CHALLENGING EXPERT TESTIMONY IN GANG CASES

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I. INTRODUCTION

In virtually every gang case, the district attorney will call an "expert" witness. This witness will invariably be a police officer who has arrested a lot of gang members, and who will testify that every crime committed by every person who is in any way acquainted with a gang member is gang related. These witnesses have become such a fixture in criminal trials that it becomes tempting to pay less and less attention to what they are saying. However, there are many fruitful areas for challenging the testimony of these experts, and these should be thoroughly explored in every gang case.

II. ADMISSIBILITY

Before attempting to launch an attack on the substance of the gang expert's testimony, it should first be determined that the testimony was in fact admissible. California law permits a person with special knowledge, skill, experience, training, or education in a particular field to qualify as an expert witness and to give testimony in the form of an opinion. (Evidence Code secs. 720, 801.) Expert testimony is admissible only if the subject matter of the testimony is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (Evidence Code sec. 801, subd. (a); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) The opinion must be based on matter perceived by, or personally known, or made known to the witness at or before the hearing that is of the type that reasonably may be relied on in forming an opinion on the subject to which the expert's testimony relates. (*Ibid.*) The use of expert testimony in the area of gang sociology and

psychology is well established (*People v. Olguin* (1994) 31 Cal.App,.4th 1355, 1370; see also *People v. Champion* (1995) 9 Cal.4th 879, 919-922; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966.) It must be ascertained that two basic requirements were met before the expert's testimony was admitted: (1) the witness was qualified as an expert in the area in which he or she is testifying (Evidence Code sec. 720, subd. (a)); and (2) the testimony must be based on matter that may reasonably be relied upon by an expert in forming an opinion regarding the subject of the testimony, but not on matter which an expert is precluded from relying upon by law, such as an unreliable scientific procedure. (Evidence Code sec. 802.) The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.) Absent a manifest abuse, the court's determination will not be disturbed on appeal. (*People v. Fudge* (1994) 7 Cal.4th 1075; 1115.)

III. GANG EXPERTS

A. WHAT ARE THEY CALLED UPON TO ESTABLISH?

A criminal defendant can be charged with either a substantive gang crime (Penal Code sec. 186.22, subd. (a)) or with a gang enhancement attached to another substantive crime. (Penal Code sec. 186.22, subd. (b).) The district attorney must prove several things which the gang expert is used to establish.

1. Penal Code section 186.22, subdivision (a)

a. The defendant actively participated in a street gang;

b. When the defendant participated in the gang, he/she knew that members of the gang engage in or have engaged in a pattern of criminal activity; and

c. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by

1. Directly and actively committing a felony offense; or

2. Aiding and abetting a felony offense.

2. Penal Code section 186.22, subdivision (b)

a. The defendant committed or attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang

b. The defendant intended to assist, further, or promote criminal conduct by gang members

Each of these elements consists of still more elements. While it may at first seem a daunting task to wade through all of these requirements in search of a failure of proof, the more the district attorney has to prove, the more opportunities there are for him or her to make mistakes and for challenge.

B. CHALLENGING PROOF OF THE ELEMENTS

1. Did the Expert Evidence Establish The Existence of a Criminal Street Gang?

Obviously, there has to *be* a gang before the defendant can actively participate in it or commit crimes for its benefit. Thus its existence must be established for either a substantive gang crime or an enhancement. In order to prove the existence of a criminal street gang, the district attorney must prove that there is an ongoing organization, association, or group of three or more persons, whether formal or informal which (1) has a common name or common identifying sign or symbol; (2) that has, as one or more of its primary activities, the commission of one or more crimes listed in Penal Code section 186.22, subdivision (e)(1) through (25) and (31) through (33); and (3) whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal activity. (Pen. Code sec. 186.22, subds. (f), (e)(1), (2); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464-1465.)

a. Common Name or Identifying Symbol

This is rarely a fruitful area for challenge. Symbols can by anything from the color of clothing to tattoos, monikers, or graffiti. Nevertheless, it is an element that must be shown to establish the existence of the gang, and the expert testimony should be carefully examined to ensure that such evidence was actually given.

b. Primary Activities

The district attorney must prove that a group with a common name or symbol has as one of its primary activities the commission of one or more of the crimes listed in Penal

Code section 186.22, subdivision (e)(1)-(25), (31)-(33). (Penal Code sec. 186.22, subd. (f).) Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently* and *repeatedly* have committed criminal activity listed in the gang statute or expert testimony regarding the primary activities of the gang. (*Id.,* at p. 324.)

