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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LENARD CURTIS, Defendant and Appellant.	B265705 Los Angeles County Super. Ct. No. BA357645

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed.

Joshua Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Autumn Christian was shot during a gang-related incident. Her companion, Robert Baker, tentatively identified defendant and appellant Lenard Charles Curtis as the shooter from a photographic six-pack, and Baker and Christian thereafter identified him at a stationhouse showup, which occurred within 44 hours of the shooting. At Curtis's trial, the prosecution introduced those identifications and Christian's in-court identification, and a jury convicted Curtis of shooting from a motor vehicle. On appeal, Curtis contends that his conviction must be reversed because the showup violated his due process rights. He further contends that evidence introduced to support the gang allegation violated the Confrontation Clause and there was insufficient evidence to support the allegation. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *The shooting*

On June 8, 2009, at approximately 10:30 to 11:00 a.m., Christian and Baker were walking near the intersection of 17th and Rimpau in Los Angeles.[1] A sport utility vehicle (SUV) passed but made a U-turn and pulled alongside them. Christian described the vehicle as "like a Grand Cherokee Jeep" that had a

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[1] Christian testified at trial, but Baker was unavailable so his preliminary hearing testimony was read to the jury instead.

shiny, silver front grille.[2] Baker similarly described the vehicle as a black "jeep" with a chrome grille.

Christian saw two people in the car, a driver and a back seat passenger. Both were young and Black, and the driver was light-skinned, had curly hair and wore glasses. Baker, however, saw three people in the car: the driver and front and back seat passengers. He also described the driver as light-skinned with short, curly hair. Christian described the shooter: he had a "round face," was "kind of dark skinned," had a short haircut and wore a baseball cap. Baker agreed that the shooter was dark-skinned. He added that the shooter had facial hair like a beard and wore a white T-shirt and black hoodie, which was not over his head. Baker thought the shooter was the front seat passenger, but Christian thought the shooter was seated behind the driver.

The driver angrily challenged Baker, " 'Where you from?' " Baker replied that he didn't " 'bang,' " but the driver and passenger said, " 'Rolling 20[s]. Fuck Crabs.' " Both Baker and Christian saw a revolver, which Baker said was black with a silver tip.

Four to five shots were fired, and the first hit Christian in the leg. She and Baker ran. After reaching a place of safety, Christian went to a hospital, returning home by the next evening.

The next evening of June 9, 2009, gang detectives were monitoring a black Toyota RAV4 SUV that had been reported stolen and was possibly used in a shooting involving Rolling 20s'

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[2] When Christian was shown a photograph of the vehicle Curtis was in just prior to his arrest, and it did not appear to have a shiny grille, she said her memory could have been wrong about the color of the grille.

gang members. Officers tried to stop the RAV4 but it attempted to flee, ultimately crashing. The three occupants—Amon Morrison, the driver; a female front seat passenger; and Curtis, the back seat passenger—got out and ran. Curtis exited from the driver's side rear door. After a brief foot pursuit, Curtis lay in the street. Police apprehended Morrison nearby.

B. *The photographic lineups and stationhouse showup*

The investigating officer, Detective John Jamison, first talked to Christian and Baker on the morning of June 9, 2009, the day after the shooting. That evening, Detective Jamison showed two six-pack photographic lineups to Christian and Baker, one containing a photo of Curtis and the second a photo of Morrison. Baker identified Morrison as the driver and Curtis as the shooter. But, because Baker said the photos "looked like" the driver and shooter, the detective characterized Baker's identifications as "tentative."[3] Christian did not select anyone. However, she did focus on one man who had similar features "[a]s far as skin tone and facial structure."[4] Not wanting to "pin" the crime on the wrong person, Christian told the detective that seeing the man in person could help her identify him.

Therefore, at 6:40 a.m. on June 10, 2009, Detective Jamison separately took Christian and Baker to a field or stationhouse showup at the Wilshire police station.[5] The

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[3] Had Baker said " 'that's one hundred percent him,' " the detective would have written " 'positively identified.' "

[4] Christian testified she was shown two photographic arrays, and she recalled circling someone. It is not clear on which photograph she focused.

[5] The showups were audio recorded and played for the jury.

detective gave the proper admonishments and refused to tell Baker, who asked, whether the person was the suspected shooter or driver. Both witnesses independently identified Curtis as the *shooter*. Initially, Christian said "[t]hat one looks like him" or "it kinda looks like him,"[6] because Curtis was contorting his face. But, when Curtis was turned to his side, she said, "Okay[,] [i]t does look like him," although she remembered the shooter being more heavyset based on the roundness of his face. Baker said, "Look like him," and when asked if "that's him," Baker agreed, "Mm-hmm." Curtis's forehead and his face stood out to Baker.

At the preliminary hearing, Baker identified Curtis as the shooter and Morrison as the driver. At trial, Christian identified Curtis as the shooter.

C. *Gang evidence*

The People's gang expert, Officer John Maloney with the Los Angeles Police Department (LAPD), had been assigned to the Wilshire gang unit since 2007. For the past three years, he had been assigned to the Wilshire-area gang impact team to investigate gang-related crimes in the Wilshire Division. The "biggest source" of his training and experience "that I do every day is related to investigating, documenting and investigating I guess I can say gang crime and gang members." He reviewed every report coming into the station for gang-related issues. His assignment included monitoring a Blood gang, Rolling 20s, which had between 180 to 250 members. Rolling 20s' "primary criminal

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[6] To the extent there may be discrepancies between the written transcript and audio of the showup and it is difficult to ascertain from the audio the precise words used, such discrepancies were for the jury to resolve.

activities," were "[a]nything from" vandalism, graffiti, narcotics sales, burglaries, robberies, assaults with a deadly weapon, attempted murder and murder. The Rolling 20s' rival, Schoolyard Crips, claimed the area where Christian was shot. Bloods derogatorily call Crips "Crabs."

In Officer Maloney's opinion, Curtis, as well as Morrison, were Rolling 20s gang members. The officer based his opinion on personal contacts he had with Curtis and Morrison. The officer, for example, had previously arrested Morrison and had multiple contacts with him, including one prior to the shooting at issue, when Morrison was photographed in gang attire and in the company of other Rolling 20s gang members. As to Curtis, the officer had a consensual contact with him on December 28, 2008 after which the officer prepared a field identification card (FI card). Curtis admitted he was a Rolling 20s gang member known as Chuckie.[7] The officer also relied on three other FI cards, which he did not prepare and which similarly indicated Curtis was a Rolling 20s gang member. Also, "AVE" is tattooed across Curtis's chest. The Avenues is a subset of the Rolling 20s, and the tattoo signifies that Curtis is a member of that subset or set.

D. *Defense case*

Retired Detective Timothy Williams testified as an expert in police procedure and the use of force. According to a 2003 LAPD training bulletin, field showups should be conducted close in time to the crime but no more than 22 hours later. A field showup should not be conducted after a tentative identification from a photographic six-pack, because the tentative identification

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[7] The FI card also noted that Curtis "has record."

may taint the later showup. Thus, field showups are usually done before photographic showups.

Dr. Mitchell Eisen testified as an eyewitness and memory expert. Memory does not operate like a camera. Instead, there are limits on our "attentional capacity," for example, attention can be divided between various things that are happening. Trauma also lessens the ability to remember details, and the presence of a weapon, for example, is distracting. Memory is malleable and can be "updated" to include correct or incorrect information. Reports closer to the event are the "best indicator" and are less likely to be affected by other sources. One-person field showups are more suggestive than lineups with multiple individuals and have a higher error rate. Conducting a showup after a photo lineup is highly suggestive.

II. Procedural background

The People filed an information in 2009 alleging that Curtis committed two counts of attempted murder and one count of shooting from a motor vehicle, each with a gang enhancement. Before trial, Curtis moved to exclude Baker's and Christian's pretrial identifications and any in-court identifications. Although the trial court described the stationhouse showup as not "the most ideal way to do it," the court saw no "impermissibility" in it and denied the motion.

The matter proceeded to trial and, on May 12, 2015,[8] a jury found defendant not guilty of the attempted murder counts but guilty of shooting from a motor vehicle (Pen. Code, former

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[8] Trial was delayed due to a finding that Curtis was incompetent. The court found him competent in January 2015.

§ 12034, subd. (c)).[9] The jury found true the gang allegation (§ 186.22, subd. (b)(1)(C)). On July 2, 2015, the trial court sentenced Curtis to seven years plus five years for the gang enhancement, for a total term of 12 years.[10]

Curtis appealed, and his appellate counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436. However, the parties were ordered to brief: (1) whether the trial court erred by denying Curtis's motion to suppress eyewitness identifications from the one-person showup, (2) whether the prosecution's gang expert testified to case-specific hearsay in violation of the Confrontation Clause, (3) whether there was sufficient evidence to prove Curtis committed the shooting for the benefit of a particular gang, and (4) whether there was sufficient evidence that the Rolling 20s' primary activities include attempted murder or assault with a deadly weapon.

DISCUSSION

I. Identification procedures

Undoubtedly, lineups and showups—photographic, live and field—are suggestive. (*People v. Medina* (1995) 11 Cal.4th 694, 753.) By their very nature, they suggest that someone in the lineup or the person at the showup might have committed the

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[9] All further undesignated statutory references are to the Penal Code.

