Filed 7/10/18 P. v. Valencia CA5



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS VALENCIA,

Defendant and Appellant.

F072943

(Super. Ct. No. LF010246B)

# OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Darren Indermill, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Jose Luis Valencia and codefendant Edgar Isidro Garcia, the latter of whom is not a party to this appeal,[1] were jointly charged with three counts of attempted willful, deliberate, and premeditated murder (Pen. Code,[2] §§ 187, subd. (a), 189, 664 [counts 1-3]); gang participation (§ 186.22, subd. (a) [count 5]); and three counts of assault with a firearm (§ 245, subd. (a)(2) [counts 6-8]). Valencia was separately charged with felony evasion of a pursuing peace officer (Veh. Code, § 2800.2 [count 4]) and knowingly permitting Garcia, a passenger, to discharge a firearm from a vehicle (§ 26100, subd. (b) [count 10]). Later, counts 2 and 7 were dismissed.

With respect to Valencia, the information further alleged he committed the offenses underlying counts 1, 3, 4, 6, 8, and 10 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); in connection with count 1, it alleged an enhancement under section 12022.53, subdivisions (d) and (e)(1); and, in connection with count 3, it alleged an enhancement under section 12022.53, subdivision (c).

Following trial, the jury found Valencia guilty as charged on count 4 but could not reach a verdict on the attached gang enhancement allegation or on the other counts. The trial court declared a mistrial as to the deadlocked counts and enhancements. On count 4, Valencia was sentenced to the Department of Corrections and Rehabilitation for two years.

Following retrial, the jury found Valencia guilty as charged on the deadlocked counts and found true the allegation he committed the underlying offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); the allegation under section 12022.53, subdivisions (d) and (e)(1) on count 1; and an allegation under section 12022.53, subdivisions (c) and (e)(1) on

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1 Garcia filed a separate appeal (case No. F073515).

2 Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

count 3.[3] In a bifurcated proceeding, Valencia admitted the gang enhancement allegation on count 4. Valencia was sentenced to seven years to life, plus 25 years to life for vicarious firearm discharge proximately causing great bodily injury, on count 1; and a consecutive seven years to life, plus 20 years for vicarious firearm discharge, on count 3. The trial court specified this sentence was to run concurrent to the two-year term imposed after the first trial. Execution of punishment on the remaining counts was stayed pursuant to section 654.

In his opening brief, Valencia makes several contentions. First, the evidence did not establish he aided and abetted the attempted premeditated murders or assaults with a firearm. Second, the evidence did not support his conviction for knowingly permitting a passenger to discharge a firearm from a vehicle. Third, in violation of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the gang expert improperly related case-specific testimonial hearsay.

Valencia presents additional arguments in a supplemental brief. First, in view of a recent amendment to section 12022.53, enacted by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2) and effective January 1, 2018, the matter should be remanded for reconsideration of sentencing. Second, in view of *People v. Franklin* (2016) 63 Cal.4th 261, 283-284, the matter should be remanded to the trial court to afford him an opportunity to make a record of information relevant to his future youth offender parole hearing. The Attorney General concedes a remand is proper for these purposes.

We conclude substantial evidence established Valencia aided and abetted the attempted premeditated murders and assaults with a firearm as well as knowingly permitted Garcia to discharge a firearm from a vehicle.

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**3** At retrial, on its own motion and "for purpose of trial only," the court renumbered count 3 to "count 2"; count 5 to "count 3"; count 6 to "count 4"; count 8 to "count 5"; and count 10 to "count 7." For consistency, we refer to the original numbering of the charged counts**.**

We also conclude the gang expert related inadmissible case-specific testimonial hearsay to establish—and the record otherwise lacks sufficient independent proof of—the commission of two or more qualifying "predicate" offenses by gang members. Predicate offenses are necessary to prove the existence of a criminal street gang (§ 186.22, subds. (e), (f)); in turn, a gang's existence is a precondition of both the gang participation offense (*id.*, subd. (a)) and the gang enhancement (*id.*, subd. (b)). In addition, each vicarious firearm enhancement alleged against Valencia is premised on a violation of section 186.22, subdivision (b). (§ 12022.53, subd. (e)(1)(A).) Because the erroneous admission of the expert's testimony on predicate offenses was prejudicial, the gang participation conviction and all gang and vicarious firearm enhancements are reversed.[4]

Finally, the matter is remanded to the trial court to afford Valencia an opportunity to make a record of information relevant to his future youth offender parole hearing.

