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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VINCENT JULIAN VALDEZ, JR., Defendant and Appellant.	G041904 (Super. Ct. No. 07CF3182) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed in part and reversed in part.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II, subparts A., B., C., and E.

A jury convicted Vincent Julian Valdez, Jr., of two counts of attempted murder, four counts of assault with a firearm, and two counts of street terrorism (Pen. Code, § 186.22, subd. (a)), arising from two separate drive-by shootings.[1] The jury also found numerous enhancement allegations to be true, including that Valdez committed the underlying offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)), was armed and vicariously discharged a firearm in the first drive-by shooting (§§ 12022, subd. (a)(1), 12022.53, subds. (d) & (e)(1)), and personally used and discharged a firearm in the second shooting (§§ 12022.5, subd. (a); 12022.53, subd. (c)).

Valdez raises a host of contentions on appeal. In the published portion of this opinion, we address Valdez's challenge to a trial exhibit consisting of printouts of his MySpace social media internet page, which the prosecution's gang expert relied on in forming his opinion Valdez was an active gang member.

In the unpublished portion of the opinion, we address Valdez's remaining contentions. Specifically, he argues the trial court erred by denying his motion to sever the street terrorism counts from the underlying assault and attempted murder counts, and to bifurcate the gang allegations. He contends the trial court both violated his confrontation rights and abused its discretion under Evidence Code section 352 by admitting statements the second shooting victim made in a 911 call and at the scene to a responding officer. Valdez also raises objections under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) to the admission of a tape-recorded statement he gave to investigating officers. Finally, Valdez asserts five separate challenges to the sufficiency of the evidence to support his conviction for two counts of street terrorism and the gang enhancement allegations attached to several underlying counts. As we explain, only

[1] Further undesignated statutory references are to the Penal Code, except as specified in part II, subpart D.

Valdez's challenge to the gang enhancement on the second shooting has merit, and we therefore reverse the enhancement and affirm the judgment in all other respects.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around 6:30 p.m. on April 27, 2007, rival gang members in a red Honda fired shots at Isaac Villa, a member of the T.I.U. gang ("Toke It Up" or "Tag It Up"), and at Alex Urzua and Ali Hammad Guzman. The three were walking on West Alton Avenue near South Timber Street in Santa Ana. Villa had previously been involved in violent confrontations with members of the T.L.F. ("Thug Family Life") gang. The victims recounted that in the present shooting, Valdez, known by his T.L.F. gang moniker, "Yums," drove the Honda, accompanied by four or five other T.L.F. members. Before the shooting, Valdez made a U-turn, drove back, and stopped in front of Villa's group. Someone yelled out from the car, "T.L.F.," and the front passenger extended his hand out the driver's side window and fired shots at Villa's group. One bullet hit Urzua in the leg, and the car sped away. Villa and Hammad carried Urzua to Hammad's house and called for an ambulance. Two of the shooting victims knew Valdez by his "Yums" moniker, and one of them noted he recognized Valdez from Valdez's MySpace web page.

A few months later, around 2:45 a.m. on July 29, 2007, Valdez parked an older model maroon Cadillac in an Anaheim fast food restaurant parking lot. At least one passenger, Robert Quinones, was in the vehicle with Valdez. Jonathan Kincaid, an admitted member of the Monte Black Gangster Crips who had dated Valdez's sister, rode by on a bicycle. Unlike T.I.U., Kincaid's gang was not a T.L.F. rival, nor was Kincaid riding in territory claimed by T.L.F. A witness in the parking lot observed Valdez and

Quinones quickly close the doors on their vehicle and speed off after Kincaid. Valdez fired at least one shot at Kincaid, but missed. Kincaid rode his bicycle to a nearby convenience store and called 911 within a minute of the shooting. He stated the driver of the car had shot at him, a backseat passenger held a shotgun, and he spotted four occupants in the vehicle, who he claimed were T.L.F. members.

An officer responded within seven minutes of Kincaid's 911 call, obtained some details from Kincaid, who now claimed only two people were in the vehicle and that Valdez, whom Kincaid knew, was the driver. The officer then departed when he was dispatched to help another officer pursuing Valdez's vehicle. The pursuing officer stopped the vehicle, occupied only by Valdez and Quinones, and found gunpowder on both hands of both men. The bystander who observed Valdez and Quinones in the fast food restaurant parking lot identified them in a curbside lineup.

Kincaid had suggested in the 911 call that he had a restraining order against his former girlfriend, who was Valdez's sister. But in a later police interview, Kincaid admitted *he* was the one who had been arrested in a domestic disturbance for harassing Valdez's mother.

Following the jury's verdict, the trial court sentenced Valdez to a total term of 46 years in state prison, consisting of a seven year term for attempting to murder Kincaid, with an additional 10 years for the gang enhancement, and twenty years for a firearm enhancement, plus a two year, four month consecutive term for the attempt on Villa's life in the first shooting, with an additional six years, eight months for a firearm enhancement. Valdez now appeals.

II

DISCUSSION

A. *Severance and Bifurcation*

Valdez argues the trial court erred by denying his pretrial motion to "bifurcate" the substantive gang counts (§ 186.22, subd. (a)) and the gang allegations (§ 186.22, subd. (b)) from the attempted murder and assault with a firearm charges. While we agree it is "confus[ing]" (*People v. Burnell* (2005) 132 Cal.App.4th 938, 946, fn. 5), severance, not bifurcation, is the proper term for disengaging substantive counts for separate trials. Bifurcation refers to determining within the same trial the underlying substantive count before submitting the punishment allegation to the jury. (*Ibid.*). In effect, Valdez sought both severance and bifurcation, and we address these contentions together because they overlap.

Section 954 authorizes joinder of offenses for a single trial if they are "connected together in their commission," but the trial court retains discretion to sever the counts "in the interests of justice . . . ." Enhancements, by definition, are inherently connected to the underlying offense, but as our Supreme Court has recognized, the trial court's broad discretion to control the conduct of proceedings (§ 1044) furnishes the trial court with ample authority to bifurcate an enhancement allegation (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1049 (*Hernandez*)). The party seeking severance of substantive counts or bifurcation of an enhancement has the burden to "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Bean* (1988) 46 Cal.3d 919, 938 (*Bean*); accord, *Hernandez*, at p. 1051.)

