DIVISION ONE
FILED: 12/22/2009
PHILIP G. URRY, CLERK
BY: GH

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | | |
|---|---|---|
| STATE OF ARIZONA | ) | 1 CA-CR 08-0731 |
| | ) | |
| Appellee, | ) | DEPARTMENT D |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| HERIBERTO CHAVEZ, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006249-001 DT

The Honorable Warren J. Granville, Judge

**AFFIRMED**

---

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

---

G E M M I L L, Presiding Judge

**¶1** Heriberto Chavez ("Chavez") appeals his convictions

and sentences stemming from a gang-affiliated drive-by shooting in Phoenix on May 31, 2006.

## FACTS AND PROCEDURAL HISTORY[1]

**¶2** In 2004, prior to events giving rise to his conviction, the Phoenix Police Department's Gang Enforcement Bureau encountered Chavez in the field as part of its routine effort to gather intelligence about gang members and their behavior. Detective E.M. testified that, following a conversation with him, Chavez was designated a gang member pursuant to Arizona Revised Statutes ("A.R.S.") section 13-105(9) (Supp. 2009)[2] and Arizona's Gang Member Identification Criteria ("GMIC") form used by police in the field.[3]

**¶3** On May 31, 2006, Chavez and two accomplices drove Chavez's mother's car, a maroon Toyota, to a neighborhood near 33rd Street and Van Buren in Phoenix. Chavez was seated in the

---

[1] The applicable standard of appellate review mandates that we view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdict. *State v. Powers,* 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

[2] We cite to the current versions of the statutes because the pertinent portions have not been materially amended.

[3] An individual must meet two of seven criteria to be a documented criminal street gang member. A.R.S. § 13-105(9). The criteria are: (1) self-proclamation of gang membership; (2) witness testimony or official statement; (3) written or electronic correspondence referencing gang membership; (4) gang paraphernalia or photographs; (5) gang tattoos; (6) display of gang clothing or colors; and (7) any other indicia of street gang membership. *Id.*

rear driver's side seat. The intended targets of the shooting were A.S. and M.E. who were sitting in front of M.E.'s parents' house.

**¶4** M.E. testified at trial that, before the shooting, the car drove by the house four times before it stopped and opened fire. Police estimated that several shots were fired from the driver's side of the vehicle. A.S. was struck by two bullets but M.E. was not hit. A car in the driveway was struck by three bullets.

**¶5** M.E.'s mother, E.E., returned home while the shooting was in progress. She followed the Toyota for several blocks until they were both stopped at a traffic signal. While stopped, E.E. saw a police officer exiting a gas station and gestured to him that "that was the vehicle that had just shot at [her] house." The police officer pursued the Toyota until it stopped on the 32nd Street 202 Freeway on-ramp. The car's occupants, including Chavez, were searched, read their *Miranda*[4] rights, and arrested.

**¶6** Soon after their arrest on the freeway on-ramp, a Phoenix Police Department crime scene specialist performed gunshot residue tests on each of the car's occupants. Chavez tested positive for gunshot residue on both his right and left arms, indicating he "may have discharged a weapon." The car's

[4] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

other occupants each tested positive for residue on only one arm.

**¶7** A search of the Toyota revealed a semi-automatic handgun, a gun holster, one bullet shell casing on the back seat where Chavez was seated, a black and white bandana, and a black CD folder inscribed with gang graffiti corresponding to the gang to which Chavez belonged. An investigation of the crime scene revealed two victims, multiple bullet shells trailing north in succession on the street, several drops of blood on the concrete, and a silver Nissan with three bullet holes in its side. A ballistics expert testified that some, though not all, of the bullet shells in the street were conclusively fired by the handgun found in the Toyota.[5]

**¶8** Chavez was charged by indictment with drive-by shooting, two counts of aggravated assault as to A.S. and M.E., respectively, and assisting a criminal street gang.

**¶9** In addition to expert ballistics testimony, several police officers testified at trial, including experts from the Gang Enforcement Bureau. Following the close of evidence, Chavez moved for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure 20. The superior court denied the motion, finding "substantial evidence to support the State's

[5] The ballistics expert reached a range of conclusions as to the ten bullet shells in evidence; however, none of the shells were conclusively *excluded* as having been fired from the gun.

allegation[s] that Mr. Chavez, as principal or accomplice, was engaged in" behavior proscribed by the charges against him.