[10] Morrison was separately tried and, in 2011, a jury found him guilty of two counts of attempted murder and of shooting from a motor vehicle. The jury found true premeditation, gang and gun allegations. Morrison appealed, and this court reversed in part and remanded for resentencing but otherwise affirmed the judgment of conviction. (*People v. Morrison* (Feb. 7, 2013, B235563) [nonpub. opn.].)

crime. (*People v. Odom* (1980) 108 Cal.App.3d 100, 110 (*Odom*) [showups may be inherently suggestive but are not unconstitutionally suggestive].) Notwithstanding their suggestive nature, such identification procedures are permissible, and the due process clause of the Fourteenth Amendment compels the exclusion of identification evidence only when the procedure used to obtain it is *unduly* suggestive and unnecessary[11] and unreliable. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; *Medina*, at p. 753.) The test for constitutionality thus consists of two prongs: "(1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989; see also *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114; *Neil v. Biggers* (1972) 409 U.S. 188 (*Biggers*).) "If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242.)

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11 Our United States Supreme Court has used "unnecessary" in different ways, referring to identifications that are "so *unnecessarily suggestive* and conducive to irreparable mistaken identification" (*Stovall v. Denno* (1967) 388 U.S. 293, 302, 304, italics added) and to identification procedures that are "suggestive and unnecessary" (*Manson v. Brathwaite* (1977) 432 U.S. 98, 99).

"A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard." (*People v. Clark* (2016) 63 Cal.4th 522, 556-557.) The defendant bears the burden of demonstrating that the identification procedure was unreliable. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 989.)

A. *The field showup was not unduly suggestive and unnecessary.*

One-person showups are not per se unduly suggestive. (See, e.g., *Stovall v. Denno*, *supra*, 388 U.S. at p. 302 [one-person showups are "widely condemned" but nonetheless only violate due process if "unnecessarily suggestive"]; *People Ochoa*, *supra*, 19 Cal.4th at p. 413; *People v. Medina*, *supra*, 11 Cal.4th at p. 753 ["although a one-person showup may pose a danger of suggestiveness, such showups 'are not necessarily or inherently unfair' "]; *People v. Bisogni* (1971) 4 Cal.3d 582, 587; *People v. Floyd* (1970) 1 Cal.3d 694, 714; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219 [one-person photographic showup not so suggestive as to taint later in-court identification]; *Odom*, *supra*, 108 Cal.App.3d at p. 110.) Indeed, " 'single-person show-ups for purposes of in-field identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the

procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.' " (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359.)

We therefore ask, was there something about Curtis's one-person showup—other than the mere fact it happened—that rendered it unduly suggestive and unnecessary? The answer is no. For a witness-identification procedure to violate due process, "the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.) Law enforcement officers here said and did nothing to suggest the witnesses should identify Curtis. Rather, officers drove Christian and Baker separately to the showup and gave them proper admonishments. (See, e.g., *People v. Sequeira* (1981) 126 Cal.App.3d 1, 16-17 [separating witnesses and telling them not to talk to each other are indicators of fair procedure].)

Detective Jamison, for example, repeatedly admonished Christian that "just because the person is in our custody right now, that means he's a possible suspect only, and the fact that he's in police custody does not indicate his or her guilt or innocence"; the "purpose of the show-up is either to eliminate or identify the person that's involved and the suspect involved in the crime"; "[j]ust because we got him, that don't mean he did it"; and "[w]e're just trying to eliminate the person who wasn't involved or identify the one that was involved." At trial, Christian agreed that Detective Jamison never told her or suggested that the person she was going to see might be the driver or the shooter, and she felt no pressure to identify anyone. Detective Jamison gave Baker a similar admonishment. When the detective said he was going show Baker "a guy," Baker asked if the person was the

driver or passenger. Detective Jamison properly did not answer that question and instead admonished Baker that the person "in temporary custody is a possible suspect only. The fact that this person is in police custody does not indicate his or her guilt or innocence. The purpose of the show-ups [unintelligible], all right? So I'm going to have you take a look at him and tell me if you recognize him." Thus, the detective told the witnesses that the person they were about to see was a possible suspect only and that the person's custodial status was not indicative of guilt or innocence.

These admonitions tempered the suggestive nature of identification procedure. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 699; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 990 [witness instructed not to assume person who committed crime was in lineup, it was equally important to exonerate the innocent, and he had no obligation to identify anyone]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [single-person showup not unduly suggestive where record devoid of any indication police suggested person was the attacker]; cf. *Odom*, *supra*, 108 Cal.App.3d at pp. 106, 110 [admonishment to witnesses to keep an open mind and that person might or might not be involved was relevant to court's determination that the identification was constitutionally sound] with *People v. Sandoval* (1977) 70 Cal.App.3d 73, 85 [police told victim they would bring suspect down station hallway and victim understood he was the man police thought committed the crime].) Curtis, however, attacks the admonishments by pointing out that Baker recalled that the police wanted to see if he could identify the shooter, and he assumed the police had the right person. The audio recording of the stationhouse showup, however, contradicts that recollection,

and Detective Jamison testified that there was no discussion with either Christian or Baker outside of that recording. The officers picked up Christian first, took her to the stationhouse and then drove her home, where they then picked up Baker and took him to the stationhouse. The recorder was running nonstop and corroborates the detective's version of events.

Nor did the photographic six-packs render the later stationhouse showup unduly suggestive or otherwise precondition Christian and Baker to identify Curtis. That Curtis was the only person common to the photographic lineup and the later showup did not per se violate due process. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1224; *People v. Blair* (1979) 25 Cal.3d 640, 658-661 [rejecting similar argument where witnesses were shown four sets of photographs, three of which contained the defendant's picture]; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 789; *People v. Spencer* (1972) 22 Cal.App.3d 786, 795; *People v. Hernandez* (1970) 11 Cal.App.3d 481, 488.) Were that the case, then in-court identifications after the victim had identified the defendant from a pretrial identification procedure would be invalid. That is not the law. (*Simmons v. United States* (1968) 390 U.S. 377, 383-384.) The law is that repeat showings of a suspect are analyzed under the same standards set forth above to determine whether an identification procedure is unduly suggestive. (*Id.* at p. 384 ["convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"].)

Curtis makes no claim of error regarding the photographic lineups. Nor do we see any error. Detective Jamison properly

admonished Christian and Baker before showing them the lineups.[12] Neither Curtis nor Morrison stand out from the other men in the lineups in a way suggesting the witness should select them. (See generally *People v. Avila*, *supra*, 46 Cal.4th at p. 698; *People v. Leung* (1992) 5 Cal.App.4th 482, 500 [identification procedure is sufficiently neutral where subjects are similar in age, complexion, physical features and build].) Moreover, under the facts of this case involving two suspects—a driver and a shooter—the six-pack procedure was even less suggestive. The witnesses were shown two photo arrays, but they had no idea which, if either, contained the driver or the shooter. The photographic lineup therefore did not render the subsequent stationhouse showup unduly suggestive.

We are thus left with the fact the showup occurred 44 hours after the crime under circumstances in which no emergency was apparent. The law encourages field identification measures to occur in close proximity to the time and place of the crime, and the element of suggestiveness in a showup procedure is offset by the reliability of a prompt identification made while the events are fresh in the witness's mind. (*People v. Garcia*, *supra*, 244 Cal.App.4th at p. 1359; *In re Richard W.* (1979) 91 Cal.App.3d 960, 965-967, 970.) Still, the law sets no outer time limit on when a field showup must occur, although they generally should and do take place close in time to the crime. (See, e.g., *Garcia*, at p. 1359 [curbside showup occurring six hours after robbery]; In *re Richard W.*, at p. 966 [field showup occurring

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[12] Baker testified at the preliminary hearing that the police told him "they caught the dudes or something. I can't really – it was too long, but they brought me two types of photographs and told me to pick them out . . . ."

within minutes of crime]; *People v. Rodriguez* (1987) 196 Cal.App.3d 1041 [approving field showups occurring approximately nine hours after crimes]; *Biggers*, *supra*, 409 U.S. at p. 201 [stationhouse one-person showup occurring seven months after rape].)[13] In, for example, *People v. Floyd*, *supra*, 1 Cal.3d at page 714, police brought the witness to the jail shortly after the defendant's arrest and within several hours of the crime for a showup. The court refused to criticize the police for the identification procedure "because they attempted to establish an affirmative identification as promptly as possible." (*Ibid.*) It was the interest of all involved—the witness, the defendant and the police—for an identification to happen quickly. (*Ibid.*; *Odom*, *supra*, 108 Cal.App.3d at p. 110 [choice between prohibiting or permitting in-field identifications involves balancing interests, and "choice has properly been made to permit" them "because the immediate knowledge whether or not the correct person has been apprehended is of overriding importance and service to law enforcement, the public and the criminal suspect"].)

Here, the showup took place 44 hours after the shooting, although it was much closer in time to Curtis's arrest and to Baker's initial identification. The shooting took place on the morning of June 8, 2009. Police arrested Curtis the next evening,

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[13] *Biggers*'s conclusion that the victim's identification did not violate the defendant's due process rights hinged on its finding that the identification was reliable under the totality of the circumstances. Although the court suggested that a seven-month lapse between a crime and the confrontation "would be a seriously negative factor in most cases," the court did not expressly hold that such a time lapse by itself renders a field showup unduly suggestive and unnecessary under the first prong of the constitutional analysis or otherwise discuss whether an outer time limit exists. (409 U.S. at p. 201.)

on June 9, 2009. Sometime that same night, Detective Jamison showed the photographic lineups to Christian and Baker. The stationhouse showup then took place first thing on June 10, 2009, at 6:40 a.m., eight hours after Baker's photographic "tentative" identification.[14] Detective Jamison explained that he conducted the showup so early in the morning because Curtis had just been taken into custody and was in the process of being arrested, so "we were trying to figure out the charges for the arrest and get the reports ready for filing." Also, "[t]he quicker that you're able to solve a case, the more fresh the things that happened are in the minds of the people that[are] involved in it."