The factors trial courts must consider in deciding whether to sever charges are: "(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case. [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.) We review the trial court's ruling for abuse of discretion, bearing in mind the defendant's burden to show prejudice from joinder. (*Ibid.*) "A determination that the evidence was cross-admissible ordinarily dispels any inference of prejudice" from the joinder of substantive counts. (*Id.* at p. 28.) The same is true on the question of whether to bifurcate an enhancement allegation. (See *Hernandez*, *supra*, 33 Cal.4th at pp. 1049-1050 ["To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary"].)

Here, the trial court reasonably could conclude evidence of Valdez's active gang participation (§ 186.22, subd. (a)) and evidence relevant to the gang enhancement (§ 186.22, subd. (b)) were also relevant and cross-admissible concerning the underlying attempted murder and assault charges. Simply put, the gang evidence tended to show a motive for Valdez's commission of these offenses. "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168; see also *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 ["'because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial

effect, and wide latitude is permitted in admitting evidence of its existence'"]; accord, *People v. Martin* (1994) 23 Cal.App.4th 76, 81-82 [gang activity or membership admissible as to motive, though damaging to defense].)

Valdez contends the second shooting in which he allegedly fired a gun at Kincaid had nothing to do with any criminal street gang, but rather is best explained by personal *animus*, based on Kincaid's involvement with Valdez's sister and Kincaid's arrest for harassing Valdez's mother. The prosecutor, however, informed the trial court at the time of Valdez's pretrial severance and bifurcation motion that the evidence would show someone in Valdez's vehicle called out "T.L.F." as shots were fired at Kincaid. According to the prosecutor, this announcement mirrored an identical pronouncement at the first shooting and showed that both were gang-related. As it turned out, the prosecutor was able to produce evidence of a "T.L.F." shout only at the first shooting, but we evaluate a trial court's severance and bifurcation decision based on the record at the time of the court's ruling. (*People v. Calderon* (1994) 9 Cal.4th 69, 81, fn. 6; *People v. Hardy* (1992) 2 Cal.4th 86, 167.) Valdez's challenge therefore fails.

B. *911 Call and Statement to Responding Officer*

Valdez contends the trial court violated his confrontation rights by admitting Kincaid's 911 call from a convenience store and statements Kincaid made to an officer who responded to the store minutes later. The 911 transcript reflected Kincaid made the emergency call approximately one minute after his assailants shot at him, and Officer Clint Cavaness arrived at the convenience store within seven minutes, while Kincaid was still on the line with the 911 dispatcher. Cavaness testified he spoke with Kincaid, who appeared "shaken up," for "a couple minutes," but Cavaness soon departed

to assist an officer tailing "a possible suspect vehicle in the area," which proved to be Valdez's.

After Valdez's arrest, Cavaness interviewed Kincaid at Kincaid's nearby home, but the trial court excluded Kincaid's statements in this interview because it was remote from the shooting and Kincaid did not testify. Kincaid, who was on probation at the time of the shooting and admitted during the 911 call he was out past his probation curfew, invoked the Fifth Amendment despite a grant of immunity, and was therefore unavailable to testify at Valdez's trial. (*People v. Smith* (2003) 30 Cal.4th 581, 623 [a courtroom witness may be unavailable if he or she refuses to testify].) Valdez does not challenge the trial court's threshold conclusion Kincaid was unavailable, but instead argues that admitting Kincaid's 911 call and convenience store statements violated the Sixth Amendment. We disagree.

As the United States Supreme Court has explained, the Constitution does not erect a general, federal bar to hearsay in criminal prosecutions, but rather only to unconfronted testimonial statements, and the high court has observed that testimony is "typically a '[s]olemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Crawford v. Washington* (2004) 541 U.S. 36, 51 (*Crawford*).) The court has specifically addressed 911 calls and follow-up investigations, as follows: "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* (2006) 547 U.S. 813, 822, fn. omitted.)

Valdez argues Kincaid's 911 call and statements to the arriving officer fell outside the ongoing emergency scenario because Kincaid "had reached a place of relative safety" at the convenience store, "those guilty of the drive-by had long since fled," Kincaid had a motive to implicate Valdez based on "hostilities" involving Valdez's sister and mother, and because, according to Valdez's attorney, Kincaid "seemed very calm" during the 911 call and, "He's making statements that are basically accusatory statements."

Valdez's post-hoc assessment, and the characterizations made by his attorney, did not require the trial court to conclude the emergency had ceased. To the contrary, Kincaid's 911 call reflected he had "just got shot at," approximately one minute earlier, and the armed perpetrators were still at large and potentially nearby, as confirmed when the police stopped Valdez's vehicle within approximately 15 minutes. Indeed, Cavaness cut short his initial contact with Kincaid to provide backup to the officer who spotted Valdez's vehicle. The fact that Kincaid knew his assailants, and they had missed their target, did not mean the danger was limited to him or that it had passed when Kincaid called 911 and later spoke to Cavaness at the convenience store. Kincaid lived "30 seconds away" and the officers could not know if Kincaid's attackers would attempt further assaults against him or others. Objectively, the report of gunmen who fired in an unprovoked attack on a bicyclist on a public roadway posed a public threat. Additionally, Kincaid identified the vehicle occupants as gang members and admitted to the 911 operator that his probation included "gang terms," which raised the specter of further gang violence.

The high court's recent opinion in *Michigan v. Bryant* (2011) __ U.S. __, 131 S.Ct. 1143, illustrates that no confrontation violation occurred here. There, officers responding to a gas station parking lot at 3:25 a.m. found a man with a gunshot wound who told them he had just been shot at a drug dealer's home before driving himself to the station. He identified the drug dealer and the dealer's address before emergency medical personnel arrived within minutes and transported him to the hospital, where he died. The Supreme Court explained that the victim's flight from the immediate scene of his shooting to reach a public location where he could place a telephone call did not mean the emergency had ceased, particularly because the perpetrator's use of a gun and likely flight objectively posed broad threats to public safety. (*Id.* at pp. 1156-1158.)

