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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL J. RODRIGUEZ,

Defendant and Appellant.

A128181

(Solano County  
Super. Ct. No. FCR271784)

A jury convicted appellant Michael J. Rodriguez of carrying a loaded firearm (count 1), carrying a loaded firearm not registered (count 2), and carrying a concealed firearm (count 4), and sustained gang enhancements allegations for each conviction. (Pen. Code,<sup>1</sup> §§ 186.22, subd. (b)(1), 12025, subd. (a)(2), 12031, subd. (a)(1).) The trial court sentenced appellant to a total term of five years in state prison: a two-year middle term for carrying a loaded firearm, with a three-year gang enhancement. Sentences on the other two convictions were stayed. On appeal, appellant contends he received improper multiple convictions; the trial court erred in admitting expert testimony; and there was insufficient evidence to sustain the gang enhancements. We vacate the conviction and stayed sentence on count 2, and affirm the judgment in all other respects.

**I. FACTS**

In November 2009, Fairfield police officers pulled over a vehicle containing four individuals, including appellant. The officers asked appellant if he had a gun, and he

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<sup>1</sup> All subsequent statutory references are to the Penal Code unless otherwise indicated.

notified the officers he had a handgun. The officers confiscated from appellant a loaded .32-caliber revolver from his waistband, a cell phone, and a red bandana from his back pocket. Appellant's cell phone contained multiple gang-related images, including a picture of him wearing a red bandana and flashing a Norteño hand signal. The person in the right rear passenger seat claimed ownership of a loaded .40-caliber semiautomatic Kahr firearm that was found on the floorboards beneath his seat.

During an in-custody questioning with Officer Justin Gutierrez, appellant admitted his gun was not registered. At the gang classification interview, appellant told Deputy Sheriff Daniel Castillo he was affiliated with the Norteños criminal street gang and listed Sureños gang members as his enemies. While in custody awaiting trial, officials confiscated a letter appellant mailed to his girlfriend in which he admitted having a loaded, concealed weapon. He also claimed in the letter to be a "gangsta" and an "ene for life," with "ene" being Spanish for the letter "N" and a reference to the Norteños gang.

At trial, the People's gang expert, Detective Craig Jiminez, opined that all four members of the vehicle were members of the Norteño criminal street gang. Detective Jiminez further indicated his belief that the type of crimes committed by appellant would be done for the benefit of a criminal street gang.

## **II. DISCUSSION**

### ***A. Multiple Convictions***

The jury convicted appellant in counts 1 and 2 of two separate felony violations of carrying a loaded firearm pursuant to section 12031, subdivision (a)(1), with an additional finding on count 2 that the firearm was not registered to appellant. The trial court imposed the midterm sentence of two years for each conviction but stayed sentence on counts 2 and 4. Appellant asserts it was error to separately convict him of carrying a loaded firearm, which is a lesser included offense of carrying a loaded firearm that is not registered. He also contends that he cannot receive two distinct convictions under section 12031, subdivision (a)(1), for one substantive offense.

A single act can lead to convictions “of any number of the offenses charged . . . .” (§ 954; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) However, a judicially created exception prohibits multiple convictions based on lesser included offenses. (*People v. Montoya, supra*, at p. 1034.) If the elements of a crime also require committing a lesser offense, the latter is a lesser included offense within the former. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) Section 12031, subdivision (a)(1) sets forth the elements of the crime of carrying a loaded firearm, while subdivision (a)(2) establishes the penalty for violation of subdivision (a)(1), depending on the circumstances.<sup>2</sup> (*People v. Ramon* (2009) 175 Cal.App.4th 843, 857.) If the person is not the registered owner of the firearm, then a violation of subdivision (a)(1) is a wobbler, and is punishable as a felony or a misdemeanor. (§ 12031, subd. (a)(2)(F); *People v. Ramon, supra*, 175 Cal.App.4th at p. 857.)

The amended information in count 1 charged appellant with carrying a loaded firearm in violation of section 12031, subdivision (a)(1). Count 2 likewise charged carrying a loaded firearm, with the added words “not registered.” The jury found appellant guilty on both counts, specifically finding with respect to count 2 that the firearm was not registered to appellant. Appellant violated section 12031, subdivision (a)(1) only once under the facts. The People concede that he can only be convicted once for this crime. Although the subdivision (a)(2)(F) offense is a wobbler, it was charged as a felony, and the trial court imposed a two-year prison term on count 2. We agree with the People that the count 2 conviction should be viewed as a finding for count 1 that the

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<sup>2</sup> Section 12031 states in pertinent part: “(a)(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory. [¶] (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [¶] . . . [¶] (F) Where the person is not listed with the Department of Justice pursuant to Section 11106, as the registered owner of the handgun, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars (\$1,000), or both that fine and imprisonment.” (§ 12031, subd. (a)(1), (2)(F).)

firearm was not registered to appellant. Therefore, we order the stayed sentence on count 2 vacated and direct that the abstract of judgment be amended accordingly.