By conducting the identification procedure as promptly as possible, Detective Jamison thus complied with well-established law. We therefore reject any suggestion that law enforcement could or should have conducted a live lineup with multiple individuals instead of the stationhouse showup. As the detective explained, live lineups are conducted at the county jail and are not allowed at the stationhouse, and they require a couple of days to a week to put together. Thus, a live lineup would have caused further delay and, based on defense expert Dr. Eisen's own testimony, heightened the chance of misidentification because of the greater time between the crime and the identification procedure.

Also, that no "life or death" exigency existed, as in *Stovall* where the victim lay near death in the hospital, is of no moment. (*Stovall v. Denno*, *supra*, 388 U.S. at p. 295; see also *People v.*

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[14] There is a discrepancy about how much time lapsed from the photographic lineups to the field showup. Christian said they were an hour apart, while the detective said they were eight hours apart.

Bisogni, *supra*, 4 Cal.3d at pp. 586-587.)[15] Such extreme exigency or emergency is not a prerequisite for a field showup. (*Simmons v. United States*, *supra*, 390 U.S. at p. 385 [where serious felony had been committed and perpetrators were still at-large, police were justified in using one-person photographic showups]; *People v. Nash* (1982) 129 Cal.App.3d 513, 518.) Rather, the law favors prompt identifications as a way to safeguard all involved interests, and no other compelling reason need exist to justify a field showup. (*In re Carlos M.*, *supra*, 220 Cal.App.3d at p. 387.) On the facts before us, conducting the showup 44 hours after the crime was clearly within the boundaries of what due process permits.

B. *The identifications were reliable.*

Because the stationhouse showup was not unduly suggestive, we need not reach the second prong of the constitutional analysis. But, lest there be any doubt the identifications were constitutionally sound, we also find that they were reliable under the totality of the circumstances. (*Biggers*, *supra*, 409 U.S. 188; see also *Manson v. Brathwaite*, *supra*, 432

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[15] In *Bisogni*, two men and a woman robbed a restaurant. Six months after the crime, witnesses identified the defendant at a lineup as one of the robbers. Following that lineup, witnesses viewed the female suspect, who was alone in a room. "Under these circumstances, the viewing of [the female suspect] alone in the room was highly suggestive that she was probably the female robber. Moreover, there was no emergency present requiring a single person showup [citation], and as the showup occurred many months after the robbery, the identifications could not have been based on recent memories of the perpetrators of the crime." (4 Cal.3d at pp. 586-587.) The court found that the identification should have been excluded and tainted in-court identifications.

U.S. 98 [identification resulting from unduly suggestive one-person showup procedure nonetheless reliable under totality of circumstances].)

Christian and Baker had a good opportunity to see the shooter. The shooting occurred in the morning, in broad daylight. The car was no more than five to six feet from Christian and Baker. Both saw the driver and the shooter long enough to describe race, gender, facial features, complexion, hair and clothing. (See, e.g., *People v. Martinez*, *supra*, 207 Cal.App.3d at p. 1218 [identification was reliable where one factor was victim had 20-to-30 second opportunity to observe driver in lighting provided by headlights and streetlight].) Both were able to notice that the gun was a revolver. The absence of spent casings at the scene corroborated that the shooter used a revolver.

Baker also had a high degree of attention at the time of the offense. He directly engaged the shooter in conversation, telling the shooter that he, Baker, didn't bang. Christian, as well as Baker, got a sufficient view of the shooter and driver to accurately describe them in detail. Christian and Baker, for example, said the shooter was dark skinned, and Curtis could be so described. Christian also said that the shooter had short hair and a round face, which could accurately describe Curtis. Baker added that the shooter had facial hair like a beard, which Curtis had when booked. Baker described the driver as having short, curly hair and light skin and wearing a T-shirt. This could describe Morrison. Also, other details of the crime matched what the witnesses said. Baker said that the shooter wore a black hoodie and white T-shirt. Curtis was wearing a black hoodie and white T-shirt when apprehended. Christian and Baker agreed that the SUV was black, similar to a jeep, and had a distinctive

front grille. The vehicle Curtis was apprehended in was black, a RAV4 and had a distinctive front grille, albeit one that appears in photographs to be dark grey rather than shiny silver or chrome. Christian's and Baker's overall description of the car was generally accurate even if the grille was a different color. (*People v. Blair*, *supra*, 25 Cal.3d at p. 662 [identification reliable notwithstanding discrepancies in victim's description of the defendant]; *In re Carlos M.*, *supra*, 220 Cal.App.3d at p. 387 [although victim's description of the defendant inaccurate in some respects, it was "generally accurate"].)

To be sure, inconsistencies existed between Baker's and Christian's details of the crime.[16] Baker saw three people in the car, and Christian saw two people. Baker thought the shooter was the front seat passenger, Christian thought he was seated behind the driver. Notwithstanding these discrepancies, Curtis was apprehended with two others, Morrison and a female, and Morrison was driving the RAV4 and Curtis was in the back, behind the driver. Thus, their seat positioning one day after the shooting was consistent with Christian's recollection of their seat positioning the day of the shooting.

Christian and Baker also were certain in their identifications. When Christian saw Curtis, she initially said "it kinda looks like him" because Curtis was trying to confuse her by making faces. When the detective had Curtis turn to the side, Christian said, "Okay. It does look like him. It does look like him, but I think that guy was maybe a little bigger in size." She explained at trial that any hesitancy she had in making the

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[16] Although not necessarily an inconsistency, Christian said the shooter wore a baseball cap, while Baker said nothing about a hat.

identification arose from her belief the shooter was more heavyset, based on what she had seen of his face. Baker was similarly certain in his identification, saying, "Look like him." The witnesses' certainty is buttressed by the little time that passed between the crime and the showup, 44 hours.

Another factor strengthening the reliability of the identifications is that neither Christian nor Baker were told whether the person in custody was the driver or shooter. Yet, both independently identified Curtis as the shooter. Moreover, although Christian and Baker had reason to believe that members of the Rolling 20s gang committed the crime, they did not know that Curtis and Morrison were in fact Rolling 20s gang members. They could not have known, for example, that Curtis had "AVE" tattooed across his chest, that Curtis had self-admitted he was a Rolling 20s gang member to Officer Maloney just six months before the shooting or that the officer had also previously arrested Morrison. Thus, that Curtis and Morrison were Rolling 20s gang members further underscores the reliability of the identifications.

Under the totality of these circumstances, Christian's and Baker's identifications of Curtis at the stationhouse showup were reliable.

II. FI cards

An accused has the right to be confronted with witnesses against him or her. (U.S. Const., 6th Amend.) The Sixth Amendment to the United States Constitution thus generally bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington*

(2004) 541 U.S. 36, 68; *Davis v. Washington* (2006) 547 U.S. 813, 821.) *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) reexamined the scope of the related rule allowing experts to testify about inadmissible hearsay on which they relied to form their opinion. *Sanchez* held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless [*Crawford*'s requirements are satisfied]." (*Sanchez*, at p. 686, fn. omitted, italics in original.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) An expert is generally not permitted to supply case-specific facts about which he has no personal knowledge. (*Ibid.*)

Sanchez found that police reports and Street Terrorism Enforcement and Prevention Act notices are inadmissible testimonial hearsay that may not be referenced by a gang expert in testifying. FI cards similarly may constitute testimonial hearsay, but the court declined to address the issue definitively based on the state of the record. The court did suggest that an FI card produced in the course of an ongoing criminal investigation would be more akin to a police report and thus testimonial. (*Sanchez*, *supra*, 63 Cal.4th at p. 697.) The court did not address the Attorney General's argument that FI cards are not testimonial if their primary purpose was to gather information for community policing efforts and potential civil injunctions.

(See generally *People v. Ochoa* (2017) 7 Cal.App.5th 575, 585; *People v. Valadez* (2013) 220 Cal.App.4th 16, 35-36.)

Although it appears on this record that the FI cards were created as part of a broader community policing effort as opposed to an ongoing criminal investigation, it is unnecessary to determine whether the FI cards Officer Maloney did not author were admissible.[17] Even assuming arguendo they were testimonial and inadmissible, their admission was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) The cards were admitted to establish a point on which there could be little doubt: Curtis was a Rolling 20s gang member. Curtis had "AVE" tattooed across his chest. The Avenues is a subset of the Rolling 20s.[18] Moreover, Curtis admitted he was a Rolling 20s gang member to Officer Maloney on December 28, 2008, just six months before the shooting. When apprehended for this crime, Curtis was with Morrison, another Rolling 20s gang member.

We have also reviewed the FI cards and see nothing prejudicial on them. The first, dated December 28, 2007, stated that Curtis had "No Moniker" and was on probation. The second, dated September 18, 2008, stated that Curtis's moniker was "Chuckles" and "Gang Activity" was circled. He was stopped for littering, drinking and loitering. The third, dated December 29,

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[17] There is no dispute that the FI card Officer Maloney authored was admissible.

[18] The officer gave this analogy to explain gang subsets: "It's like if I'm Los Angeles Police Department [Officer], but I [am] . . . assigned to Wilshire Division. I'm still a Los Angeles Police Department Officer[,] just like a Rampart Officer, Olympic. It's the same type of thing. He's from Rolling 20's, but Avenues is his set."