## STATEMENT OF FACTS

### I. The blackout.

On Saturday, August 23, 2014, sometime prior to the incident (see below), a traffic accident on Highway 223 west of Comanche Drive caused a widespread power outage in the City of Arvin.

### II. The incident.

a. *Jose B. and Alejandro P.*

At about 11:00 p.m. or midnight, cousins Jose and Alejandro arrived in separate pickup trucks at a multi-bay self-service carwash on the southeast corner of the Bear Mountain Boulevard-Walnut Drive intersection. Although it was dark due to the power outage, moonlight ensured "it wasn't pitch black." Jose parked in the easternmost bay and Alejandro parked directly behind him. The two then sat on the tailgate of

[4] Our ruling renders moot Valencia's request for a remand due to recent amendments to section 12022.53 enacted by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2).

Alejandro's truck and waited for their companions David A. and Manuel B. Between five and 20 minutes later, David and Manuel arrived. The four hung out at the carwash for roughly 30 minutes until David and Manuel left.

About "a minute . . . [or] two minutes" after David and Manuel's departure, while Jose and Alejandro were still sitting on the tailgate of Alejandro's truck, gunfire erupted. Bullets ricocheted off the ground and the bay. Jose and Alejandro ran. The former was struck in the right leg and the latter escaped unharmed. At some point, bullets punctured the rear tires of Alejandro's truck.

b. *Officer Gonzalez.*

On Sunday, August 24, 2014, at approximately 1:00 a.m., Officer Gonzalez of the Arvin Police Department was driving westbound on Bear Mountain Boulevard past the carwash when he spotted a white Chevrolet pickup truck heading northbound on Walnut Drive at "approximately . . . five miles an hour" with its headlights off. He then saw between seven and 10 "muzzle flashes"[5] near the front passenger side window of the truck and heard between seven and 10 gunshots. Gonzalez maneuvered his vehicle to face the front of the truck and turned on two "high-intensity" "take-down lights." Valencia was the driver and Garcia was sitting in the front passenger seat. Valencia "accelerated and turned right onto Bear Mountain Boulevard," commencing a high-speed chase lasting "about an hour and nine minutes" and spanning "about 84 miles." At some point during the pursuit, the vehicles headed southbound on Comanche Drive and then eastbound on Di Giorgio Road. In addition, Gonzalez witnessed Garcia tossing a black object out of the window. The chase ended when a spike strip deployed by the California Highway Patrol deflated the truck's tires. Valencia and Garcia were taken into custody.

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[5] At retrial, Gonzalez described a "muzzle flash": "It's when a weapon is fired, and especially in darkness, it produces a spark, and from my previous experience in law enforcement I've seen that many times . . . ."

Gunshot residue was detected on the front driver's side door and the front passenger's side door.

**III. The cylinder.**

Frank G., an Arvin resident, "look[ed] for cans and bottles along the roadways" about "three or four times a week." On the morning of "a Sunday" in August 2014, on the "south side" of Di Giorgio Road about 100 yards east of the Di Giorgio Road-Comanche Drive intersection, he found the cylinder of a firearm containing shell casings. The cylinder and the shell casings were neither "dirty [n]or rusty."

**IV. Gang evidence.**

Officer Calderon of the Arvin Police Department, the prosecution's gang expert, testified Arvina 13, also known as Arvina Poor Side and Poor Side Locos, is a southern Hispanic gang that territorializes the area bounded by Di Giorgio Road to the north, Herring Road to the south, Vineland Road to the west, and Tower Line Road to the east. This area contains the carwash on the southeast corner of the Bear Mountain Boulevard-Walnut Drive intersection as well as Di Giorgio Park, "a common area where Arvina 13 gang members and associates congregate." Members identify with the color blue and often wear blue clothing or carry blue bandanas. They graffiti and/or get tattoos of the words "Arvina," "Arvina Poor Side," and/or "Poor Side Locos"; the letters "A" (for Arvina) and/or "P" (for Poor Side Locos); the abbreviations "AVN" (for Arvina), "APS" (for Arvina Poor Side), "PSL" (for Poor Side Locos), "KC" (for Kern County), and/or "CA" (for California); the numbers "13," "854" (Arvin's area code), and/or "93203" (Arvin's zip code); and/or three dots forming the shape of a triangle, which signifies "liv[ing] a crazy life." Members also have gang monikers, which "makes it more difficult for law enforcement to determine the actual identity of a gang member." The gang's rivals include Lamont 13, also known as Varrio Chicos Lamont.