So it is here. As the trial court commented, "As far as [an] ongoing emergency, I think that is rather self-evident. You have four guys running around in a car with a shotgun and a pistol shooting rounds. That's an emergency." Furthermore, the potential gang element to the shooting enhanced the continuing nature of the emergency given the police had to contend with the potential for further gun violence. Consequently, the trial court did not err in overruling Valdez's confrontation objection.

Valdez also objected on grounds the evidence was more prejudicial than probative. (Evid. Code, § 352.) Specifically, Valdez explains on appeal he was prejudiced because Kincaid was "an exceptionally untrustworthy declarant, whose motives were questionable." The trial court, however, was not required to settle the question of Kincaid's credibility as a matter of law, but instead could leave these issues for the jury's determination. (See *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 ["It is the exclusive function of the trier of fact to assess the credibility of witnesses"]; see also *People v. Arias* (1996) 13 Cal.4th 92, 155 [section 352 rulings committed to trial

court's discretion].) Valdez highlighted Kincaid's motive to implicate him based on hostilities that included Kincaid's dating relationship with Valdez's sister and Kincaid's arrest for harassing Valdez's mother, which Kincaid admitted to Cavaness. But it was for the jury to evaluate these issues in light of the exigency of Kincaid's 911 call and statements to Cavaness.

Valdez complains of "significant discrepancies" among Kincaid's statements, but the ones he identifies were reconcilable and did not bar admission of Kincaid's statements under Evidence Code section 352. For example, Kincaid told the 911 operator four men were in the vehicle and he told Cavaness two men shot at him. On cross-examination, in which *Valdez elicited* Kincaid's statements in his later interview with Cavaness, Cavaness explained that Kincaid affirmed four people were in the vehicle and two of them shot at him, which is not inconsistent.

Valdez argues that having to elicit Kincaid's later statement to Cavaness was prejudicial because in addition to Kincaid's admission he was arrested for harassing Valdez's mother, Kincaid gave an inflammatory account of the shooting, claiming Valdez shot at him three times and someone discharged a shotgun. These issues concerning the underlying facts were, as noted, for the jury to weigh and determine, and neither Kincaid's statements nor Valdez's tactical decisions to elicit the statements on cross-examination require exclusion under Evidence Code section 352. (*People v. Karis* (1988) 46 Cal.3d 612, 638 (*Karis*) [prejudicial is not synonymous with damaging]; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1023 ["prejudice" in § 352 means """its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors"""], abrogated on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896,

911-912.) Accordingly, the trial court did not err in admitting Kincaid's hearsay statements.

C. Miranda *Challenge*

Valdez asserts the trial court violated his *Miranda* rights by allowing the prosecutor to introduce his admissions in a tape-recorded, stationhouse interview that he associated occasionally with T.L.F. members, that he had been driving a burgundy Cadillac for several months, and that he sometimes drove his mother's red Honda. Valdez's *Miranda* challenge is without merit.

Valdez's sole objection in the trial court was that the interviewing officers did not obtain an express waiver of his *Miranda* rights. An express waiver is not required; rather, an implied waiver suffices. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373; see, e.g., *People v. Sully* (1991) 53 Cal.3d 1195, 1233 (*Sully*) [implied waiver valid where defendant received *Miranda* advisement, acknowledged he understood his rights, and proceeded to speak with police].) Because Valdez asserted below only the necessity of an express waiver of *Miranda* rights, and did not contest the validity of his implied waiver, he deprived the trial court and the prosecutor of the opportunity to address his claim or further develop the record with testimony by the interviewing officers or other evidence concerning the circumstances of his waiver. (See *People v. Partida* (2005) 37 Cal.4th 428, 435 (*Partida*) [trial court cannot err "in failing to conduct an analysis it was not asked to conduct]; *People v. Morris* (1991) 53 Cal.3d 152, 187-188 [specific challenge "allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal"], disapproved on another point by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Valdez therefore forfeited his challenge to admission of his police interview. Indeed, he failed to raise his express waiver objection until *after* the jury heard the recording. (Evid. Code, § 353; see, e.g., *Partida* (2005) 37 Cal.4th at p. 436 [constitutional claim may be forfeited by absence of specific objection]; *People v. Waidla* (2000) 22 Cal.4th 690, 717 [timely objection required].) Valdez's only potential remedy is a habeas claim for ineffective assistance of counsel on a more fully developed record.

Here, the record before us reflects that after the officers provided Valdez both oral and written advisements of his rights, Valdez expressly stated, verbally and in writing, that he understood those rights, and he proceeded to engage in conversation with the officers, asking them questions about his arrest warrant and answering their inquiries, without invoking his right to silence or requesting an attorney. The record thus demonstrates that by engaging the officers Valdez impliedly waived his *Miranda* rights. (E.g., *Sully*, *supra*, 53 Cal.3d at p. 1233.)

Valdez now asserts his implied *Miranda* waiver was invalid for a number of reasons, but his implicit claim that his attorney should have objected on these grounds is without merit. First, Valdez sets up an irrelevant straw man by citing cases in which courts addressed whether the suspect's detention rose to the level of custody. Valdez notes that "[i]n contrast to" these cases, his police interview "was undisputedly custodial." That is true, but irrelevant. As the Attorney General observes, Valdez's "custody status is relevant to whether *Miranda* warnings were *required*, not whether his *Miranda* rights were *waived*." (Original italics.) Valdez received his *Miranda* warnings as required, so we do not address this ill-conceived claim further.

Valdez next cites his youth and the asserted ambiguity of the *Miranda* warnings as reasons to find his waiver invalid. Valdez insists the officer's direction "'to

answer yes or no if you understand what I'm reading to you'" failed to inform 19-year-old Valdez "he could ask for a further explanation of his rights, even if he understood the words being read." (Original emphasis.) But there was nothing ambiguous in either the standard verbal or printed *Miranda* warnings the officers provided, and Valdez points to no authority the police are required to expand on the meaning of clearly stated rights, especially for an adult who has shown no hint of misunderstanding. Nothing about the *Miranda* warnings, the officer's recitation, or Valdez's age suggests any basis for an objection, let alone one reasonably likely to have changed the trial's outcome.