2007, also did not list a moniker, and it indicated that Curtis was stopped for loitering in a gang neighborhood with other Rolling 20s, including Morrison. All three FI cards thus indicated that Curtis was a Rolling 20s gang member, which was merely cumulative of other evidence. To the extent the FI cards indicated that Curtis did not have a moniker, then they furthered the defense argument he was not a gang member and were therefore not prejudicial. One FI card did indicate that Curtis was "on probation," but no other reference was made about that comment, which, given the overwhelming evidence of Curtis's gang membership, did not prejudice him.[19]

Curtis, however, argues that the FI cards established that he and Morrison had prior run-ins with the law while hanging out together. Given that Morrison and Curtis were childhood friends and, moreover, were apprehended together in this case

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[19] Although *Sanchez* noted the limited utility of a limiting instruction, the trial court nonetheless gave two such instructions. First, just before the prosecution introduced the three FI cards Officer Maloney did not prepare, the court said, in front of the jury, that "it's my understanding you're not offering that exhibit for its truth but only as a basis for this expert's opinion." Second, the court thereafter instructed the jury that it could "consider evidence of gang activity, including the [FI] cards, which were admitted into evidence, only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the gang-related crimes and enhancement charge or the defendant had a motive to commit the crimes charged. You may also consider this evidence when you evaluate the credibility . . . when you consider the facts and information relied on by an expert in reaching his opinion. You may not consider this evidence for any other purpose. *You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit [the] crime*." (Italics added.)

after trying to evade police officers, we fail to see any prejudicial significance. Although one FI card indicated that Curtis was loitering in a gang area with Morrison, characterizing this as a prior "run in" with the law is hyperbolic. Loitering with Morrison was hardly evidence of their "criminal enterprise past."

III. Sufficiency of the evidence

Next, Curtis contends that there was insufficient evidence of the "primary activities" prong of the gang enhancement. That is, a " 'criminal street gang' " is any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more statutorily enumerated offenses, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. (§ 186.22, subd. (f); see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320, 323 (*Sengpadychith*).) To establish the group's primary activities, the trier of fact may consider past offenses as well as the present, charged offenses. (*Id.* at p. 323.) The offenses must be one of the group's " 'chief' " or " "principal' " occupations, which necessarily excludes "the occasional commission of those crimes by the group's members." (*Ibid.*; see also *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611 [isolated criminal conduct insufficient]; *People v. Perez* (2004) 118 Cal.App.4th 151, 160 [retaliatory shootings of a few individuals over a period of less than a week plus a beating six years earlier insufficient].)

Sufficient proof of the gang's primary activities "might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224-1225 [evidence that gang

committed three predicate crimes over short time period, including charged crime, satisfied primary activities prong].) A gang expert's testimony may also provide evidence of a gang's primary activities. (*Sengpadychith*, at p. 324; *People v. Gardeley* (1996) 14 Cal.4th 605, overruled on other grounds by *Sanchez*, *supra*, 63 Cal.4th 665.)

In contrast to the conclusory testimony the expert in *Alexander L.* gave and which that court found insufficient to support the gang allegation, Officer Maloney based his testimony on his personal experience with the Rolling 20s and at least one contact with Curtis. Officer Maloney monitored the Rolling 20s as part of his review of every report taken at the Wilshire station, so his opinion about the gang's primary activities, which he said included attempted murder and assault with a deadly weapon, was clearly supported. But, in addition to his personal knowledge about the gang, he testified about two predicate crimes committed by other Rolling 20s gang members, a 2007 assault with a deadly weapon committed by Brandon Bell and a 2008 attempted voluntary manslaughter committed by Dwight McDowell. These predicate crimes, coupled with Officer Maloney's other testimony, was more than sufficient to establish the primary activities prong of the enhancement.

IV. Sufficiency of the evidence the shooting was committed for the benefit of a particular gang

Finally, Curtis contends there was insufficient evidence the shooting was committed for a particular gang's benefit, under *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*). *Prunty* considered what showing the prosecution must make to support its theory that various gang subsets constitute a single criminal street gang under section 186.22, subdivision (f). The court held

that "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67-68; see also *id.* at pp. 80-81.) *Prunty* thus applies "where the prosecution's theory of why a criminal street gang exists turns on the conduct of one or more gang subsets, not simply to those in which the prosecution alleges the existence of 'a broader umbrella gang.' " (*Id.* at p. 71, fn. 2.)

Prunty is inapplicable. Unsurprisingly, given that Curtis yelled "Rolling 20s" before shooting Christian, the prosecution's theory was Curtis committed the crimes for the benefit of or in association with Rolling 20s. The predicate offenses introduced to prove that theory were committed by Rolling 20s members Bell and McDowell. Certainly, there was evidence that Curtis was also a member of a Rolling 20s subset, the Avenues. But there was no argument he committed the crime to further the subset as opposed to the gang at large. No *Prunty* issue arises.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

I concur:

EDMON, P. J.

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

LAVIN, J., dissenting:

Defendant Lenard Curtis was convicted in 2015 of committing a 2009 drive-by shooting to benefit a criminal street gang. No physical or forensic evidence connected defendant to the shooting, and the weapon was never recovered. Instead, the most significant evidence of defendant's involvement came from two eyewitness identifications elicited at post-arrest, single-person, stationhouse show-ups conducted 44 hours after the shooting. And those show-ups were conducted *after* the eyewitnesses had been shown a six-pack that included defendant's photograph but failed to identify him with any certainty. Because the show-ups were unduly suggestive and unnecessary, the resulting identifications were unreliable and should have been excluded by the trial court. I also conclude there is insufficient evidence to support the gang enhancement because the prosecution did not establish the existence of a criminal street gang—namely, that the Rollin' 20s' primary activities include assault or attempted murder. Therefore, I respectfully dissent.

FACTUAL BACKGROUND

1. The Shooting

On June 8, 2009, at 10:30 or 11:00 a.m., Autumn Christian was walking with her boyfriend, Robert Baker, on 17th Street near Rimpau Boulevard in Los Angeles.[1] A black SUV with a

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[1] Christian testified at defendant's May 2015 trial, but Baker was declared unavailable, and his December 2009 preliminary hearing testimony was read to the jury. Most of the prosecution's non-gang evidence consisted of the testimony of these two witnesses.

shiny, silver grille pulled up next to the couple.[2] The SUV was carrying a driver and at least one passenger.[3]

The driver asked Baker, "Where you from?" Baker replied, "I don't bang." At this point, Christian "wasn't facing the vehicle" and "wasn't paying them any attention. I got a look at the driver, and then I just kind of let them go back and forth … ." As the couple walked away, the driver and one of the passengers said, "Rollin' 20s," "Fuck Crabs." *Crabs* is a derogatory term for members of Crips gangs.

When Christian heard the exchange, she looked back at the SUV, which was idling five to six feet behind her diagonally. The window was halfway down. Christian saw a gun and alerted Baker. As Christian was turning, she heard the first shot. She "very quickly … got a glimpse" of the shooter's face.[4] He was African-American, with a "round face, kind of dark skinned." She thought he was wearing a baseball cap. Like Christian, Baker saw the driver and the shooter for about a second. He testified that the shooter had dark skin, a beard, and was wearing a black, hooded sweatshirt.

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[2] Christian described it as "like a Grand Cherokee Jeep that had like a silver grille on the front of it." Baker also described it as "a Jeep" with a silver grille.

[3] Baker testified that there were three people in the SUV—the driver, a front passenger, and a backseat passenger. Because the windows were tinted, Baker couldn't tell if the rear passenger was male or female. Christian, on the other hand, testified that there were only two people inside—the driver and a backseat passenger; the front passenger seat was empty.

[4] Baker testified that the shooter was the front passenger. Christian thought he was the backseat passenger. They agreed the gun was a revolver.

The shot hit Christian in the leg. Baker grabbed her, and they started to run as the shooter fired four or five more shots. The couple fled to a nearby parking lot and waited for the police and paramedics to arrive.

2. The Stolen RAV4

On June 9, 2009, the evening after the shooting, officers were monitoring a black Toyota RAV4 with a black grille that had been reported stolen. Sometime after 6:00 p.m., patrol officers spotted it being driven by a man later identified as Amon Morrison. There was a woman in the front passenger seat, and defendant was in the back. The officers tried to stop the car, but Morrison did not pull over. A high-speed chase ensued, and Morrison eventually crashed the SUV into another car. Morrison and the female passenger got out and started to run. Defendant followed them for the length of a couple of houses, but as the officers approached, he lay down in the street and waited. Defendant was arrested.

Baker and Christian later testified that the stolen RAV4 looked similar to the SUV involved in the shooting—but Baker was certain the RAV4 was the wrong vehicle, and both witnesses emphasized that the SUV from the shooting had a silver chrome grille, which the RAV4 lacked.

3. Identification Evidence

Around 11:00 p.m., several hours after defendant's arrest and about 36 hours after the shooting, Los Angeles Police Department Detective John Jamison went to Christian and Baker's house to show them six-pack photographic line-ups containing photos of defendant and Morrison. Christian could not identify anyone from either group, but she pointed out the person

who looked most like the shooter. She told Jamison that if she "could possibly see him in person, maybe that could help [her] identify him better." Baker told Jamison that defendant "look like" the shooter. Jamison recorded that statement as a "tentative" identification.[5]

At 1:00 or 2:00 a.m. on June 10, 2009, a few hours after the meeting with Baker and Christian, police executed a warrant to search defendant's home. They told defendant's mother they were looking for gang attire. The search did not reveal any evidence linking defendant to either a gang or the shooting.