Arvina 13 primarily engages in shootings, stabbings, assaults with weapons, felony assaults, possession of firearms and other dangerous weapons, burglaries, grand

theft, vehicle theft, felony vandalism, witness intimidation, and narcotic sales. However, drive-by shootings are not a primary activity. Calderon explained:

> "One of the unwritten rules [Arvina 13] ha[s,] which is common among southern Hispanic gangs[,] is that [members] are not allowed to do actual drive-by shootings. They have to do what is referred to as 'putting a foot on the ground', meaning, the vehicle has to stop, the person has to get out of the car before they fire any shots, or else they could be punished when in the prison system by other southern Hispanic gang members or the prison gang, the Mexican Mafia."

Calderon described how the perpetration of crimes benefits Arvina 13:

> "The gang is strengthened by crimes that are committed such as assault with a deadly weapon, things like this. That type of a crime instills fear within the community of the gang members, it intimidates them, and often, the community is afraid to report crimes because they are afraid of the actual gang and its members.
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> "The members themselves gain notoriety. They gain more respect from other Arvin gang members if they are known to commit certain crimes, especially the more violent the crime is the more respect and notoriety within the gang."

According to Calderon, "it's against the gang rules to provide information to law enforcement, to be a snitch."

Calderon identified three cases involving the commission of predicate offenses by Arvina 13 members. In 2013, Orion Jimenez was convicted of attempted robbery, assault with force likely to produce great bodily injury, and gang participation. In 2010, Adam Arellano pled nolo contendere to assault with a deadly weapon and gang participation. In 2008, Jose Arredondo pled nolo contendere to assault with force likely to produce great bodily injury. Calderon did not have personal knowledge of these cases. Instead, he spoke with officers who took part in the criminal investigations and reviewed their reports. The court admitted into evidence certified copies of each case's "REGISTER OF ACTIONS/DOCKET."

Based on an examination of photographs of Valencia's tattoos, four police reports, and two field interview cards,[6] Calderon opined Valencia was an active member of Arvina 13 at the time of the shooting.

Valencia displayed the following tattoos: three dots forming the shape of a triangle on his right cheek; the abbreviation "CA" on the back of his head; three dots on his right hand; the letter "A" on his left arm; and the letter "P" on his right leg.

Four police reports predating the August 24, 2014, shooting chronicled several encounters with Valencia. On April 18, 2014, Valencia, Garcia, and Francisco Banos, an Arvina 13 member, were involved in a heated argument. Garcia accused Banos of being a snitch. Banos referred to Garcia and Valencia by their respective monikers "Green Eyes" and "Amoska." On June 9, 2013, Calderon and another officer witnessed Valencia fighting Jose Gonzalez, an Arvina 13 member. The officers arrested the two men and found an "opened" switchblade in Valencia's pocket, "something that members of Arvina 13 typically do." On December 9, 2012, law enforcement pulled over a vehicle occupied by Valencia and Jesus Castro, an Arvina 13 member. On September 3, 2012, Valencia and Luis Gomez, an Arvina 13 member, assaulted the victim and stole his hat. The victim identified Valencia and Gomez by their respective gang monikers "Little Moska" and "Little Dirty."

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**6** Calderon described field interview cards:

> "They are also sometimes referred to as street checks, but that is any time we have contact with somebody, not just gang members, but sometimes we'll go to a call or a traffic stop that we have had, or sometimes we just make a regular consen[s]ual encounter to speak with somebody who wants to voluntarily speak with us. We fill out—it's like a five-by-seven index card, and we'll document that we contacted the person, where the location we contacted them at, and also the reasoning for the contact."

Two field interview cards dated September 27, 2010, and July 13, 2013, chronicled additional encounters with Valencia. On both occasions, Valencia was accompanied by Garcia.

Calderon testified he spoke to Valencia "about ten times," "as a witness, and . . . when he was in custody for different crimes."