Similarly, Valdez's belated claims the officers used psychological pressure and deceit are without merit and furnish no basis for reversal. Valdez complains the officers' statement there was a warrant for his arrest became misleading when they suggested that *if* the warrant was a result of a "misunderstanding," an "honest and forthcoming" explanation would "clear it up." We discern no false promise or anything objectionable in the officer's statement. Valdez also complains the officers practiced deceit by "rebuff[ing]" his "inquires about the reasons for his arrest and deliberately with[holding] information regarding [the] specific nature of the crimes that they were investigating." Valdez, however, knew the circumstances of his arrest, including that he had gunpowder on his hands. Moreover, there is no authority that investigators are required to divulge the results of their investigation or their suspicions to the suspect. The record reflects that any inclination Valdez may have felt to explain himself was self-imposed and not the result of police coercion. (See *Colorado v. Connelly* (1986) 479 U.S. 157, 167 [coercive state activity "a necessary predicate" to involuntariness claim]; *People v. Maury* (2003) 30 Cal.4th 342, 388 [same].) Exhortations to honesty that, as here, do not involve threats or promises do not render a statement involuntary.

(*People v. Johnson* (2010) 183 Cal.App.4th 253, 260.) On the basis of the record before us, any objection to Valdez's implied waiver would have been futile. Consequently, Valdez's *Miranda* challenges are without merit.

D. *MySpace page*

Valdez contends the trial court erroneously admitted pages from his MySpace social networking site that included his gang moniker ("Yums"), a photograph of him making a gang hand signal, and written notations including "T.L.F.," "YUM $ YUM," "T.L.F.'s '63 Impala," "T.L.F., The Most Wanted Krew by the Cops and Ladiez," and "Yums. You Don't Wanna F wit[h] this Guy." (Capitalization modified to initial capital letters only.) The MySpace page included the following under "Groups": "CO 2006, Thug Life/Club Bounce. O.C.'s Most Wanted G's. Viva Los Jews. Screaming Thug Life" and, in an interests section, stated: "Mob[b]ing the streets and hustling, chilling with homies, and spending time with my mom." (Capitalization modified from original.) The prosecution's gang expert, Castillo, explained that in gang parlance, the letter "G" in "O.C.'s Most Wanted G's" stood for "gangster."

An investigator from the district attorney's office, Kevin Ruiz, testified he printed out the web pages in May 2006, a year *before* the shootings, after accessing them as part of his internet search using the terms "T.L.F. Santa Ana." He explained that a person's MySpace pages are accessible publicly without a password, but only the person who has created that MySpace profile, or a person who has a password for the page, may upload content to it or manipulate images on it. Ruiz explained, "[W]ithout having the password that belongs to the creator of that website, you can only view what's there[.]" In other words, "to actually add or subtract anything, you would need the . . . password that was given by the person who created the website[.]" Ruiz admitted he did not know

who uploaded the photographs or messages on Valdez's page, who created the page, or how many people had a password to post content on the page.

The trial court admitted the MySpace printouts for specified purposes and not for the truth of any express or implied assertions. In particular, the court instructed the jury to consider the MySpace evidence for the limited purposes of (1) corroborating a victim's statement to investigators shortly after the first shooting that the victim recognized Valdez from the MySpace site and (2) as foundation for Castillo's expert testimony. Castillo relied on the MySpace page and other evidence as a basis for his opinion Valdez was an active T.L.F. gang member. Valdez objected to admission of the MySpace evidence based on lack of authentication, hearsay, and that it was more prejudicial than probative under Evidence Code section 352,[2] and he renews those challenges on appeal. As we explain, they are without merit.

1. Authentication

Valdez's authentication challenge fails because the prosecution met its initial burden to support its claim the MySpace site belonged to Valdez, and that the photographs and other content at the page were not falsified but accurately depicted what they purported to show. Importantly, "the fact that the judge permits [a] writing to be admitted in evidence does not necessarily establish the authenticity of the writing; all that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic." (Cal. Law Revision Com., com., 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1400, p. 440.) Thus, while all writings must be authenticated before they are received into evidence (§ 1401),

[2] For ease of reference, all undesignated statutory references in this subpart of the opinion are to the Evidence Code.

the proponent's burden of producing evidence to show authenticity (§ 1400) is met "when sufficient evidence has been produced to sustain a finding that the document is what it purports to be. [Citation.]" (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.) The author's testimony is not required to authenticate a document (§ 1411); instead, its authenticity may be established by the contents of the writing (§ 1421) or by other means (§ 1410 [no restriction on "the means by which a writing may be authenticated"]). "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility. [Citations.]" (*Jazayeri*, at p. 321.) "'[L]ike any other material fact, the authenticity of a [document] may be established by circumstantial evidence. . . .'" (*Chaplin v. Sullivan* (1945) 67 Cal.App.2d 728, 734.)

Here, Valdez does not dispute that the MySpace page icon identifying the owner of the page displayed a photograph of Valdez's face. Other indicia the page was his included greetings addressed to him by name ("Hey, Vince") and by relation ("Hey, big brother") in a section of the page where other MySpace users could post comments. In particular, Valdez does not dispute his sister left the "big brother" salutation on his MySpace page, accompanied by a user icon consisting of her photograph and the perhaps facetious label, "Mrs. Kincaid" (she was dating the eventual shooting victim, Jonathan Kincaid, at the time). The greeting from Valdez's sister was one of many posts by friends and by the page owner that included personal details; for example, the post by "Mrs. Kincaid" stated in full: "Hey, big brother, I kinda miss you around the house. Love ya. Bye. Congrats on the job." Additionally, the page owner's stated interests, including an interest in gangs generally and in T.L.F. specifically, matched what the police otherwise knew of Valdez's interests from their field contacts with him. This

suggested the page belonged to Valdez rather than someone else by the same name, who happened to look just like him. Although Valdez was free to argue otherwise to the jury, a reasonable trier of fact could conclude from the posting of personal photographs, communications, and other details that the MySpace page belonged to him. Accordingly, the trial court did not err in admitting the page for the jury to determine whether he authored it. (See Cal. Law Revision Com. com., *supra*, 29B pt.4 West's Ann. Evid. Code, foll. § 1400, p. 440 [trier of fact "may find that the writing is not authentic despite the fact that the judge has determined that it was 'authenticated'"].)

