worry, I got this. *Dirt and Infant Bucc* walk down the street. The victim is following some distance behind. The victim yells out to the two of them not to go so far down. [¶] The two Rollin' 30's gang members talk briefly and then start to approach back towards the victim and once they reach the victim, *Infant Bucc* pulls out a handgun, yells fuck Hoover, and starts firing at the victim who was in a fighting stance prepared to have a fist fight who then turns around and starts running as he's getting shot at. The documented 30's member, *Infant Bucc*, continues to fire the gun as the victim is running away. That victim sustained several gunshot wounds to his chest." (Italics added.) The prosecutor then asked whether Officer Moon had an "opinion about whether or not that shooting would be committed 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 other gang members?"

The defense objected. At side-bar, defense counsel argued that it was improper to use the moniker "Infant Bucca Trucc" to ask Officer Moon "the reason and purpose

behind his firing the gun. . . . She's used specific facts and testimony from this trial, and I think the case law forbids that. It's not a hypothetical." The court ruled that the hypothetical was proper.

Officer Moon then opined that the crime would be for the benefit of the Rolling 30's, because "they believe this individual [the victim] to be a member or an associate at the very least" from the rival gangs. Asked who "they" were, Officer Moon replied, "The Rollin' 30's, more particular *Infant Bucc and Dirt.*" (Italics added.) The prosecutor continued: "So *Infant Bucc and Dirt,* the two documented Rollin' 30's, they are perceiving the victim as a P-Stone or a Hoover?" and Officer Moon answered, "Yes." (Italics added.)

Soon thereafter, the prosecutor asked, "I think you talked about two different people for a moment. So *Dirt* is the individual who tells the victim things are going to be fine, don't worry?" Officer Moon answered, "That's correct." The prosecutor asked, "*Infant Buc*[*c*] is the shooter?" Officer Moon answered, "Yes, ma'am." The prosecutor asked, "In that situation, are you saying that *Infant Bucc* would need permission in order to shoot?" and when Officer Moon agreed, continued: "And in your opinion, *Dirt's contact with the victim and Infant Bucc* in that hypothetical is providing permission to do the shooting?" The court overruled two objections by the defense, and Officer Moon continued: "*Dirt* is a higher-ranking member and would be able to give the okay or so-called green light to take out that kind of action on the victim." (Italics added.)

In *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), our Supreme Court held that hypothetical questions could properly be used to elicit testimony from gang experts, and that such hypothetical "questions must be rooted in the evidence of the case being tried, not some other case." (*Id.* at pp. 1045–1046.) The hypothetical questions asked by the prosecutor in *Vang* only "'thinly disguised'" the evidence. (*Id.* at p. 1046.) The *Vang* court noted that *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*) had stated: "'[T]he prosecution may not use a hypothetical question to conceal an expert's improper testimony on the real defendants' subjective knowledge and intent,'" but described that case's "limited significance: "'The opinion never specifically states whether or how the

expert referred to specific persons, rather than hypothetical persons. Obviously, there is a difference between testifying about specific persons and about hypothetical persons. *It would be incorrect to read* Killebrew *as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons.*" (*Id.* at pp. 1044, 1047, quoting *People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.) The Supreme Court added: "To the extent that *Killebrew* . . . was correct in prohibiting expert testimony regarding whether the *specific* defendants acted for a gang reason," the reason for the rule in *Killebrew* was that "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]." (*Vang*, at p. 1048, fn. omitted.)

The Supreme Court added in a footnote: "It appears that in some circumstances, expert testimony regarding the specific defendants might be proper. [Citations.] The question is not before us. Because the expert here did not testify directly about defendants, but only responded to hypothetical questions, we will assume for present purposes the expert could not properly have testified about defendants themselves." (*Vang*, *supra*, 52 Cal.4th at p. 1048, fn. 4.)

We are presented with the question not before the court in *Vang*, and we conclude that in this case the expert testimony about Montgomery *himself* requires reversal. Here, in response to the prosecutor's questions following a hypothetical identical to the facts of the case *and which frequently used Montgomery's and Rhone's gang monikers*, Officer Moon stated that "Infant Bucc and Dirt" believed the victim to be a member or associate of a rival gang, identified the shooter as Infant Bucc, and stated that "Dirt is a higher-ranking member" who could have given the shooter the go-ahead. This constitutes not "thinly disguised" evidence used as a hypothetical, but direct questions and testimony

about the defendant Montgomery. Officer Moon testified that "Infant Bucc" thought the shooting victim was a rival gang member, long after ample testimony established that "Infant Bucc" was Montgomery's gang moniker. In so doing, Officer Moon testified both that Montgomery was the shooter, and that Montgomery acted with a gang-related motive. Officer Moon's references to "Dirt," Rhone's moniker, as the Rolling 30's member who was in a position to give Infant Bucc the go-ahead to shoot the victim, served to anchor the testimony even more firmly in this case, rather than in a hypothetical situation, and expressed opinion regarding Montgomery's guilt on the substantive crime of attempted murder and on the gang enhancement.