Based on an examination of photographs of Garcia's tattoos, eight police reports, including one on the August 24, 2014, shooting, and three field interview cards, Calderon opined Garcia was an active member of Arvina 13 at the time of the shooting.

Garcia displayed the following tattoos: the area code "854" on his right temple; the zip code "93203" on his wrist; a skull wearing a hat with the letters "K" and "C" on his left forearm; three dots in the form of a triangle and the number "13" on his chest; the letter "P" on the right side of his abdomen; the letters "K" and "C" on his left leg; and the letter "A" on his right leg.

Seven police reports predating the August 24, 2014, shooting chronicled several encounters with Garcia. Sometime between April 18 and August 24, 2014, Garcia and Banos fought a patron at a bar. Witnesses identified Garcia and Banos by their respective gang monikers "Green Eyes" and "Sloppy." On April 18, 2014, Garcia, Valencia, and Banos were involved in a heated argument. Garcia accused Banos of being a snitch. Banos referred to Garcia and Valencia by their respective monikers "Green Eyes" and "Amoska." On January 20, 2013, Garcia, Banos, and Sergio Contreras, an Arvina 13 member, vandalized a vehicle and intimidated the owner with a baseball bat. On October 9, 2012, Garcia and Arvina 13 members Adrian Avila, Francisco Guzman, and Fabian Zuniga gathered at Di Giorgio Park. Garcia, who was "near Arvina 13 graffiti," wore a baseball cap with the letter "A" and the abbreviation "PS" and carried a blue bandana in his pocket. On April 15, 2012, Garcia, Contreras, and Roland Johnson, a member of Arvina 13, attended a party, where they discovered one of the guests was a Lamont 13 member. As the Lamont 13 member was leaving the party, he was shot by an

unknown assailant and then stabbed by Garcia, Contreras, and Johnson, inter alios. On December 30, 2011, Garcia and Saulito Ramirez, an Arvina 13 associate, were in possession of a stolen vehicle. They were arrested following a pursuit. On July 31, 2011, law enforcement pulled over a vehicle occupied by Garcia, Contreras, and Arvina 13 members Eddie Medina and Jose Garcia. The four men were taken into custody after a .22-caliber rifle was found in the trunk.

Three field interview cards between September 27 and November 19, 2010, chronicled additional encounters with Garcia. On one occasion, Garcia wore a black hat with the letter "A" and admitted he affiliated with Arvina 13. On two other occasions, he was in the company of Arvina 13 members.

Calderon testified he spoke to Garcia multiple times in a four-year period. During these exchanges, Garcia never mentioned his affiliation with Arvina 13.

The prosecutor posed the following hypothetical:

> "You have two active members of Arvina 13. They drive-by a location—let's call it a car wash—where some young people are hanging out. That car wash is in Arvina 13 territory. And as the two members drive by, their head lights are off. As they drive by, one or both of the active members shoot at the group of young people at the car wash, and they hit one of them. An officer sees this as it happens. He begins to pursue them immediately and eventually chases them down after a rather lengthy pursuit."

The prosecutor asked "whether or not the crimes in th[e] hypothetical were done for the benefit of or in association with Arvina 13." Calderon responded:

> "In my opinion, that crime would be done in association with and for the benefit of the Arvina 13 gang. And I base it on the fact that it's two Arvina 13 gang members, together, shooting at members of the community, which instills fear into the community from the gang itself and also, will provide notoriety and respect for those gang members within the gang itself. [¶] . . . [¶]

> ". . . [Respect] has a great deal amount to do within the gang. The more respect the individual has in the gang, the more other gang members look up to him and want to be like [him]. [¶] . . . [¶]
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> ". . . There is [*sic*] different ways to gain respect. Some of them are committing certain crimes. The more crimes and/or the severity of the crime will determine whether [the] amount of respect you gain within the gang itself . . . . [¶] . . . [¶] Committing a burglary or a vehicle theft would gain less respect than committing a stabbing or a shooting would."

The prosecutor then asked whether "it [was common] for members of Arvina 13 to commit crimes together." Calderon responded:

> "Yes, it is. [¶] . . . [¶] . . . The purpose of committing the crimes together is so that they have somebody as a witness that could back up their story, to be able to let other gang members, know for certain that they are the ones that committed that crime."