Similarly, the trial court could conclude that particular items on the page, including a photograph of Valdez forming a gang signal with his right hand, met the threshold required for the jury to determine their authenticity. The contents of a document may authenticate it. (§ 1421.) Valdez does not dispute he is the person depicted in the gang signal photograph. Other "content" in the photograph, specifically, the deliberately posed position of Valdez's hands, was precise and definite to suggest an intentional rather than inadvertent or accidental hand gesture. Nothing on the rest of the page undermined an initial impression the photograph accurately depicted Valdez making a gang hand sign instead of some other signal or motion. Rather, the writings on the page and the photograph corroborated each other by showing a pervading interest in gang matters, rather than an anomalous gesture. Importantly, this consistent, mutually-reinforcing content on the page helped authenticate the photograph and writings, with no evidence of incongruous elements to suggest planted or false material. Other key factors include that the evidence strongly suggested the page was Valdez's personal site, as discussed above, and that the page was password-protected for posting and deleting

content, which tended to suggest Valdez, as the owner of the page, controlled the posted material.

Valdez's reliance on *People v. Beckley* (2010) 185 Cal.App.4th 509 is misplaced. In finding the authentication of a website photograph there insufficient, the court repeated an observation that "'"[a]nyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can[not] adulterate the content of *any* web-site from *any* location at any time.'"' (*Id.* at pp. 515-516, original italics; quoting *St. Clair v. Johnny's Oyster & Shrimp, Inc.* (S.D. Tex. 1999) 76 F.Supp.2d 773, 775.) Here, in contrast, evidence of the password requirement for posting and deleting content distinguishes *Beckley*, as does the pervasive consistency of the content of the page, filled with personal photographs, communications, and other details tending together to identify and show owner-management of a page devoted to gang-related interests. (Compare with *Beckley*, at p. 515 [lone photo at issue there was on the defendant's girlfriend's MySpace web page, showing *her* making a gang sign].)

And unlike other authority on which Valdez relies, nothing suggested he had a personal enemy with a motive to implicate Valdez in future gang crimes by creating an entire site or individual postings on it. (See *United States v. Jackson* (7th Cir. 2000) 208 F.3d 633, 638.) Ruiz's downloading of the page contents long predated any conceivable motive in *anyone* to hack or fabricate a MySpace page or its content to implicate Valdez in the shooting crimes here, which occurred a year later. We recognize, of course, that hacking may occur and that documents and other material on the internet may not be what they seem. But the proponent's threshold authentication

burden for admissibility is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic. The prosecution met that burden here, as the trial court properly concluded. We therefore reject Valdez's authentication challenge.

2. Hearsay and Evidence Code Section 352

Valdez's hearsay challenge is without merit because the trial court did not admit the MySpace material for the truth of any assertion on the page. Valdez contends the trial court's limiting instruction on this score was "the essence of sophistry" because no "instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) But our jury system rests on the assumption jurors are intelligent and capable persons, and we therefore presume the jury adhered to the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Cruz* (2001) 93 Cal.App.4th 69, 73 [court must presume the jury "'meticulously followed the instructions given'"].) Moreover, the MySpace page lacked any improper "electric effect" that might suggest the jury disobeyed the court's instructions. (*People v. Brophy* (1954) 122 Cal.App.2d 638, 652 [prosecutor produced in closing argument a missing bullet never admitted in evidence; instruction inadequate to cure prosecutorial misconduct]; see *People v. Allen* (1978) 77 Cal.App.3d 924, 935 ["It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions'"].) Far from an improper subject matter, gang evidence was central to the case to explain a motive for the drive-by shootings, both to inflict damage on other gangs and to enhance a gang's reputation for violence in seemingly random strikes.

In any event, Valdez's hearsay objection fails because the nature of the evidence here did not consist of declarative assertions to be assessed as truthful or untruthful, but rather circumstantial evidence of Valdez's active gang involvement. For example, a reasonable jury would understand its purpose was not to determine whether Valdez and his "Krew" were truly "Most Wanted" by the "Ladiez" in Orange County. Rather, as instructed, the jury was to consider the evidence in deciding what weight, if any, to put in Castillo's opinion testimony.

Valdez insists admission of mere "gang braggadocio" from his MySpace page was more prejudicial than probative, but the fact probative evidence reflects negatively on a defendant is not grounds for its exclusion. (See *Karis*, *supra*, 46 Cal.3d at p. 638 [under § 352, prejudicial is not synonymous with damaging].) In hindsight, Valdez suggests alternative, more selective admission of the MySpace evidence would have been prudent, such as only a photograph identifying him by his "Yums" moniker, "without the inflammatory gang-related writing." But he made no such suggestion below (*Partida*, *supra*, 37 Cal.4th at p. 435 [trial court does not "err[] in failing to conduct an analysis it was not asked to conduct"]) and, as discussed, the gang evidence was relevant and probative. There was no error.

E. *Sufficiency of the Evidence*

1. T.L.F.'s Primary Activities as a Criminal Street Gang

Valdez challenges the sufficiency of the evidence to support the jury's conclusion T.L.F. qualified as a criminal street gang as defined in section 186.22, subdivision (f), based on its primary activities. "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." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457, italics added.) The criminal street gang finding is a necessary predicate to the substantive gang crimes (§ 186.22, subd. (a)) and punishment enhancements (§ 186.22, subd. (b)) the jury found to be true arising from the two shootings.