At 6:40 a.m. on June 10, 2009, 44 hours after the shooting, officers brought Christian and Baker to the police station individually for single-person show-ups of defendant. After hearing an admonishment, Christian said, "It *kinda* looks like him."[6] The police reminded Christian that she had described a "male black, heavyset with a round face." Though defendant was making faces, which Christian found "confusing," she ultimately said, "Okay. It does look like him. It does look like him, but I think that guy was maybe a little bigger in size." The officers characterized this response as "she said it could be. She said it looks like him." Christian went on to identify defendant as the shooter at trial.

Next, officers brought Baker to the police station. Baker remembered officers telling him they had caught the suspects

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[5] While the interview was recorded, the recording went missing from police and prosecution files before trial.

[6] Though the transcript of the recording indicates Christian responded, "That one looks like him," the transcript is incorrect on that point.

and wanted Baker to verify them. He assumed the police had the right people, so he was looking for people he had seen in the six-packs the night before. In particular, Baker testified that the police told him in advance that they had the shooter in custody and "just wanted to verify if that's the shooter" once they got to the police station. When they arrived, police read Baker an admonishment. Baker exclaimed, "It's a Jeep like that, the white one right there. It's a Jeep like that." As for defendant, Baker said, "Look like him." Officers asked what about defendant looked like him. Baker replied, "his face," and upon further questioning said he recognized defendant's forehead. Yet while Baker identified defendant as the passenger, he qualified, "I don't know if it's the person who pulled the trigger." Baker then repeated, "it *look* like him" but said he wasn't totally sure defendant was the right person. But Baker emphasized he was sure about something else: "Like I said, that Jeep, that white one I had seen, they had a black one just like that."

Retired LAPD Detective Timothy Williams testified as an expert in law enforcement procedures used to identify suspects. Referring to the Peace Officer's Source Book issued by the Department of Justice, Williams testified that department policy required officers to conduct any live show-up within 22 hours of the commission of the offense. Policy also prohibited live show-ups within 24 hours of a photographic six-pack identification because the closeness in time between the procedures could taint the show-up and reinforce the show-up's inherent suggestiveness. Finally, Williams testified that a tentative identification is not a positive identification.

Psychologist Mitchell Eisen testified as an expert in memory and suggestibility. Eisen explained that single-person

show-ups are always more suggestive than multi-person lineups because the presence of only one person reveals the suspect's identity, a risk not present with multiple people. Lineups, on the other hand, reduce the likelihood of a false identification because if a witness cannot recall what the suspect looks like, he or she is less likely to pick anyone—and if the witness does guess, there is only a one-in-six chance of a misidentification.

Nor will an admonition save this procedure. Eisen explained that it is inherently suggestive to give an admonition, then do a photographic six-pack, then do a live show-up. Doing so creates a carryover effect from the photographic showing to the show-up because, at the show-up, the witness will still be familiar with the suspect's face and may be confused as to where he or she previously saw it.

With respect to memory, Eisen testified that a witness's confidence in his or her identification correlates with accuracy as long as the witness makes the identification immediately in a fair lineup. Lack of confidence, however, indicates a lack of recognition or inaccurate memory. And while proximity to the perpetrator during the crime can make it easier for a witness to notice details about the person's appearance, a "traumatic stressor" like a gun may prevent the witness from making those observations.

PROCEDURAL BACKGROUND

By information dated December 28, 2009, defendant was charged with two counts of attempted murder (Pen. Code,[7] § 664/187, subd. (a); counts 1 and 2) and one count of shooting

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[7] All undesignated statutory references are to the Penal Code.

from a motor vehicle (§ 12034, subd. (c)). The information alleged all counts were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Because defendant was intellectually disabled, competency training was required to render him competent to stand trial, and defendant's trial did not take place until May 2015, almost six years after the shooting.[8] Defense counsel moved to suppress all testimony by Christian and Baker identifying defendant as the person who shot Christian. Although the court acknowledged "it wasn't the most ideal way to do it," it concluded, "I don't see any impermissibility here," and denied the motion. After a trial at which he did not testify, the jury acquitted defendant of counts 1 and 2, convicted him on count 3, and found the gang allegation true.

The court sentenced defendant to 12 years in state prison—the upper term of seven years for count 3, plus five years for the gang enhancement. Defendant's custody credits were subsequently corrected to 2,216 days actual credit and 1,460 days conduct credit, for a total of 3,676 days presentence custody credit.

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[8] Among other delays, defendant spent four months in local custody awaiting a competency determination. After being found incompetent, he spent another nine months awaiting placement to undergo "competency training." Defendant spent 15 months undergoing competency training, and proceedings were reinstated on August 14, 2013. On December 13, 2013, the court again declared a doubt about defendant's competence to stand trial and suspended proceedings a second time. A court trial on the matter was not held for another year. Finally, after a two-day court trial, defendant was declared competent on January 26, 2015, and proceedings resumed.

Defendant filed a timely notice of appeal on July 29, 2015, and on October 19, 2015, we appointed counsel to represent him. After almost 10 months, appointed counsel failed to file an opening brief, and on June 28, 2016, we relieved her and appointed the California Appellate Project to represent defendant. Five months later, on November 14, 2016, staff attorneys at the California Appellate Project filed a brief in which they raised no issues and asked us to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436, 443.) After reviewing the record, the superior court file, and the exhibits, on December 28, 2016, we ordered the California Appellate Project and the People to provide us with supplemental briefing on various issues relating to the identification evidence and the gang enhancement. Supplemental briefing was completed on August 21, 2017.

DISCUSSION

1. The identification evidence should have been excluded.

The Supreme Court has long recognized that eyewitness identifications have a unique confluence of features—unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—that can undermine the fairness of a criminal trial. Accordingly, the due process clause requires the exclusion of identification testimony if the state uses "unnecessarily suggestive" identification procedures and "the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123.)

In this case, defendant contends the post-arrest, single-person stationhouse show-ups conducted 44 hours after the shooting and seven or eight hours after both witnesses failed to clearly identify him in photographic lineups were suggestive and unnecessary and should have been excluded. The People argue the show-ups were not suggestive because Baker and Christian received pre-show-up admonishments; the procedure was necessary because "law enforcement needed to make an expeditious identification"; and in any event, the resulting identifications were reliable under the totality of the circumstances. The majority agrees with the People's position. I do not.

1.1. Legal Framework

To determine whether eyewitness identification testimony satisfies the due process clause, courts conduct a two-part burden-shifting analysis. First, we determine whether the defendant established that the challenged identification procedure was unduly suggestive and unnecessary. (*Perry v. New Hampshire* (2012) 565 U.S. 228, 238–239; *People v. Ochoa* (1998) 19 Cal.4th 353, 412.) If he cannot make this showing, the inquiry ends. (*People v. Thomas* (2012) 54 Cal.4th 908, 930–931.) But if the show-up *was* unduly suggestive and unnecessary, we proceed to step two, in which the People must prove that notwithstanding the suggestive procedure, the resulting identification was reliable under the totality of the circumstances. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989; *Neil v. Biggers* (1972) 409 U.S. 188, 199 (*Biggers*) [listing factors].) Unless the People can make this showing, admission of the identification evidence violates the defendant's right to due process of law under the 14th

Amendment. (*People v. Bisogni* (1971) 4 Cal.3d 582, 585 (*Bisogni*).)

An identification procedure is suggestive if it " 'caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' " (*People v. Cook* (2007) 40 Cal.4th 1334, 1355, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 367; accord *People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.) As such, single-person show-ups are *inherently* suggestive. (*Stovall v. Denno* (1967) 388 U.S. 293, 299–302 (*Stovall*).) Because of the great danger of suggestion from "a one-to-one viewing [that] requires only the assent of the witness" (*People v. Martin* (1970) 2 Cal.3d 822, 829), the courts have long held that show-ups should not be used without a "compelling reason" (*In re Hill* (1969) 71 Cal.2d 997, 1005). Necessity is evaluated based on the totality of the circumstances. (*Bisogni*, *supra*, 4 Cal.3d at p. 587.)

Thus, in *Brathwaite*, the Court held it was unduly suggestive and unnecessary to show the witness a single photograph of a suspect because no emergency or exigent circumstances warranted the procedure. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 110 (*Brathwaite*).) In *Stovall*, on the other hand, a single-person show-up was "imperative" where it occurred in the hospital room of the sole witness to a murder as she lay in critical condition from 11 stab wounds. (*Stovall*, *supra*, 388 U.S. at pp. 295, 302.) The Court reasoned that the stabbing victim was the only person who could possibly exonerate the accused; the hospital was close to the courthouse and jail; no one knew how long the witness might live; and taking the defendant to the hospital room was the only feasible procedure. (*Id.* at p. 302.) Under the circumstances, " 'the usual police station line-up … was out of the question.' " (*Ibid.*)

Appellate courts review de novo the trial court's ruling that a pretrial identification procedure was not unduly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

1.2. The post-lineup stationhouse show-up procedure was unduly suggestive.

In assessing suggestiveness, courts focus on the identification procedure itself, not the motives of the officers who administered it. (*Perry v. New Hampshire*, *supra*, 565 U.S. at p. 233, fn. 1 ["what triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive"]; *Moore v. Illinois* (1977) 434 U.S. 220, 224 ["Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused."]; *United States v. Wade* (1967) 388 U.S. 218, 229 [recognizing "[s]uggestion can be created intentionally or unintentionally in many subtle ways"]; *id.* at p. 235 [disavowing assumption that suggestive influences may only be "the result of police procedures intentionally designed to prejudice an accused"]; *id.* at p. 236 [noting "grave potential for prejudice, intentional or not, in the pretrial lineup"].)