*B. Expert Testimony*

Appellant next argues that the trial court abused its discretion in allowing certain testimony from the prosecution's criminal street gang expert, Detective Jiminez. He reasons Detective Jiminez's answers to hypothetical questions amounted to inadmissible testimony of appellant's subjective knowledge and intent.

*1. Detective Jiminez's Testimony*

At trial, Detective Jiminez opined that appellant and the other passengers in the vehicle were members of the Norteño criminal street gang. The detective based this opinion on appellant's association with other known Norteño gang members, his personal admission he was a Norteño gang member, prior police reports, gang-related tattoos on appellant's body, photos from appellant's cell phone depicting Norteño images and appellant in gang clothing, and the intercepted letter.

The prosecutor asked Detective Jiminez whether "this crime, that is, carrying concealed weapons inside a vehicle," is committed by gang members for the benefit of their criminal street gang. Over defense objection, he testified that the commission of this type of crime would be for the benefit of the Norteño gang. He based this opinion on his knowledge that gangs equate fear with respect, and that having a gun informs other gang members of the willingness to use the weapon. Detective Jiminez stated the weapon would be used for attacking rival gang members or resisting arrest from police officers.

In the form of a hypothetical, the prosecutor asked Detective Jiminez whether four gang members driving in a vehicle with two weapons would benefit or promote a criminal street gang. He responded that having more than one weapon present benefitted the gang by ensuring extra fire power should they need to attack a rival gang member. Detective Jiminez began to mention that "[t]heir stop comes on the heels of a shooting," until the trial court sustained an objection that the answer was beyond the scope of the question.

The prosecutor asked a final hypothetical, adding to the first hypothetical that the guns in the vehicle with four gang members were unregistered. Detective Jiminez opined that the unregistered nature of the firearms would benefit the gang by allowing the firearms to be easily disposed of without fear of tracing to the gang activity. He also said it would further benefit the gang by allowing the gun to be passed from member to member, allowing insulation from later investigation. Additionally, Detective Jiminez believed possession of guns would assist the gang in its primary activities of committing felonious assaults.

## *2. Permissible Expert Testimony*

A jury may rely on expert testimony about gang culture and habits when reaching a verdict on gang-related offenses or findings on gang enhancement allegations. (Evid. Code, §§ 720, subd. (a), 801, subd. (a); see *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) Generally, an expert may give opinion testimony based on hypothetical questions that are rooted in the evidentiary facts. (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) An expert may not testify on the subjective knowledge and intent of a specific individual. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*).) A trial court's admission of expert testimony is reviewed for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

Appellant provides no example of expert testimony by Detective Jiminez violating *Killebrew*'s ban on the testimony of a defendant's subjective knowledge or intent. Detective Jiminez limited his opinions to hypothetical situations, and noted the questions were hypothetical several times. He explained he was unable to testify to the specific subjective knowledge and intent of appellant; rather, he could only testify based on his "training and experience and what [he's] been told by other Nortenos and other gang experts . . . ." At all times Detective Jiminez's answers avoided mentioning any specific individuals, and referred only to hypothetical gang members. Although some questions and answers referred to "this crime," the context indicates no reference to a specific person, including appellant. Additionally, the opinion that carrying a concealed weapon

would benefit “the Norteño criminal street gang,” rather than gangs generally, was proper as Detective Jiminez was a gang expert and was shown to have personal knowledge of the Norteño street gang. He did begin to give testimony specific to appellant when referring to “[t]heir stop,” but the trial court properly sustained an objection before the testimony was given.

Further, the hypothetical questions posed to Detective Jiminez were properly phrased. Appellant cites *People v. Vang* (2010) 185 Cal.App.4th 309, review granted September 15, 2010, S184212, reasoning each hypothetical was carefully crafted to make it apparent the expert opinion testimony went to his subjective knowledge and intent. Although *Vang* is no longer valid law, we conclude that the questions posed to Detective Jiminez were sufficiently rooted in the facts, while remaining broad enough to avoid thinly disguising appellant’s identity. The questions posed in *Vang* only changed the names of the parties, and gave descriptions such that it was clear which role each party played in the hypothetical. Each hypothetical posed to Detective Jiminez gave general facts of the case, and omitted references to specific individuals. Therefore, the expert testimony of Detective Jiminez was admissible, and no abuse of discretion occurred.