The prosecution's gang expert, Castillo, identified auto theft and felony vandalism as two of T.L.F.'s primary activities. (See § 186.22, subd. (e) [listing these crimes as proscribed primary activities].) Valdez attacks the foundation for Castillo's testimony. On appeal, we must view the evidence disclosed by the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466 (*Elliot*); accord, *People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*) [same standard applies to review of gang evidence].) The fact the evidence may be reconciled with a contrary conclusion does not warrant reversal. (*Bean*, *supra*, 46 Cal.3d at pp. 932-933.) "'[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*).) Although we must ensure the evidence is reasonable, credible, and of solid value, we may not substitute our judgment for the trier of fact's if substantial evidence supports the jury's conclusion. (*Ibid.*)

Relying on *In re Alexander L.* (2007) 149 Cal.App.4th 605, Valdez challenges as inadequate the arrest records, police reports, and police field identification cards concerning T.L.F. members that formed a partial basis for Castillo's testimony identifying T.L.F.'s primary activities. But in *Alexander L.*, the gang expert simply

stated in a conclusory fashion that he "'kn[e]w'" the defendant's gang had been involved in certain criminal activities. (*Id.* at p. 611.) The expert did not describe his background, training, experience, or contacts with gang members or the defendant's gang. (*Ibid.*) In contrast, in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), the Supreme Court found the gang expert's testimony sufficient to establish a gang's primary activities included the sale of narcotics and witness intimidation, where the expert based his opinion "on conversations with the defendants and with other Family Crip members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies." (*Id.* at p. 620.)

As our Supreme Court has explained, a gang's primary activities may be established in two ways. First, "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." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, original italics (*Sengpadychith*).) Thus, the prosecution may rely on evidence of particular "past or present criminal acts" committed by a group's members, provided the offenses are enumerated in section 186.22, subdivision (e), and they aggregate to form a "chief" or "principal" gang endeavor, rather than "the occasional commission of those crimes by the group's members."[3] (*Sengpadychith*, at p. 323.) Second, as here, expert testimony may "[a]lso" suffice to detail a gang's primary activities. (*Id*. at p. 324, citing *Gardeley*, *supra*, 14 Cal.4th 605 as an example.)

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[3] By way of example, the Supreme Court has explained that "'environmental activists or any other group engaged in civil disobedience could not be considered a criminal street gang under the statutory definition *unless one of the primary activities of the group was the commission of one of the . . . enumerated crimes found within the statute*.'" (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324, italics added.)

Here, as in *Gardeley*, the gang expert detailed his qualifications and the basis for his opinion. Castillo explained that as a 15-year gang unit veteran, including 12 years as a supervising corporal, he had investigated over a thousand gang cases, interviewed more than 5,000 gang members, received over 500 hours of gang training, supervised numerous gang training courses, testified as a gang expert 146 times, and, as one of his primary duties, reviewed all in-custody cases involving Santa Ana gang members. He was familiar with T.L.F. in particular, having personally interviewed approximately half its members. He noted his contact with probation officers for T.L.F. members, and he identified the gang detectives he consulted and the supporting documentation he reviewed concerning T.L.F., including police reports concerning two 2007 and 2006 auto thefts committed by T.L.F. members, a 2007 felony vandalism, a 2006 conviction for felony vandalism, and at least three felony vandalism police reports from 2006.

Valdez attacks the police reports, field investigation cards, and other documents on which Castillo relied because they "often contain untested, unverified hearsay recitals by victims and witnesses, as well as extrajudicial statements by arrestees and the police." But as noted, these and similar sources formed an adequate basis for the expert's opinion in *Gardeley*, *supra*, 14 Cal.4th at p. 620.) And in *People v. Gonzalez* (2006) 38 Cal.4th 932 (*Gonzalez*), the Supreme Court expressly rejected a challenge to the indirect nature of the expert's knowledge, based on unreliable hearsay rather than the expert's personal investigation of specific crimes. The high court explained, "A gang expert's overall opinion is typically based on information drawn from many sources and on years of experience, which *in sum* may be reliable." (*Id.* at p. 949, italics added.) So it is here.

In a supplemental opening brief, Valdez asserts the trial court was required to instruct the jury on the elements of auto theft and felony vandalism so the jury could judge for itself whether particular past incidents fell into these categories, but Valdez cites no authority holding this is necessary. To the contrary, it follows from the Supreme Court's endorsement of expert testimony in *Gonzalez*, *Sengpadychith*, and *Gardeley* that it is sufficient for the jury to evaluate the expert's testimony, qualifications, and foundation to determine whether the prosecution has met its burden to prove the proscribed nature of a gang's primary activities. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

Citing *Crawford*, *supra*, 541 U.S. 36, Valdez argues that relying on expert opinion testimony to establish a gang's primary activities violates the Confrontation Clause, but a gang expert "is subject to cross-examination about his or her opinions," and the "materials on which the expert bases his or her opinion are not elicited for the truth of their contents" but rather "to assess the weight of the expert's opinion." (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) Thus, out of court statements used solely as the basis for an expert's opinion are not testimonial within the meaning of the Sixth Amendment, and the Confrontation Clause therefore does not apply. (*Ibid.*; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 ["hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned"]; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [same].) Consequently, Valdez's attack on the sufficiency of the evidence to show T.L.F.'s primary activities involved committing the requisite criminal offenses is without merit.

2. Knowledge of T.L.F.'s Pattern of Criminal Conduct

Valdez challenges the sufficiency of the evidence to support the jury's conclusion he knew his gang engaged in a pattern of criminal conduct. The substantive gang offense defined in section 186.22, subdivision (a), requires proof that the defendant "actively participates in any criminal street gang *with knowledge that its members engage in or have engaged in a pattern of criminal gang activity* . . . ." (Italics added.) The requisite "pattern of criminal gang activity" consists of the commission, or attempted commission or conspiracy or solicitation to commit, by the defendant's fellow gang members of any of more than 30 enumerated felonies on at least two occasions within three years. (§ 186.22, subd. (e).) Given that we must review the evidence in the light most favorable to the verdict (*Elliot*, *supra*, 37 Cal.4th at p. 466), we find no merit in Valdez's challenge.

In particular, the police issued Valdez a "gang notice" in June 2005, two years before the current offenses, warning him of the proscribed, enumerated felonies committed by gangs and that T.L.F. fell within the definition of a criminal street gang. Additionally, the evidence demonstrated Valdez — who the jury concluded committed two drive-by shootings, including one in which he or fellow members shouted "T.L.F." before firing shots — was an active T.L.F. member. Distinguishing other criminal offenders who typically attempt to conceal their crimes to avoid detection, Castillo explained gang members boast of their offenses to garner, in a perverse fashion, "respect" for themselves and their gang. Consequently, just as Valdez and his cohorts broadcast their initial shooting, the jury reasonably could infer that as an active member Valdez similarly had learned of previous T.L.F. criminal exploits.