Lineups and show-ups are not fungible identification techniques. "A 'lineup' is a relatively formalized procedure wherein a suspect, who is generally already in custody, is placed among a group of other persons whose general appearance resembles the suspect. The result is essentially a test of the reliability of the victim's identification. [Citation.] … An in-the-field showup, on the other hand, is generally an informal confrontation involving only the police, the victim and the suspect. … An in-the-field showup is not the equivalent of a

lineup. The two procedures serve different, though related, functions, and involve different considerations for all concerned." (*People v. Dampier* (1984) 159 Cal.App.3d 709, 712–713.) Though exigent circumstances may sometimes justify their use, all show-ups are inherently suggestive. (*People v. Odom* (1980) 108 Cal.App.3d 100, 110.)

This is particularly so where the police give the witness other opportunities to identify the suspect before the show-up. (See *Simmons v. United States* (1968) 390 U.S. 377, 383–384 [recognizing danger of using photographs for identification before a corporeal lineup because "the witness ... is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup"].) In *Foster v. California*, for example, the Supreme Court found multiple such showings violated the due process clause. (*Foster v. California* (1969) 394 U.S. 440, 442.) There, the witness failed to identify the defendant the day after the robbery when the witness first confronted him in a live lineup; though he thought the defendant "was the man," he was not sure. (*Id.* at p. 441.) The witness asked to speak to the defendant, and police arranged a show-up, during which the witness could make only a tentative identification. (*Ibid.*) Ultimately, at yet another live lineup, the witness was able to muster a definite identification. (*Id.* at pp. 441–442.) The Court held the identifications were inadmissible, observing the "suggestive elements in this identification procedure made it all but inevitable" the witness would identify the defendant. (*Id.* at p. 443.)

Here, the People concede "the victims had been shown a six-pack that included appellant's photo within eight hours [before] the single-person show-ups" and "the detectives told the

witnesses they believed they had the shooter in custody" before taking them to view defendant at the police station—circumstances that compounded the inherent suggestiveness of the show-up procedure. The People nevertheless contend—and the majority agrees—that the show-up procedure was not suggestive because admonitions were given to Christian and Baker before the individual show-ups. I disagree.

Certainly, it is better to admonish a witness than not—but an admonishment is not a magic bullet to fix a procedure that the courts have "widely condemned" for more than a half-century. (*Stovall*, *supra*, 388 U.S. at p. 302.) Contrary to the People's and the majority's implication, the California courts have never held otherwise. In *Cunningham*, the issue was whether anything caused the defendant to stand out from the five other people in a six-pack lineup. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) The Court concluded defendant's "photograph was similar to that of the others." (*Id.* at p. 990.) As such, it was not unduly suggestive. (*Ibid.*) In *Arias*, which also concerned a photographic lineup, the Court addressed the officer's warning as part of its reliability analysis in step two. (*People v. Arias* (1996) 13 Cal.4th 92, 169.) It did not hold the admonition was relevant to—much less dispositive of—the procedure's initial suggestiveness. And in *Garcia*, the court was concerned less with the fact of the admonishment than with its result: the record revealed that it worked. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1360–1361.) The admonishment, therefore, helped establish that the identification was reliable under the totality of the circumstances. (*Id.* at p. 1361 [record showed "the witnesses acted independently of any suggestion or pressure that may have been expressed or inherent in the circumstance"].)

Here, the single-person show-ups at the police station plainly caused defendant to stand out. Christian and Baker had both seen defendant's picture in a photographic lineup the night before. Baker testified that officers told him they had caught the suspects and wanted Baker to verify them. Baker assumed they had the right people, so he looked for people he had seen in the six-pack the night before. Then, at the show-up, an officer told Christian he was going to show her the person in the picture. Under the governing case law, this procedure was unduly suggestive.

1.3. The show-up procedure was unnecessary.

Reviewing courts next ask whether, despite its suggestiveness, the identification procedure used here—a six-pack photo lineup followed seven or eight hours later by single-person stationhouse show-ups conducted 44 hours after the shooting—was necessary. In my view, it wasn't.

In general, despite their suggestiveness, show-ups are justified by " 'promptitude of identification' … ." (*People v. Smith* (1980) 112 Cal.App.3d 37, 44–45.) "[O]rdinarily very little time, one to two hours, has passed when an on-the-scene confrontation is orchestrated by the police. And the justification for that onsite confrontation, as opposed to a formal lineup procedure, is generally the need to exclude from consideration innocent persons so that the police may continue to search for the defendant while it is reasonably likely that he is still in the immediate area." (*People v. Nash* (1982) 129 Cal.App.3d 513, 517–518 [noting that justification was "obviously … strained" where a show-up was held 20 hours after rape]; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 38–39 [" 'Prompt identification of a suspect who has been apprehended close to the time and place of

the offense … is a valid purpose for conducting a one person showup' "].) "The potential unfairness in such suggestiveness ... is offset," in these cases, "by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later." (*People v. Odom*, *supra*, 108 Cal.App.3d at p. 110.) That is, courts will allow "in-the-field identifications" notwithstanding their inherent suggestiveness where "the immediate knowledge whether or not the correct person has been apprehended is of overriding importance and service to law enforcement, the public and the criminal suspect himself." (*Ibid*.) In short, show-ups may be necessary where they occur pre-arrest and soon after the crime. (*People v. Sandoval* (1977) 70 Cal.App.3d 73, 85.)

In this case, the People insist[9] the show-ups were necessary because "law enforcement needed to make an expeditious identification when the event was still fresh in the victims' minds, and quickly confirm the correct suspect was in custody." Yet none of the People's cited cases—*Biggers*, *supra*, 409 U.S. 188; *People v. Alexander* (2010) 49 Cal.4th 846; *People v. Floyd* (1970) 1 Cal.3d 694, 710–714; *In re Carlos M.* (1990) 220 Cal.App.3d 372 (*Carlos M.*); *People v. Martinez* (1989) 207 Cal.App.3d 1204; and *People v. Cowger* (1988) 202 Cal.App.3d 1066—hold that a preference for expeditious police work, without more, is an exigent circumstance justifying a single-person show-up 44 hours after the crime and seven or eight hours after the

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[9] Although the majority does not directly address this issue, it appears to agree with the People's position.

witnesses failed to identify the defendant in a six-photograph lineup with any certainty.

For example, while the People are correct that *Biggers* upheld an identification elicited in a stationhouse show-up seven months after the crime, they are mistaken that the *Biggers* Court approved the procedure. To the contrary, the *Biggers* Court concluded that *even though* the identification *was* unduly suggestive and unnecessary, it was nevertheless reliable under the factors enumerated in that case—the issue in step two.[10] (*Biggers*, *supra*, 409 U.S. at pp. 194–201.)

Nor were the show-ups in this case "similar to a show-up procedure approved" in *People v. Floyd*, as the People suggest. In *Floyd*, the defendant challenged a *multi-person lineup*, asserting that his clothing caused him to stand out. (*People v. Floyd*, *supra*, 1 Cal.3d at pp. 713–715.) The lineup occurred within several hours of the robbery and within an hour of the defendant's arrest. (*Id.* at p. 714.) Likewise, in *Carlos M.*, the court approved a hospital show-up conducted fewer than three hours after a victim's 75-minute rape where the victim accurately described the defendant and was certain of the identification. (*Carlos M.*, *supra*, 220 Cal.App.3d at p. 387.) In *Martinez*, in which the lower-court ruling was reviewed for substantial evidence, the court upheld a single-photo identification conducted within an hour of the incident. (*People v. Martinez*, *supra*, 207 Cal.App.3d at pp. 1219–1220.) In *Cowger*, a show-up conducted the night of the assault was not unduly suggestive under the totality of the

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[10] *Biggers* was decided before *Brathwaite* established the two-part framework that governs this issue, but it is clear from *Brathwaite* that the reliability analysis conducted in *Biggers* would now occur as part of step two. (*Braithwaite*, *supra*, 432 U.S. at pp. 105–106, 113–117.)

circumstances. (*People v. Cowger*, *supra*, 202 Cal.App.3d at pp. 1071–1073.) And in *Alexander*, the California Supreme Court found it was not unduly suggestive and unnecessary to show an officer trial exhibit photos the night before his testimony. (*People v. Alexander*, *supra*, 49 Cal.4th at pp. 902–903.) None of these cases hold that a show-up conducted two days after a crime is justified as a "prompt on-the-scene confrontation." (*Cowger*, at p. 1071.)[11]

As discussed, the show-ups here were conducted 44 hours after the shooting—at least a full day longer than any show-up considered necessary in any published opinion. But I need not speculate about whether the police had time to conduct a lineup in lieu of the show-ups: we *know* they did because they *in fact* conducted a photographic lineup before the show-ups. If they wanted to try again, a second lineup was required. The People have not explained how—or if—the intervening photographic lineup is relevant to their assertion of necessity. They have not argued that a live lineup could not have been arranged. Nor have they identified any other exigency that required them to use this procedure. Accordingly, I conclude the show-ups were unnecessary.