**¶10** A jury found Chavez guilty as charged. He was sentenced to concurrent prison terms of 13.5 years on Count 1, 10.5 years on Counts 2 and 3, and 7.5 years on Count 4 with 417 days of presentence incarceration credit.

**¶11** We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(3) (Supp. 2009), and Article 6, Section 9, of the Arizona Constitution. For the following reasons, we affirm.

**DISCUSSION**

**¶12** Count 1 of the indictment charged Chavez with drive by shooting, a class two dangerous felony, in violation of A.R.S. § 13-1209 (2001). "A person commits drive by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure." A.R.S § 13-1209(A). Counts 2 and 3 of the indictment charged Chavez with aggravated assault as to A.S. and M.E., respectively, both class three dangerous felonies, in violation of A.R.S. § 13-1204 (Supp. 2009). A person commits aggravated assault if the person commits assault by causing "serious physical injury to another" or if the person uses "a deadly weapon or dangerous instrument." A.R.S. § 1204(A)(1) &

(2). Count 4 of the indictment charged Chavez with assisting a criminal street gang, a class three dangerous felony, in violation of A.R.S. § 13-2308 (Supp. 2009).[6]

**¶13** The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause prohibits admission of testimonial hearsay in a criminal trial against a defendant unless the proponent of the evidence can show the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. *State v. Bocharski*, 218 Ariz. 476, 486, ¶ 37, 189 P.3d 403, 413 (2008) (citing *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004)).

**¶14** The Supreme Court in *Crawford* emphasized that the Confrontation Clause is directed primarily to testimonial hearsay statements. *Id*. at 53. Although not defining the term "testimonial," the Court identified three "formulations of [the] core class of 'testimonial' statements." *Id*. at 51. The first formulation includes "*ex parte* in-court testimony or its

[6] The State contends that the evidence challenged on appeal was elicited to prove that Chavez intended to assist a criminal street gang and therefore pertain to Count 4 exclusively. While we agree that Chavez's convictions on Counts 1 through 3 did not depend on his status as a documented gang member, the challenged evidence relates to Chavez's potential motive to commit all of the charged offenses. We therefore reject the State's position that only Court 4 is at issue on appeal.

functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id*. (quoting Brief for Petitioner at 23). The second formulation includes "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id*. at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment)). The third formulation includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 52 (quoting Brief for Nat'l Ass'n of Crim. Defense Lawyers et. al. as Amici Curiae at 3). The Court also included "[s]tatements taken by police officers in the course of interrogations" as testimonial. *Id*.

**¶15** Two years later, the Supreme Court expanded its definition:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the

> interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis v. Washington*, 547 U.S. 813, 822 (2006).

**¶16** This court reviews evidentiary rulings that implicate the Confrontation Clause de novo. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

**¶17** On appeal, Chavez argues the superior court admitted inadmissible hearsay testimony in violation of the United States Supreme Court's decision in *Crawford* because he did not have an opportunity to cross-examine witnesses against him in violation of the Confrontation Clause of the Sixth Amendment. Specifically, Chavez argues (1) expert testimony regarding T.A., a documented gang member involved in an April 2006 shooting in which Chavez's accomplices were victims, was inadmissible hearsay and that he did not have an opportunity to cross-examine T.A. in violation of the Confrontation Clause; (2) testimony regarding Chavez fulfilling gang member criteria pursuant to A.R.S. § 13-105(9) was inadmissible hearsay in violation of the Confrontation Clause; and (3) testimony regarding D.B., a documented gang member, was inadmissible hearsay in violation of the Confrontation Clause. We address each of these contentions in turn.

**Evidence of Chavez's Relationship to T.A.**

**¶18** Chavez argues the superior court erred in admitting

evidence regarding T.A., a documented gang member, who was arrested in connection with an April 2006 drive-by shooting in which Chavez's accomplices were victims. Specifically, the evidence consisted of a photograph of T.A. "throwing signs," testimony regarding T.A.'s apparent gang affiliation based on the gang signs displayed in the photograph, and testimony regarding a search of T.A.'s home in which gang paraphernalia was found. The State's apparent purpose in offering this evidence was to convey that because T.A. belonged to a gang in conflict with Chavez's gang and because T.A. "disrespected" members of Chavez's gang by shooting at them, Chavez was motivated to commit this shooting in retaliation and to assist or further his criminal street gang, in violation of A.R.S. § 13-2308.