## DISCUSSION

### I. Substantial evidence established Valencia aided and abetted the attempted premeditated murders and assaults with a firearm as well as knowingly permitted Garcia to discharge a firearm from the truck.

a. *Standard of review.*

"To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955 (*Tripp*).) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "We need not be convinced of the defendant's guilt beyond a reasonable doubt; we merely ask whether ' "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]' [Citation.]" (*Tripp, supra,* at p. 955, italics omitted.) "This standard of review . . . applies to circumstantial evidence. [Citation.] If the circumstances, plus all the logical inferences the jury might have drawn from them,

reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*Ibid.*)

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis what[so]ever is there sufficient substantial evidence to support it." (*People v. Redmond, supra*, 71 Cal.2d at p. 755.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

b. *Analysis*.

i. Aider and abettor liability.

" '[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295-296.) "[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

In his opening brief, Valencia concedes "the evidence establishes . . . [he] drove a vehicle to the carwash with Garcia as a passenger, then drove away from the scene at

high rates of speed while being pursued by Officer Gonzalez, following shots being fired at [Alejandro] and Jose . . . ." Nevertheless, he insists the evidence failed to demonstrate he "knew of Garcia's intent to shoot at [Alejandro] and Jose . . . or to attempt to murder the two men" and "intended to assist Garcia in those acts." We disagree.

"Whether one has aided and abetted in the commission of a crime is a question of fact for the jury to determine from the totality of the circumstances proved." (*People v. Perryman* (1967) 250 Cal.App.2d 813, 820.) "Among the factors which may be considered in determining aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the crime, including flight." (*In re Jessie L.* (1982) 131 Cal.App.3d 202, 217; accord, *People v. Mitchell* (1986) 183 Cal.App.3d 325, 330.) The record—viewed in the light most favorable to the prosecution—shows "all of the probative factors relative to aiding and abetting are present . . . ." (*People v. Mitchell*, *supra*, at p. 330.) Valencia and Garcia were together in the white Chevrolet pickup truck at the crime scene. Prior to the shooting, Valencia, the driver, proceeded at "approximately . . . five miles an hour" and, in the midst of a citywide blackout, kept the headlights off. A jury could reasonably conclude these actions facilitated the shooting: Garcia was able to aim the firearm more accurately since the truck was moving at a significantly reduced speed and, under the cover of darkness, caught Jose and Alejandro off guard. Furthermore, given the motor was still running, Valencia was primed for a quick getaway. (Cf. *id.* at pp. 327-328, 330 [direct perpetrators robbed the victim on an escalator; the defendant positioned himself on the escalator in such a way as to facilitate the perpetrators' escape and, immediately after the taking, fled with them to his car in a nearby parking lot, entered the driver's side, and started the engine].) When confronted by Gonzalez, Valencia commenced a high-speed chase lasting "about an hour and nine minutes" and spanning "about 84 miles," during which Garcia discarded the weapon. (See *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1095 ["[F]light is one of the factors which is relevant in determining consciousness of guilt."].) Under these circumstances,

any rational trier of fact could have found—beyond a reasonable doubt—Valencia shared Garcia's unlawful objective and intended to help him accomplish the shooting. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [" 'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' "].)[7]

ii. Knowingly permitting a person to discharge a firearm from a vehicle.

Section 26100, subdivision (b), punishes "[a]ny driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm from the vehicle . . . ." "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the [terms of the statute]. It does not require any knowledge of the unlawfulness of such act or omission." (§ 7, subd. (5); see *People v. Calban* (1976) 65 Cal.App.3d 578, 584 ["A requirement of knowledge is not a requirement that the act be done with any specific intent."].)

As noted, the record—viewed in the light most favorable to the prosecution—shows Valencia and Garcia were together in the truck at the crime scene. Valencia, the driver, proceeded at a significantly reduced speed and kept the headlights off, facilitating the shooting. He was also prepared to flee the scene and, in fact, did so when confronted by Gonzalez. The ensuing hour-long high-speed chase allowed Garcia to dispose of the

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[7] Valencia offers alternative explanations for why he drove the truck slowly with the headlights off and fled from Gonzalez. In considering a challenge to the sufficiency of the evidence, however, "[w]e do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact." (*People v. Baker* (2005) 126 Cal.App.4th 463, 468-469.) To reiterate, "[w]e may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis what[so]ever is there sufficient substantial evidence to support the conviction." (*Tripp, supra*, 151 Cal.App.4th at p. 955.) "If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, . . . that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*)

firearm. Under these circumstances, any rational trier of fact could have found—beyond a reasonable doubt—Valencia knowingly permitted Garcia to discharge the firearm. (See *People v. Gonzales* (2015) 232 Cal.App.4th 1449, 1463 [" 'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' "]; see also *People v. Nguyen*, *supra*, 61 Cal.4th at p. 1055 [same].)