This is an area that is vulnerable to attack. Very often, the expert will testify simply that he "knows" the gang members have engaged in the enumerated crimes in the past without testifying the circumstances of the crimes or how the expert had obtained the information. Such testimony lacks an adequate foundation since "[t]he requirements for expert testimony are that it related to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.]" (*Olguin, supra,* 31 Cal.App.4th at p. 137.) "While experts may offer opinions and the reasons for their opinions, they may not under the guise of reasons bring before the trier of fact incompetent hearsay evidence." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003.) Therefore, appellate counsel should ascertain that the expert witness has testified as to the basis for his or her opinion, and that the basis is reasonably reliable.

In In re *Alexander L.* (2007) 149 Cal.App.4th 605, 611 an expert witness's testimony

stating "I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations." The Fourth District held that this was in insufficient foundation since there was no showing that the basis for the expert testimony was reliable.

After *Alexander L.*, the Fourth District decided *People v. Martinez* (2008) 158 Cal.App.4th 1324. There the appellant contended, as had been done in *Alexander L.,* that there was no evidence of how the expert knew of or had obtained his information about the gang's primary activities, and thus his testimony lacked foundation. However, in *Martinez*, the expert witness testified that he had experience and training as a gang expert. He specifically testified as to the primary activity of the gang, based upon eight years spent dealing with that specific gang, including investigations and personal conversations with members, and review of reports. (*Id.,* at p. 1330.) The Court found that this distinguished the case from *Alexander L.* where the expert simply testified that he "knew" the gang had been involved in certain crimes.

The lesson to be drawn from *Alexander L.* and *Martinez* is that the expert's testimony, including the voir dire, should be carefully scrutinized to ensure that a proper foundation was laid. Expert testimony simply saying he knows these things, without more, is inadequate and should be challenged.

The district attorney will typically introduce court records showing that a gang

member was in the past convicted of one of the enumerated crimes in order to establish a pattern of criminal activity. (See III.B.1.c., *infra*.) This can be challenged as insufficient to show primary activities. "The phrase 'primary activities' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the groups' members . . . Section 186.22 . . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime[s] . . . '" (*Sengpadychith, supra,* 26 Cal.4th at pp. 323-324.) Without more, two or three convictions do not establish the kind of consistent and repeated conduct required by the gang statute. (*Ibid.; Duran, supra,* 97 Cal.App.4th at p. 1465.) This can be a particularly effective argument where the expert has, as they often do, emphasized what a vast enterprise the gang is. Where the expert has testified that the gang boasts hundreds and even thousands of members, two or three convictions is simply insufficient to establish consistent and repeated commission of the enumerated offenses.

c. Pattern of Criminal Activity

As used in the gang statute, a pattern of criminal gang activity means the commission of, attempted commission of, conspiracy to commit, or solicitations of, sustained juvenile petition for, or conviction of two or more of the 33 enumerated offenses, provided at least one of them occurred after September 26, 1988, and the most recent crime occurred within three years after one of the earlier crimes, and the offenses were committed on separate

occasions, or by two or more persons (Penal Code sec. 186.22, subd. (e).) It may not be established solely by proof of commission of offenses enumerated in subdivision (e)(26)-(30) [felony theft of an access card or account information (Pen. Code sec. 484e); counterfeiting, designing, using, attempting to use and access card (Pen. Code sec. 484f); felony fraudulent use of an access card or account information (Pen. Code 484g); unlawful use of personal identifying information to obtain credit, goods, services, or medical information (Pen. Code sec. 530.5); or wrongfully obtaining DMV documentation (Pen. Code sec. 529.7.)].