**¶19** In overruling Chavez's ongoing objection, the superior court found it is appropriate "for the expert to opine on what factors constitute a gang and whether [Chavez's alleged gang] constitute[s] a criminal street gang." The superior court further found "the expert can render those opinions based upon hearsay not admitted" and that, pursuant to Arizona Rule of Evidence 403, "the expert should not opine that any individual is a member of [either gang], except based upon otherwise admitted admissible facts, such as self acknowledgement, gang signs, [or] gang paraphernalia as listed in the definition of

criminal street gang member."

**¶20** Detective E.M. testified that T.A. was a member of a gang that was a rival of Chavez's gang; T.A. was the perpetrator of a shooting at members or associates of Chavez's gang; and that a photograph of T.A. showed him "throwing" gang signs for his gang. For some of these opinions, the detective relied on statements made to him by T.A. and others. Our supreme court has held that "[f]acts or data underlying the testifying expert's opinion are admissible for the limited purpose of showing the basis of that opinion, not to prove the truth of the matter asserted. Testimony not admitted to prove the truth of the matter asserted by an out-of-court declarant is not hearsay and does not violate the confrontation clause." *State v. Rogovich*, 188 Ariz. 38, 42, 932 P.2d 794, 798 (1997); *See State v. Tucker*, 215 Ariz. 298, 315, ¶¶ 61-62, 160 P.3d 177, 194 (2007).

**¶21** Similarly, the Supreme Court in *Crawford* stated that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59, fn. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). Because our supreme court in *Rogovich* and *Tucker* has held that facts and data underlying a testifying expert's opinions are not offered for the truth of the matters stated therein and because *Crawford*, *Rogovich*, and

*Tucker* confirm that such facts and data are beyond the reach of the Confrontation Clause, we are compelled to reject Chavez's challenges here.

**¶22** Chavez was not constitutionally entitled to cross-examine T.A.

**GMIC Classification**

**¶23** Chavez argues that testimony about his status as a documented gang member pursuant to the GMIC criteria, A.R.S § 13-105(9), was improperly "derived [from] the stealth collection of 'intelligence' unknown and unavailable to gang experts and then used by other gang experts to identify Chavez as a gang member," which, he argues, constitutes inadmissible "double or triple hearsay" in violation of the Confrontation Clause. We disagree.

**¶24** Detective E.M. testified that Gang Enforcement Bureau police officers routinely attempt to gather intelligence by "communicating with people" and "identifying gang members per criteria" in A.R.S. § 13-105(9). He further testified that in 2004 Chavez spoke to him voluntarily. Based on that conversation and his observations, Detective E.M. determined that Chavez satisfied multiple GMIC criteria, and as a result, Detective E.M. submitted GMIC documentation, including biographical information and a photo of Chavez, to be included in the police department's database.

**¶25** No Confrontation Clause violation occurred because Detective E.M. was cross-examined at trial. Moreover, Chavez's own out of court statements cannot form the basis of a Confrontation Clause challenge by Chavez.

**Evidence of Association With D.B.**

**¶26** D.B. is a documented member of the same gang Chavez is a documented member of. Chavez argues testimony about his association with D.B. was admitted in violation of the Confrontation Clause because Chavez did not have an opportunity to cross examine D.B.

**¶27** Detective T.F. of the Gang Enforcement Bureau testified that he has extensive experience with members of Chavez's gang and with gang behavior generally. He further testified that he witnessed Chavez and D.B. together and that he made contact with them simultaneously. Unaware Chavez had already been documented by Detective E.M., Detective T.F. independently determined Chavez satisfied at least two of the GMIC criteria. Specifically, Detective T.F. identified (1) a CD case inscribed with graffiti corresponding to the gang D.B. and Chavez belonged to and (2) Chavez's association with D.B., a documented gang member. These GMIC criteria are among those included in A.R.S. § 13-105(9). Detective T.F. filed the GMIC form identifying Chavez as a member of the same gang as D.B.

**¶28** Detective T.F. testified on the basis of his personal

knowledge, recollection, and opinion of his encounter with Chavez and D.B., but he did not discuss any of D.B.'s statements. Consequently, no Confrontation Clause violation occurred because no testimonial statements were admitted and because Detective T.F. himself was subject to cross-examination. *See Crawford*, 541 U.S. at 51.

**CONCLUSION**

**¶29** For the foregoing reasons, we affirm Chavez's convictions and sentences.

____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/_____
JON W. THOMPSON, Judge

___/s/_____
PATRICK IRVINE, Judge