## II. Calderon prejudicially related case-specific testimonial hearsay to establish the commission of two or more qualifying predicate offenses by gang members.

a. *Forfeiture.*

As a threshold matter, we reject the Attorney General's forfeiture claim. Pertinent case law at the time of retrial held: (1) an expert witness could base his or her opinion on any material known to him or her, including hearsay not otherwise admissible, so long as the material was of a type reasonably relied upon by professionals in the same field (see, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*)); (2) out-of-court statements related by an expert as a basis for his or her opinion were not offered for their truth (see, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 919) and therefore implicated neither the hearsay rule nor the confrontation clause (see, e.g., *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210); and (3) in general, a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the basis testimony under Evidence Code section 352, sufficiently obviated any hearsay and confrontation concerns (see, e.g., *People v. Bell* (2007) 40 Cal.4th 582, 608).

"Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

On May 14, 2014, prior to Valencia and Garcia's trial, the California Supreme Court granted review in *Sanchez*. Additionally, post-*Crawford*, questions had been raised

in other opinions about the continuing validity of the notion that evidence supporting an expert's opinion was not offered for its truth. (See, e.g., *Williams v. Illinois* (2012) 567 U.S. 50, 108-109 (conc. opn. of Thomas, J.); *id*. at pp. 125-133 (dis. opn. of Kagan, J.); *People v. Dungo* (2012) 55 Cal.4th 608, 627 (conc. opn. of Werdegar, J.); *id*. at p. 635, fn. 3 (dis. opn. of Corrigan, J.); *People v. Valadez* (2013) 220 Cal.App.4th 16, 31-32; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1137; but see *People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210.) Nevertheless, during an October 19, 2015, hearing on in limine motions, the trial court explicitly advised the parties it would follow *Gardeley* and its progeny, the law then in existence, and would admonish the jury with a limiting instruction.[8] Therefore, we find any objection would likely have been futile and address the merits of the argument.

b. *Relevant law*.

i. California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.).

The California Street Terrorism Enforcement and Prevention Act "created a substantive offense, set forth in section 186.22, subdivision (a), and a sentencing enhancement, set forth in subdivision (b) of the statute." (*People v. Rios* (2013) 222 Cal.App.4th 542, 558.)

Section 186.22, subdivision (a), punishes "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." " 'The elements of the

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**8** On June 30, 2016, months after Valencia and Garcia's retrial, the California Supreme Court issued its ruling in *Sanchez* and disapproved *Gardeley* "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) It also disapproved several prior decisions that had concluded an expert's basis testimony was not offered for its truth. (*Ibid.*)

gang participation offense . . . are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Johnson* (2014) 229 Cal.App.4th 910, 920, fns. omitted.) Proof of the existence of a criminal street gang is a prerequisite. (See *People v. Lara* (2017) 9 Cal.App.5th 296, 337 (*Lara*) ["[W]ithout the improperly admitted testimonial hearsay regarding the missing predicate offense, the prosecution would not have proved every element of either the gang crime or the gang enhancement."].)

Section 186.22, subdivision (b)(1), imposes an enhancement on "any person who is convicted of a felony 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 . . . ." "There are two prongs to the gang enhancement under section 186.22, subdivision (b)(1) . . . . The first prong requires proof that the underlying felony was 'gang related,' that is, the defendant committed the charged offense 'for the benefit of, at the direction of, or in association with any criminal street gang.' [Citations.] The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' [Citations.]" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.) Again, proof of the existence of a criminal street gang is a prerequisite. (See *Lara, supra,* 9 Cal.App.5th at p. 337.)

The firearm enhancements alleged in counts 1 and 3 require proof Valencia violated subdivision (b) of section 186.22. (§ 12022.53, subd. (e)(1)(A).)

" 'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's

primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]' [Citation.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]' [Citation.]" (*Lara*, *supra*, 9 Cal.App.5th at pp. 326-327; accord, § 186.22, subds. (e), (f).)