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[11] The People also argue the single-person show-up used here was proper because "[l]aw enforcement obtained the identifications as quickly as possible following the shooting." The People misapprehend the nature of the necessity requirement. As discussed, the officers' good intentions are immaterial; the relevant question is whether the *show-up procedure* was necessary, not whether the delay was necessary.

1.4. The People have not proven the identifications were reliable under the circumstances.

Having concluded the show-ups were unduly suggestive and unnecessary, I turn to step two, and assess whether notwithstanding their suggestiveness, the identifications themselves were reliable under the totality of the circumstances. (*Bisogni*, *supra*, 4 Cal.3d at p. 585.) In assessing reliability, courts consider five factors: "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation." (*Biggers*, *supra*, 409 U.S. at pp. 199–200.) I address each factor in turn.

The People contend the identifications here satisfy the first and second *Biggers* factors because the shooting took place in broad daylight; the witnesses were only a few feet away from the shooter; and both witnesses saw the gunman. Though the People acknowledge Christian and Baker appeared to have been focused on the gun, they contend the witnesses "had a reasonable opportunity to see appellant at the time of the shooting." On the other hand, Christian testified that when the SUV pulled up, she "wasn't facing the vehicle" and "wasn't paying them any attention." She turned to face the SUV as the first shot was fired. Before the bullet hit her leg, she "[v]ery quickly … got a glimpse" of the shooter's face. Baker also saw the shooter for about a second. But the witnesses couldn't agree on where the shooter sat in the car or the gender of the backseat passenger. Nor did they agree on whether the shooter had a beard, a baseball cap, or a

sweatshirt. On balance, I conclude the first and second factors do not support the view that the identifications were reliable.

Turning to the third *Biggers* factor—the accuracy of the witnesses' descriptions—the witnesses agreed on four things: the shooter was male, had dark skin, was riding in a black Jeep Grand Cherokee with a silver grille, and shot at them using a revolver. Although defendant was found a day-and-a-half later after he fled from a RAV4 (not a Jeep) with a black grille (not a silver grill), the People contend "the descriptions provided by Baker and Christian were generally accurate." Why? Because they agreed the shooter had dark skin and was holding a gun. Unfortunately, as the gun was never recovered, that aspect of the description cannot be tested here—and as such, does not appear relevant to the shooter's identity. Based on my review of the photo lineup, defendant does appear to have dark skin. On balance, however, this factor does not weigh in favor of reliability.

As to the fourth *Biggers* factor, the People contend "Christian and Baker affirmatively identified appellant as the shooter at the show-up." After listening to the recording of the show-ups, I disagree. Clearly, both witnesses were uncertain. Christian said defendant "*kinda* looks like him" but she thought "that guy was maybe a little bigger in size." Baker said defendant "look like him"—specifically, his forehead—but never conclusively identified defendant as the shooter. I also note that Baker testified the police told him they just wanted him to verify that defendant was the shooter. When combined with both witnesses' earlier statements when shown a photo lineup—including the fact that the recording of Jamison's interview of the non-testifying Baker went missing—this factor weighs against reliability.

Finally, while waiting 44 hours to conduct a single-person show-up was unduly suggestive and unnecessary, I acknowledge that the timing alone does not render the identifications obviously unreliable. On the other hand, 44 hours is not soon enough after the shooting to weigh heavily in favor of reliability. On balance, I find this factor is neutral.

Taken together, I conclude the five *Biggers* factors do not support a finding that the identifications were reliable notwithstanding their suggestiveness. As such, I would find that the trial court erred in denying defendant's motion to suppress.

1.5. The People have not established that the error was harmless beyond a reasonable doubt.

Reviewing courts assess federal constitutional errors under *Chapman v. California* (1967) 386 U.S. 18, 24. Under *Chapman*, we must reverse unless the People "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid*.) In this case, the People have not argued that the error was harmless beyond a reasonable doubt. As they have not made the required showing, reversal is required.

Moreover, on this record, I cannot say that the trial court's error was harmless beyond a reasonable doubt. No physical or forensic evidence connected defendant to the shooting. No cellular, surveillance, or other evidence established defendant's movements around the time of the shooting. None of the perpetrators confessed. The gun was never found. The case rested instead on testimony from two victim-witnesses. Yet the two victim-witnesses saw the shooter for mere seconds—and they disagreed on almost everything else. They disagreed on the number of passengers in the SUV, on the position of the shooter in the vehicle, on whether the shooter had facial hair, and on

what he was wearing. They agreed, however, that the SUV was a Jeep with a chrome grille and that the gun was a revolver. After defendant was arrested a day later after riding as a passenger in a stolen RAV4—which was not a Jeep and which lacked the distinctive silver grille—both witnesses failed to identify him conclusively in a six-pack photo array, though one witness thought defendant "looked like him." After a middle-of-the-night search of defendant's home failed to uncover any evidence connecting him to the shooting, the victims were brought to the police station for a "show-up." Though both victims identified defendant that time, neither sounded sure.

Certainly, there was other identification evidence that was properly admitted. For instance, both Baker and Christian identified defendant in court. And Baker told Jamison that defendant "looked like" the shooter after viewing a six-pack photo. Assuming that the in-court identifications were not tainted by the show-up procedure, this evidence, if believed, could support a finding that defendant was the shooter. I cannot, however, conclude that the verdict would have been the same absent the court's error in admitting evidence of the single-person show-ups of defendant. "An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376.) After a four-day trial, the jury deliberated for eight hours over two days before reaching a verdict. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case].) Although the jurors acquitted defendant of the most serious charges, they asked questions and made requests about the identification evidence—the most important but weakest part of the prosecution's case.

(See, e.g., *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close. [Citations.]"]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the jury].)

In short, the error was not harmless beyond a reasonable doubt. I would reverse the conviction and allow the People, on retrial, to attempt to prove that the in-court identifications stemmed from a source independent of the show-up procedure used here. (See *People v. Yokely* (2010) 183 Cal.App.4th 1264, 1266–1267; *People v. Caruso* (1968) 68 Cal.2d 183, 189 ["To overcome the effect of the taint, the People must [on remand] show by clear and convincing proof that the in-court identifications were based upon observations of the accused at the scene of the [crime]."].)

2. There is insufficient evidence to support the gang enhancement.

A criminal defendant may not be convicted of any crime or enhancement unless the prosecution proves every fact necessary for conviction beyond a reasonable doubt. (U.S. Const., 5th & 14th Amends.; see Cal. Const., art. I, §§ 7, 15; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Tenner* (1993) 6 Cal.4th 559, 566.) "This cardinal principle of criminal jurisprudence" (*Tenner*, at p. 566) is so fundamental to the American system of justice that criminal defendants are always "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." (*United States v. Powell* (1984) 469 U.S. 57, 67.)

Here, defendant contends the evidence was insufficient to establish that the Rollin' 20s are a criminal street gang within

the meaning of section 186.22 because the prosecution did not prove the group *consistently and repeatedly* committed an enumerated crime. I agree and would also reverse the true finding on the gang allegation.[12]

2.1. Elements of the Gang Enhancement

To enhance a defendant's sentence under section 186.22, subdivision (b)(1), the prosecution must prove the underlying offense was "committed for the benefit of, at the direction of, or in association with **any criminal street gang**, with the specific intent to promote, further, or assist in any criminal conduct by gang members … ." (§ 186.22, subd. (b)(1), emphasis added.) To establish the "criminal street gang" element, the prosecution must prove:

- the existence of an ongoing association of at least three people with a common name or identifying sign or symbol;
- one of the group's **primary activities** is the commission of at least one crime listed in the statute;
- some of the group's members, alone or together, engage in a **pattern of criminal gang activity** by committing, attempting, or soliciting two or more listed crimes.[13]

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[12] Because I would reverse on this basis, I do not reach defendant's remaining contentions concerning the gang evidence.

[13] Cases often refer to the offenses used to establish a pattern of gang activity as *predicate crimes*. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383, fn. 13.)

(§ 186.22, subd. (f); *People v. Gardeley* (1996) 14 Cal.4th 605, 623–624 & fn. 10 (*Gardeley*) [enhancement satisfies due process requirements by "impos[ing] increased criminal penalties only when the criminal conduct is felonious and committed … 'for the benefit of, at the direction of, or in association with' a group that meets the specific statutory conditions of a 'criminal street gang' "].)

The phrase *primary activities* "implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id.* at p. 324.) It is not enough to prove "the occasional commission of those crimes by the group's members." (*Id.* at p. 323.)

2.2. There is insufficient evidence of the Rollin' 20s' primary activities.

Here, the prosecution relied on the testimony of Officer John Maloney, a member of the Wilshire Division gang impact team, to prove the elements of the gang enhancement. Maloney testified that he had previously been assigned to monitor African-American gangs like Rollin' 20s, Black P-Stones, and Hoovers; that the Rollin' 20s had between 180 and 250 documented members; and that their territory lay between Crenshaw Boulevard and Vermont Avenue to the east and west and Pico and Jefferson Boulevards to the north and south. When the prosecutor asked, "what are primary criminal activities of the Rollin' 20s?" Maloney replied: "Anything from vandalism, graffiti, which you see a lot, narcotics sales, burglaries, robberies, ADWs,

attempt murders to murder." Maloney also testified to two specific instances of criminal behavior committed by known members of the Rollin' 20s—assault with a deadly weapon committed by Brandon Bell on March 24, 2007, and attempted murder committed by Dwight McDowell on December 31, 2007.[14] Certified dockets of these convictions were entered into evidence.