Valdez complains no specific evidence established he knew of two T.L.F. criminal convictions the prosecutor introduced from 2006, one for felony vandalism and another for assault likely to cause great bodily injury. But as discussed above, Castillo's testimony demonstrated T.L.F.'s criminal activities were more pervasive than just two recent convictions, and the jury reasonably could conclude Valdez knew of T.L.F.'s pattern of criminal conduct based on the notice he received, his active status in the gang, and the tendency of gang members to divulge their crimes to each other. "Knowledge, like intent, is rarely susceptible of direct proof and generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise." (*People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495.) Thus, the prosecutor properly relied on circumstantial evidence here, and we cannot say under the standard of review that the jury was required to conclude Valdez was ignorant of his gang's criminal conduct. His appellate challenge therefore fails.

3. Personal Use of a Firearm in the Second Shooting Incident

Valdez challenges the sufficiency of the evidence to support the jury's conclusion he personally used and discharged a firearm (§§ 12022.5, 12022.53, subds. (b) & (c)) in the July 2007 incident in which someone in his vehicle shot at Kincaid. This contention requires little discussion. Kincaid identified Valdez as the shooter through a combination of two statements: he alerted the 911 dispatcher that the driver of the vehicle shot at him and, minutes later when the responding officer arrived, Kincaid identified Valdez as the driver.

A single witness's uncorroborated identification suffices to support a conviction. (See *People v. Gammage* (1992) 2 Cal.4th 693, 700.) Here, the prosecution established Kincaid's statements were "'sufficiently trustworthy to be presented to the

jury'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318) under the excited utterance doctrine (Evid. Code, § 1240), and the trial court reasonably could conclude Valdez failed to require their exclusion by rebutting their spontaneity or reliability (see *People v. Raley* (1992) 2 Cal.4th 870, 893 [spontaneous statements admissible "'if it . . . appears that they were made under the stress of excitement and while the reflective powers were still in abeyance'"]; accord, *People v. Riva* (2003) 112 Cal.App.4th 981, 995 ["spontaneous declaration" required, "not an instantaneous one"]). Once admitted, Kincaid's identification was for the jurors to consider and we may not second-guess their conclusion. (*Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

Moreover, ample other evidence pointed to Valdez as a shooter. A bystander in the restaurant parking lot identified Valdez as the driver of the car from which the shots were fired, bolstering Kincaid's identification of Valdez as the driver and therefore also the shooter. Additionally, Valdez was driving the vehicle when police stopped it nearby shortly after the shooting. Other compelling evidence included that investigators found gunshot residue on Valdez's hands and he had a personal motive to shoot at Kincaid, based on criminal charges Kincaid had harassed Valdez's mother. While circumstantial evidence often may be reconciled with a contrary conclusion, an appellate court may not substitute an alternate judgment for the trier of fact's. (*Bean*, *supra*, 46 Cal.3d at pp. 932-933.) In sum, substantial evidence supports the jury's verdict.

4. Whether the Second-Shooting Was Gang-Related

Valdez challenges the sufficiency of the evidence to support the jury's conclusion the second shooting met the criteria for a punishment enhancement under section 186.22, subdivision (b)(1), as a gang-related shooting. This subdivision provides

for enhanced punishment when an underlying offense is committed, in pertinent part, "for the benefit of, at the direction of, or in association with any criminal street gang . . . ." (§ 186.22, subd. (b)(1).) Valdez argues the evidence established only a personal *animus* for him to shoot Kincaid, and he contends the gang expert's broader opinion that this type of unprovoked gun attack benefited the T.L.F. gang by enhancing its reputation for violence "'did nothing more than inform the jury how [the expert] believed the case should be decided.'" (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197, quoting *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.) The Attorney General relies on Castillo's testimony "that the unprovoked and violent act of shooting at a bicyclist would enhance the reputation and respect of the [T.L.F.] gang."

This evidence does not justify imposing the gang enhancement on Valdez. "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness *can be* sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22[, subd.] (b)(1)." (*Albillar, supra,* 51 Cal.4th at p. 63, italics added.) But the Supreme Court has explained that substantial evidence must undergird the expert's opinion: "'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" (*Gardeley, supra,* 14 Cal.4th at p. 618.) In *Albillar*, the foundation for the expert's opinion that a rape committed in concert by gang members benefited the gang included evidence that "'*this* crime is reported as not three individual named Defendants conducting a rape, but members of [Southside] Chiques conducting a rape, and that goes out in the community by way of mainstream media or by way of word of mouth. That is elevating [Southside] Chiques' reputation to be a violent, aggressive gang

that stops at nothing and does not care for anyone's humanity.'" (*Albillar*, at p. 63, italics added, brackets and capitalization in original.)

Here, no evidence suggested that a seemingly random shooting at a bicyclist would be reported throughout the community as a gang shooting, and subsequent investigation did not reveal a connection to Valdez's gang, but rather a personal motive. Unlike in *Albillar*, no evidence showed knowledge or endorsement of the crime among fellow gang members and affiliates who urged the victim to remain silent or face gang retaliation. Unlike the defendants in *Albillar*, Valdez did not act in concert with fellow gang members to accomplish the crime. His passenger, Quinones, was his neighbor, not a T.L.F. member. Kincaid suggested in his 911 call that *four* T.L.F. members occupied Valdez's car, but the evidence did not bear out this claim, given his subsequent statement to the responding officer numbering only two men in the car, and that police stopped the car soon after the shooting with only Valdez and Quinones inside. The shooting did not occur in territory claimed by T.L.F. or a rival gang. Unlike the retaliatory, earlier drive-by shooting at rival T.I.U. members, the shot or shots fired at Kincaid did not fit the mold of "classic" gang-related activity. (See *Albillar*, *supra*, 51 Cal.4th at p. 71 (conc. & dis. opn. of Werdeger, J.).) Nor was the shooting related to any of T.L.F.'s primary activities (see *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 (*Ramon*)); *People v. Ochoa* (2009) 179 Cal.App.4th 650, 653), which Castillo identified as automobile theft and felony vandalism.