Officer Moon's expert opinion that "Infant Bucc" was the shooter and that "Dirt" gave him the go-ahead to shoot were references to "'specific persons, rather than hypothetical persons. Obviously, there is a difference between testifying about specific persons and about hypothetical persons.'" (*Vang*, *supra*, 52 Cal.4th at p. 1047.) Using the gang monikers of the defendant and another gang member involved in the shooting erased the fine line between the hypothetical and the case against Montgomery which the prosecution had laid out before the jury. Officer Moon "g[a]ve an opinion on whether the defendant[] did commit an assault in that way, and thus did . . . give an opinion on how the jury should decide the case." (*Id.* at p. 1049.) Officer Moon's opinions on the ultimate facts of Montgomery's identity as the shooter and his gang-related motive exceeded the scope of permissible expert opinion and "'"are inadmissible because they are of no assistance to the trier of fact."'" (*Id.* at p. 1048.) The trial court abused its discretion in admitting the testimony over Montgomery's objections to the use of his and Rhone's gang monikers.

Officer Moon was asked to testify directly whether Montgomery shot Braggs, and whether Montgomery acted to benefit his gang. In response, Officer Moon obliged, stating that the gang, "more particular Infant Bucc," perceived Braggs as a rival gang member, and answering yes to the prosecutor's question whether "Infant Buc[c] is the shooter." This goes a far cry beyond the scope of permissible expert opinion, by testifying that Montgomery committed the charged crimes, and committed them with the

specific intent to benefit the gang. Officer Moon, who was not at the scene and had no personal knowledge, advised the jury how to decide Montgomery's guilt on both the substantive charge and the gang enhancement allegation.

We conclude that it is reasonably probable that Montgomery would have received a more favorable result in the absence of this error. The identification of Montgomery as the shooter rested heavily on the testimony of Braggs, the victim. Braggs testified that Montgomery was at the party; King, however, who was at the party and knew Braggs, testified that Montgomery was not there. Braggs testified that he did not have an orange bandanna, which was the color of the Hoovers, a rival gang; Officer Thayer, however, testified that an orange bandanna was close to Braggs's body on the sidewalk, and that King told him that Braggs wrapped an orange bandanna around his fist in preparation for a possible fist fight with Montgomery. Braggs also told Officer Fedynich at the hospital that he used an orange bandanna to wrap his fist. In addition, Officer Fedynich testified that Braggs told him that he currently associated with the Hoovers. While we have concluded that there was sufficient evidence to support the identification, we also believe that had the jury not heard the police expert identify Montgomery as the killer acting with a gang motive, it is reasonably probable that it would have disbelieved that evidence and thus acquitted Montgomery. Braggs' inconsistent statements about his association with a rival gang, King's consistent statement that Montgomery was not at the party, and the difficult medical circumstances under which Braggs identified Montgomery to the police all make a jury acquittal reasonably probable in the absence of the highly prejudicial testimony.[5] In other words, it is reasonably probable that absent the prejudicial evidence discussed herein, the jury would have found that the prosecution did not prove its case beyond a reasonable doubt.

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[5] We note that after the jury verdict, the court denied Montgomery's request for a continuance to allow Montgomery's counsel to consider a recent statement from King. As we reverse, we do not consider Montgomery's claim that the failure to grant the continuance was an abuse of discretion.

Montgomery also argues that cumulative error rendered Montgomery's trial fundamentally unfair. (See *People v. Hill* (1998) 17 Cal.4th 800, 815.) Adding the improper admission of the testimony regarding "Money Over Bitches" to the police officer's statement that Montgomery was the shooter and acted with a gang-related motive, we agree. Montgomery was tarred by the erroneous admission of a noxious gang slogan which nowhere appeared in the evidence before the jury, and then feathered by Officer Moon's statement that Montgomery committed the shooting and did so for the benefit of a gang.

We reverse.

DISPOSITION

The judgment is reversed.

NOT FOR PUBLICATION.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.