The jury was instructed in part that a "*criminal street gang* is any ongoing ... association … [¶] ... [¶] [t]hat has, as one or more of its primary activities, the commission of attempted murder or assault with a deadly weapon." To "qualify as a *primary* activity," the court explained, "the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group."

The People insist this evidence was legally sufficient for three reasons. First, the People argue that the two predicate convictions established the Rollin' 20s consistently and repeatedly commit attempted murder. Second, the People argue that the two counts of attempted murder charged in *this* case—the counts for which defendant was acquitted—established the Rollin' 20s consistently and repeatedly commit attempted murder. Third, the People argue that Maloney's expert opinion that the Rollin' 20s' "primary criminal activities" include "[a]nything from vandalism, graffiti, which you see a lot, narcotics sales, burglaries, robberies, ADWs, attempt murders to murders" established the Rollin' 20s consistently and repeatedly commit attempted murder and assault with a deadly weapon.

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[14] Maloney's testimony that Bell was convicted of attempted murder was inaccurate.

2.2.1. The prosecution presented evidence of two predicate crimes that violated two different statutes.

As discussed, Maloney testified to one incident of assault with a deadly weapon committed by a Rollin' 20s member in March 2007 and one incident of attempted murder committed by a different Rollin' 20s member in December 2007. While this evidence may have been sufficient to establish a *pattern* of activity, it was not sufficient to establish the Rollin' 20s' *primary* activities.

The reason lies in the difference between the two elements. Whereas the *pattern* element targets gang members' behavior, the *primary activities* element focuses on the gang's *raison d'être*. Put another way, *primary activities* are the gang's purpose; a *pattern* of criminal activity is the method by which a gang tries to achieve that purpose.

The distinction is fundamental to the statute's constitutionality. "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*National Ass'n for A. of C. P. v.State of Alabama* (1958) 357 U.S. 449, 460–461.) But this protection " 'does not extend to joining with others for the purpose of depriving third parties of their lawful rights.' " (*People ex. rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1110–1112.) Here, because the statute requires that "one of the primary activities of the group or association *itself* be the commission of crime," it "does not punish association with a group of individuals who, in a separate capacity, may commit crimes." (*People v. Gamez* (1991) 235 Cal.App.3d 957, 971, italics added, disapproved on another point in *Gardeley*, *supra*, 14 Cal.4th 605, 624, fn. 10.)

As the Supreme Court has explained: " 'Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a *primary activity* of the department.' " (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 323–324.) Unlike the pattern element, proving the *primary activities* element is not always as simple as proving that two members of a group have committed two predicate crimes. Thus, in *Alexander L.*, the court held that evidence of two assaults established a *pattern* of criminal gang activity but did not prove that *primary activities* of the 105-member gang included assault. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 614, fn. 5 (*Alexander L.*).) The statute requires more.

2.2.2. The prosecution convicted defendant of one crime, which was neither attempted murder nor assault with a deadly weapon.

Next, the People note defendant "was charged with attempted murder and shooting from a motor vehicle. Both crimes are listed in the gang statute. [Citation.]" Thus, they contend, "the jury heard evidence of additional qualifying predicate offenses from which it could reasonably find the group consistently and repeatedly committed such crimes. [Citations.]"

In support of this view, the People point to the general rule that prosecutors may use charged offenses to establish a *pattern* of criminal gang activity. (See *People v. Loeun* (1997) 17 Cal.4th 1, 5, 8–14 [current charge may be used as a predicate offense to establish a pattern of criminal activity; defendant convicted]; *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1366, 1383 [stating general rule; defendant convicted]; *In re Leland D.* (1990) 223 Cal.App.3d 251, 258 [same].) Yet the People do not explain how or why that rule, which is based on a detailed textual analysis of

an entirely different element, should apply to the *primary activities* at issue in this case. (E.g., *Loeun*, at pp. 10–11 ["The Legislature's use of the present tense 'engage in' indicates its intent that instances of current criminal conduct can satisfy the statutory requirement for a 'pattern of criminal gang activity.' "].) Regardless, the cited authorities do not hold—or even imply—that the rule applies to charges for which the jury *acquitted* the defendant. (See, e.g., *Leland D.*, at p. 258 [although gang statute does not require proof of prior convictions, it does require proof that the offenses were committed].) Plainly, since the jury in this case found defendant not guilty of two counts of attempted murder, those counts are not substantial evidence that the Rollin' 20s "*consistently and repeatedly*" commits attempted murder. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

To be sure, the jury did convict defendant of shooting from a motor vehicle—and that crime, the People note, is "listed in the gang statute." While the People seem to attach some importance to that fact, its relevance is not immediately obvious. The jury below was instructed to decide whether the Rollin' 20s had "as one or more of its primary activities, the commission of attempted murder and assault with a deadly weapon." It is unclear how—or if—shooting from a motor vehicle relates to that question. (See *People v. Brown* (2017) 11 Cal.App.5th 332, 341–342 [when the prosecution's choice to proceed on one factual theory obviates the need for a unanimity instruction, reviewing court is bound by the election when reviewing sufficiency of the evidence].)

Yet even if the People could, in theory, save an enhancement by pointing to evidence of a primary activity not submitted to the jury, the evidence here would still be insufficient. Viewed in the light most favorable to the verdict, the

prosecution established that over a two-year period, three of the Rollin' 20s' 180–250 alleged members committed three crimes that violated three different statutes. There is no evidence any crime was committed more than once. As such, these convictions do not establish that gang members consistently and repeatedly committed any enumerated offense. (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 614, fn. 5.)

2.2.3. Maloney's testimony lacked foundation and relied on improper sources.

Turning to their third point, the People stress that a "gang expert's testimony is sufficient to establish that a gang's primary criminal activities include the repeated and consistent commission of qualifying predicate crimes … ." Here, Maloney testified that the Rollin' 20s' "primary criminal activities" were "[a]nything from vandalism, graffiti, which you see a lot, narcotics sales, burglaries, robberies, ADWs, attempt murders to murders." The People maintain that this testimony, when combined with "Bell's and McDowell's attempted murder convictions," provided substantial evidence that the Rollin' 20s consistently and repeatedly committed attempted murder and assault with a deadly weapon.[15] I disagree.

As a general matter, Maloney's testimony fell short of the thorough, detailed testimony upheld in other cases. Though he listed a number of generic gang crimes, Maloney did not testify that the Rollin' 20s *consistently* and *repeatedly* committed those crimes. Nor did Maloney discuss the other sorts of markers that often signal an organized criminal enterprise working towards a

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[15] As explained above, though McDowell was convicted of attempted murder, Bell was convicted of assault with a deadly weapon.

common goal. For example, he did not explain the Rollin' 20s' command structure, history, or purpose. What are the membership requirements? Who's in charge? Are there ranks? If so, how does a member advance through them? The answers to all these questions were left to speculation. As such, this case differs from *People v. Duran*, in which an expert testified that gang members committed robbery, assault, and drug sales " 'often,' indeed often enough to obtain 'control' of the narcotics trade in a certain area of Los Angeles." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.) Nor was Maloney's testimony as detailed as the *Gardeley* testimony approved in *Sengpadychith*, in which the expert testified "that the Family Crip gang's primary purpose was to sell narcotics, but that the gang also engaged in witness intimidation and other acts of violence to further its drug-dealing activities." (*Gardeley*, *supra*, 14 Cal.4th at p. 612; *Sengpadychith*, *supra*, 26 Cal.4th at p. 322.)

But Maloney's opinion not only lacked sufficient detail; it also lacked sufficient reliability. The *Gardeley* Court recognized that "any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] … 'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.]" (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) In *Gardeley*, unlike the case before us, "the court knew where the information to which the expert was testifying originated and was able to assess its reliability." (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 613.) Here, by contrast, the prosecution did not elicit information establishing its reliability. (*Id.* at p. 612 [expert testimony insufficient to support gang enhancement where it was "impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such

as court records of convictions, or entirely unreliable hearsay. [Citation.] [Fn.]"].)

The testimony Maloney offered on other matters is not reassuring, however. For example, early on, Maloney described the Rollin' 20s' territory as the area encompassed by Crenshaw Boulevard to the west, Pico Boulevard to the north, Vermont Avenue to the east, and Jefferson Boulevard to the south. But later, Maloney described a different, smaller territory. The change happened when the prosecutor presented Maloney with a map depicting an area encompassed by Crenshaw Boulevard to the west, Country Club Drive to the north,[16] Western Avenue to the east, and Interstate 10 to the south. Maloney testified that the map depicted "the area that's claimed by Rollin' 20s." In so doing, Maloney shrank Rollin' 20s' territory considerably. Notably, while much of this second territory overlapped with the area Maloney had described earlier, a sizable portion did not.

Taken as a whole, Maloney's "conclusory testimony cannot be considered substantial evidence as to the nature of the gang's primary activities." (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 612, fn. omitted.) Though Maloney recited a list of "primary criminal activities," he did not reveal the basis for his opinion or explain how often Rollin' 20s members committed the crimes. He also testified to two predicate crimes, one of which he misdescribed. But even when combined with the rest of Maloney's testimony, the predicate crime evidence—that in 2007, one of the 180 to 250 members of the Rollin' 20s committed assault and another of the 180 to 250 members of the Rollin' 20s committed

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[16] The prosecutor inaccurately described the area on the exhibit as extending to Olympic Boulevard in the north.

attempted murder—did not prove either crime was one of the group's primary activities.

For these reasons, I would reverse the judgment and direct the trial court to dismiss the gang allegation upon remand.

LAVIN, J.