To prove the elements of the gang participation offense and the gang enhancement, the prosecution may present expert testimony. (See, e.g., *People v. Franklin, supra,* 248 Cal.App.4th at p. 948; *People v. Williams* (2009) 170 Cal.App.4th 587, 609; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.)

ii. Expert testimony, hearsay, and the confrontation clause.

"While lay witnesses are allowed to testify only about matters within their personal knowledge [citation], expert witnesses are given greater latitude. 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' [Citation.] An expert may express an opinion on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.] In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. This latitude is a matter of practicality. . . . An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue. When giving such testimony, the expert often relates relevant principles

or generalized information rather than reciting specific statements made by others." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.)

In general, hearsay evidence, i.e., evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated, is inadmissible. (Evid. Code, § 1200.) However, "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. '[T]he common law recognized that experts frequently acquired their knowledge from hearsay, and that "to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on . . . impossible standards." Thus, the common law accepted that an expert's general knowledge often came from inadmissible evidence.' [Citations.] Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters 'beyond the common experience of an ordinary juror.' [Citations.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Sanchez*, *supra*, 63 Cal.4th at p. 676; see *id.* at p. 685 ["Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code."].)

"By contrast, an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) "When 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." (*Id.* at p. 686.)

"The admission of expert testimony is governed not only by state evidence law, but also by the Sixth Amendment's confrontation clause, which provides that, '[i]n all

criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .' [Citation.]" (*Sanchez, supra*, 63 Cal.4th at p. 679.) "Under previous United States Supreme Court precedent, the admission of hearsay did not violate the right to confrontation if it bore 'adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.' [Citation.] *Crawford* overturned . . . [this] rule. *Crawford* clarified that a mere showing of hearsay reliability was insufficient to satisfy the confrontation clause. 'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. . . . [¶] The [adequate indicia of reliability] test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.' [Citation.] Under *Crawford*, if an exception was not recognized at the time of the Sixth Amendment's adoption [citation], admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. [Citations.]" (*Id.* at p. 680.)

"In light of our hearsay rules and *Crawford*, a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is testimonial hearsay, as the high court defines that term." (*Sanchez, supra*, 63 Cal.4th at p. 680, italics omitted.) "Although the high court has not

agreed on a definition of 'testimonial,' testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo*, *supra*, 55 Cal.4th at p. 619; see *Sanchez*, *supra*, at p. 689 ["Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony."].)

iii. Prejudice.

"Ordinarily, an improper admission of hearsay would constitute statutory error under the Evidence Code." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) We analyze prejudice of such an error under *People v. Watson* (1956) 46 Cal.2d 818, 836, which provides for reversal only when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." On the other hand, "[c]onfrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Geier* (2007) 41 Cal.4th 555, 608; accord, *Sanchez*, *supra*, at p. 698.) "The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' " (*People v. Geier*, *supra*, 41 Cal.4th at p. 608.)

c. *Analysis.*

On appeal, Valencia challenges Calderon's testimony regarding (1) the predicate offenses; (2) the police reports dated September 3, 2012, December 9, 2012, and April 18, 2014; and (3) the field interview cards dated September 27, 2010, and July 13, 2013.

i. Predicate offenses.

At retrial, Calderon testified Arredondo, Arrellano, and Jimenez are Arvina 13 members who previously committed qualifying predicate offenses: Arredondo pled nolo contendere to assault with force likely to produce great bodily injury in 2008; Arrellano

pled nolo contendere to assault with a deadly weapon in 2010; and Jimenez was convicted of attempted robbery and assault with force likely to produce great bodily injury in 2013. (See § 186.22, subd. (e)(1)-(2).) Calderon derived these details from conversations with officers involved in the criminal investigations and their reports. In other words, he related testimonial hearsay. (See *Lara*, *supra*, 9 Cal.App.5th at p. 337 [gang expert testified from police reports generated by other officers during official investigations of predicate offenses].)

The Attorney General contends Calderon's testimony on predicate offenses was not case specific because it did not refer to either Valencia or Garcia. We disagree. Testimony establishing a predicate offense, including a predicate offender's gang affiliation at the time of the offense, is case specific because the facts are beyond the scope of a gang expert's general knowledge. In *Sanchez*, the Supreme Court described case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) It provided the following example to distinguish case-specific facts from background information:

> "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez*, *supra*, 63 Cal.4th at p. 677.)