Instead, the evidence strongly suggested a personal motive, based on Kincaid's fractured relationship with Valdez's sister and Kincaid's arrest for harassing Valdez's mother.[4] The prosecution's gang expert nevertheless suggested that *any*

[4] The hypothetical the prosecutor posed to the gang expert also suggested that Kincaid feared retaliation from Valdez at the time of the shooting because Valdez

unprovoked, violent attack Valdez might commit would necessarily be gang-related because such attacks enhance a gang's reputation for violence. On appeal, the Attorney General also suggests the jury could rely on Valdez's involvement in the earlier, undeniably gang-related shooting, but again this approach requires the conclusion that *any* subsequent violent act Valdez might commit would necessarily be gang-related. As the Supreme Court has explained, however, "Not every crime committed by gang members is related to a gang." (*Albillar, supra*, 51 Cal.4th at p. 60.) Rather, an opinion that the defendant's activities are gang-related must be "rooted in the evidence of the case being tried, not some other case." (*People v. Vang* (2011) 52 Cal.4th 1038, 1046.) Thus, "the record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762 (*Martinez*).)

Here, the expert's general observation that unprovoked violence benefits a gang did not establish this was *Valdez*'s intent. The benefit prong of the gang

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may have believed he (Kincaid) had been involved in breaking a window recently at Valdez's house. But the parties do not cite, nor have we located in the record, any evidentiary basis for this portion of the hypothetical. In any event, nothing suggests the alleged vandalism was gang-related or invited gang-related retaliation.

In another portion of the expert's testimony, he appeared to rely on an unfounded premise specific to this case, namely, a police report stating that *Kincaid* — not just the victims of the first shooting — heard the occupants of the vehicle yell out "T.L.F." The prosecutor, however, did not introduce the report or other evidence of the purported statement to Kincaid, and nothing in the admitted evidence suggests it occurred. Nor did the expert rely on this statement for his opinion a hypothetical shooting like the one at Kincaid would be gang-related. Rather, the expert considered it a factor in his conclusion T.L.F. was a criminal street gang. Accordingly, the supposed shout is *not* evidence that may be deemed to bolster the expert's gang-shooting opinion or otherwise support the jury's gang enhancement conclusion.

enhancement does not turn on an objective determination of whether a gang *did* or *might* benefit from particular conduct, but rather on the actor's subjective state of mind. The prosecution must prove the defendant intended to benefit his or her gang in the case at hand (*Martinez, supra*, 116 Cal.App.4th at p. 762), and "a mere possibility is not sufficient to support a verdict" (*Ramon, supra*, 175 Cal.App.4th at p. 853). """By definition, 'substantial evidence' requires *evidence* and not mere speculation. In any given case, one 'may *speculate* about any number of scenarios that may have occurred. . . . . A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture , or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'""" (*Id.* at p. 851, italics & ellipses in original.)

In *Albillar*, as noted, the expert pointed to the manner in which "'*this* crime'" would be reported as gang-related. (*Albillar, supra*, 51 Cal.4th at p. 63, italics added.) There, the Supreme Court also noted the rape occurred in a locale "'saturated' with gang paraphernalia" (*id.* at p. 62) and, undermining the defendants' claim of a personal motive, the initial rapist "suppressed his own personal interest in having sex with the victim and immediately yielded to the others when they asked if they could 'get in'" (*id.* at p. 61), thus permitting the conclusion the defendants relied on their common gang bond to commit the offense with minimal risk of prosecution, given further evidence of a gang code of silence and intimidation of witnesses. No similar evidence tied Valdez's armed assault on Kincaid to a gang motive. Instead, in a case where all the evidence pointed to an opportunistic shooting based on a personal motive, attributing a

gang motive to Valdez was no more than speculation. Consequently, the gang enhancement cannot stand and we reverse that portion of the judgment.

5. Substantive Gang Crime Conviction Arising from the Second Shooting

Valdez challenges the sufficiency of the evidence to support the jury's conclusion the shooting incident involving Kincaid supported a conviction under section 186.22, subdivision (a). That subdivision creates a substantive offense comprised of the following elements: "(1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*Albillar*, *supra*, 51 Cal.4th at p. 56.)

Specifically, Valdez asserts the jury could not reasonably find his act of shooting at Kincaid constituted a gang-related offense. Our Supreme Court, however, has concluded the "felonious criminal conduct" underlying the crime of street terrorism (§ 186.22, subd. (a)) need not be gang-related. (*Albillar*, *supra*, 51 Cal.4th at pp. 1068, 1070.)

Valdez suggests it is absurd to base a conviction for active gang participation on "a felony that has no connection to gang membership, such as drunk driving, felony tax evasion, domestic violence, or perhaps felony neglect or endangerment of the gang member's own child." Valdez implies that if a person who is a gang member commits these offenses, he must do so *as a gang member* to trigger application of the gang statutes. He argues that if the underlying felony need not be gang-related, the statutory scheme violates due process by punishing mere group membership that is, by itself, nonculpable.

Construing the words employed in subdivision (a) of section 186.22, "felonious criminal conduct [committed] by members of that gang," the Supreme Court has concluded no gang nexus is required. In other words, the defendant's offense need not be "gang-related." (*Albillar*, *supra*, 51 Cal.4th at p. 56 [finding "absence of ambiguity in the statutory language"].) Consequently, absent a requirement of a link between the offense and the gang, the prosecutor need not show the defendant shares a common purpose with his gang or knowledge that its primary activities include criminal endeavors. (See § 186.22, subd. (a) [omitting these requirements].) Instead, the Supreme Court has concluded participation in the group in a more than nominal or passive fashion and knowledge of a "pattern of criminal conduct" by fellow members — consisting of two felonies committed within three years (§ 186.22, subd. (e)) — exceeds federal due process standards of personal guilt, when coupled with the defendant's commission of a felony that may be unrelated to the gang. (*Albillar*, at pp. 58-59.) We are bound by this conclusion. (*Auto Equity*, *supra*, 57 Cal.2d at p. 455.) Valdez's challenge therefore fails.

III

DISPOSITION

The true finding on the gang enhancement alleged in count eight for the attempted murder of Kincaid is reversed. The judgment is affirmed in all other respects.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.