### *C. Sufficient Evidence for Gang Enhancement*

#### *1. Benefit of a Gang*

Appellant finally attacks his gang enhancement finding, arguing that without Detective Jiminez’s testimony, insufficient evidence was present to show his action was done for the benefit of a criminal street gang. Additionally, even with the expert testimony, he asserts that substantial evidence for finding the crime was committed to benefit a gang is lacking. Appellant reasons that carrying a loaded weapon is a crime that does not uniquely show gang association or benefit.

Section 186.22, subdivision (b)(1), imposes additional punishment 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 . . . .” (§ 186.22, subd. (b)(1).) Upon a challenge to the sufficiency of evidence in support of an enhancement, we review the record in a light favorable to the judgment to determine whether substantial evidence

exists from which a jury could find the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60; *People v. Wilson* (2008) 44 Cal.4th 758, 806.) A gang expert's testimony alone is insufficient evidence to support a gang-related allegation, but can raise the inference that the conduct was committed for the benefit of a criminal street gang. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657; *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354.) "We presume every fact in support of the judgment [that] the trier of fact could have reasonably deduced from the evidence." (*People v. Albillar, supra*, 51 Cal.4th at p. 60.) If the jury's findings are reasonably justified, an equally reasonable contrary finding does not warrant reversal of the judgment. (*People v. Lindberg, supra*, 45 Cal.4th at p. 27.)

The record supports a finding that appellant was carrying a loaded, unregistered firearm for the benefit of a criminal street gang. Detective Jiminez explained that possession of a gun by a gang member creates subjective feelings of respect through fear and indicates a willingness to protect other gang members in the event of an attack. He testified that gang members are aware when another member is armed so they know who can retaliate during encounters against rivals or the police. The detective further testified that unregistered firearms benefit gangs because the guns may easily be transferred to other members of the gang or disposed of to avoid tracing to gang activity.

Detective Jiminez's testimony aside, there was sufficient evidence to show that appellant's crime was committed for the benefit of a gang. Multiple times appellant admitted he was a gang member: personally to Detective Jiminez; during his classification interview with Deputy Castillo; and in his confiscated letter to his girlfriend. The standardized California Department of Justice gang classification criteria identify admission to gang affiliation during an in-custody classification as stand-alone proof of gang membership. Appellant had multiple Norteño gang tattoos, possessed Norteño gang colors at the time of his arrest, and had images on his cell phone related to the Norteño gang. Most importantly, appellant was in the presence of three other Norteño gang members at the time of his arrest. The evidence of appellant's Norteño

gang association is sufficient to convince a reasonable jury that his carrying of a loaded weapon was done for the benefit of the gang.

## *2. Specific Intent to Benefit a Gang*

Appellant also contends that with or without Detective Jiminez's testimony, there was insufficient evidence to show he possessed the specific intent to benefit a gang by carrying a loaded firearm. He reasons that carrying a loaded firearm is something one does personally and not in conjunction with others.

The mental state prong of section 186.22, subdivision (b)(1) requires a person to have the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1).) If substantial evidence shows an individual intended to and did commit the charged felony with known gang members, the jury may fairly infer that the individual had the specific intent to promote, further, or assist criminal conduct by those gang members. (*People v. Albillar, supra*, 51 Cal.4th at p. 68.)

Detective Jiminez opined that all four occupants of the vehicle at the time of the incident were members of the Norteño criminal street gang. He also testified that possession of a loaded, unregistered firearm would assist the gang in its commitment of crimes and explained that fellow gang members know when another member is armed with a firearm in case its use becomes necessary.

Even without the contested portions of Detective Jiminez's opinion testimony, sufficient evidence is present to show that appellant had the required specific intent. Appellant claimed to have purchased his gun out of fear of the person offering to sell it, and also admitted he carried the gun because he was in a rough neighborhood. Detective Jiminez opined that all four members of the vehicle were Norteño gang members. The evidence showed that the passenger found in possession of the other loaded, unregistered firearm was wearing gang colors and had gang-related images on his cell phone. Appellant's confiscated letter indicated he wanted his gun back and that he would be a gang member all his life. Accordingly, substantial evidence exists that appellant acted with the specific intent to promote, further, or assist gang members.



### **III. DISPOSITION**

We vacate the conviction and stayed sentence of count 2; in all other respects, we affirm the judgment.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Sepulveda, J.