As noted, a gang's existence is a precondition of both the gang participation offense and the gang enhancement, and predicate offenses are necessary to prove this existence. (See *ante*, at pp. 16-18.) Whether a specific crime actually occurred and was actually committed by a member of a particular gang is analogous to the presence of the diamond tattoo, not the explanation regarding its meaning, in *Sanchez*. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 588-589 [likening predicate offender's gang-membership

admission to the diamond tattoo example in *Sanchez*].) These facts, though not specific to Valencia's or Garcia's conduct, are case-specific. To hold otherwise would allow the prosecution to prove the existence of a gang through predicate offenses without any actual evidence in the record that the crimes were committed by actual gang members.

Moreover, we find the erroneous admission of Calderon's testimony on Arredondo's, Arrellano's, and Jimenez's prior convictions prejudicial. The prosecution primarily relied on this testimony to help "satisf[y] [a] separate element[] of the [California Street Terrorism Enforcement and Prevention] Act's definition [of a criminal street gang]." (*People v. Prunty* (2015) 62 Cal.4th 59, 67.) Although the court admitted into evidence certified copies of each case's "REGISTER OF ACTIONS/DOCKET," these documents do not contain any information regarding the offenders' affiliation with Arvina 13. Without the expert's testimony on this point, the prosecution could not establish an essential precondition of the gang participation offense and the gang enhancement. (See § 186.22, subds. (a), (b)(1), (e), (f); *Lara*, *supra*, 9 Cal.App.5th at p. 337.) Because a gang enhancement under section 186.22, subdivision (b), cannot be proven, neither can either of the vicarious firearm enhancements alleged against Valencia. Accordingly, we cannot conclude it is clear—beyond a reasonable doubt—a rational jury would have found Valencia guilty of gang participation and found true the gang and vicarious firearm enhancement allegations absent the error.[9]

ii. Police reports and field interview cards.

The Attorney General concedes the three police reports at issue constituted case-specific testimonial hearsay. We accept this concession.

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[9] Valencia also calls for reversal of his convictions for the attempted premeditated murders on counts 1 and 3, the assaults with a firearm on counts 6 and 8, and knowingly permitting Garcia to discharge a firearm from the truck on count 10. Without taking into account Calderon's disputed testimony, we have concluded substantial evidence supported these convictions. (See *ante*, at pp. 11-15.)

The Attorney General also concedes the field interview cards at issue constituted case-specific hearsay. We accept this concession. On the other hand, the Attorney General maintains these cards were not testimonial.

Even assuming, arguendo, the content of the field interview cards was not testimonial, we need not decide whether admission of Calderon's testimony regarding these cards as well as the police reports was prejudicial since, for the reasons discussed above, we found reversal of the gang participation conviction and the gang and vicarious firearm enhancements appropriate.

## III. On remand, Valencia shall be afforded an opportunity to make a record of information relevant to his future youth offender parole hearing.

In a supplemental brief, pursuant to *People v. Franklin*, *supra*, 63 Cal.4th at pages 283-284, Valencia asks us to remand the matter to the trial court to give him an opportunity to make a record of mitigating youth-related factors, also known as *Miller*[10] factors (see *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1387-1389), relevant to his future youth offender parole hearing under sections 3051 and 4801, subdivision (c). Since the Attorney General does not object, we grant this request without further discussion.

## DISPOSITION

The judgment of conviction on count 5 (Pen. Code, § 186.22, subd. (a)), the criminal street gang enhancements (*id.*, subd. (b)(1)), and the firearm enhancements (Pen. Code, § 12022.53, subds. (c), (d), (e)(1)) are reversed.[11] The judgment of conviction is otherwise affirmed. The matter is remanded to the trial court. Following retrial, or if the People elect not to retry count 5 and the enhancements, the trial court shall resentence Valencia and prepare an amended abstract of judgment consistent with this disposition

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**10** *Miller v. Alabama* (2012) 567 U.S. 460.

**11** See *ante*, footnote 4.

and send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In either event, on remand, Valencia shall be afforded an opportunity to make a record of information that will be relevant to the parole authority as it fulfills its statutory obligations under Penal Code sections 3051 and 4801, subdivision (c).

_____
DETJEN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
ELLISON, J.†

† Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.