This element is less prone to attack than the "primary activity" element since the statute specifies that two offenses are sufficient and since it is proved by the introduction of court records of prior convictions; thus it is not a proper subject for expert testimony. If the expert does render such an opinion and trial counsel does not object, appellate counsel should investigate the viability of a claim of ineffective assistance of counsel. Because these prior offenses are almost always proved by the introduction of court documents, appellate counsel must make sure that those documents met all requirements for admission. If they were no included in the record, be sure to request them from the Superior Court pursuant to California Rules of Court, rules 8.340(b), 8.320(c)(13)(C).)

2. Did the Expert Establish the Defendant's Active Participation in a Criminal Street Gang?

A finding of guilt of a substantive gang crime requires 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 . . ." (Pen. Code sec. 186.22, subd. (a).) It is not necessary for the prosecution to prove that the defendant devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. "Active participation in the criminal street gang is all that is required." (Pen. Code sec. 186.22, subd. (i).) The California Supreme Court has defined active participation as follows: " . . . one 'actively participates' in some enterprise or activity by taking part in it in a manner that is not passive. Thus, giving these words their usual and ordinary meaning, we construe the statutory language 'actively participates in any criminal street gang' [citation] as meaning involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.)

While this may seem like a difficult aspect of the expert testimony to attack, there are some areas that are vulnerable. For example, it is not enough that a defendant actively participated in a criminal street gang at any point in time. A defendant's active participation must be shown at or reasonably near the time of the crime. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.) Therefore, even if the expert testifies that the defendant has in the

past engaged in criminal activity at the direction of or for the benefit of a gang and is therefore an active participant, if that event can be characterized as not reasonably close in time to the charged crime, the active participation element can be challenged.

The active participation requirement as it relates to the substantive gang crime necessarily includes knowledge that members of the gang engage in or have engaged in a pattern of criminal gang activity. (Pen. Code sec. 186.22, subd. (a).) Thus, to be charged with the substantive gang crime in a crime in which there are codefendants or at least cohorts, the defendant must know that the other actors are in fact gang members. Penal Code section 186.22, subdivision (b) is worded slightly differently in that it requires that a felony be committed for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members. Courts may infer that the Legislature's failure to include the knowledge language was intentional. (See *People v. Hagedorn* (2005) 127 Cal.App.4th 734, 743.)

There is still a viable argument, however, that courts have interpreted the Penal Code section 186.22, subdivision (b) to require knowledge that the other parties involved are gang members. " . . . the STEP[1] Act does not punish a defendant for the actions of associates; rather the act increases the punishment for a defendant who committed a felony to aid or abet criminal conduct of a group that has as a primary function the commission of specified criminal acts and whose members have actually committed specified crimes, and who acted

[1] The Street Terrorism Enforcement and Prevention Act

with the specific intent to do so." (*Gardeley, supra,* 14 Cal.4th at p. 624, fn. 10.) This would seem to imply that just committing a crime with someone else who *happens* to be a gang member is insufficient without *knowledge* that the person is in fact a gang member. (See also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [finding it significant that the defendant knew that the two codefendants with whom he committed robberies were in fact gang members].)

Even if the expert testifies to all of the elements establishing the existence of a criminal street gang, it can still be argued in the appropriate case that the expert has not shown that the defendant had knowledge that he was in fact committing crimes with gang members, and consequently that active participation has not been proven.

3. The Requirement That Defendant Either Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct By Members of the Gang Either by Directly and Actively Committing a Felony Offense or by Aiding and Abetting a Felony Offense (Pen. Code sec. 186.22, subd. (a)); or Committed or Attempted to Commit the Crime for the Benefit of, at the Direction of, or in Association With a Criminal Street Gang and Intended to Assist, Further, Or Promote Criminal Conduct By Gang Members (Pen. Code sec. 186.22, subd. (b)(1).)

The intent that must be shown for either the substantive gang crime or the enhancement is not the intent to commit the crime, but the intent to promote, further, or assist the gang in its felonious conduct, irrespective of who actually commits the offense. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.) An expert witness may not testify

to the subjective knowledge and intent of the defendant or anyone else involved. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.) He or she *can* testify to a gang member's expectation of what might occur when confronted with a specific action. (See *Olguin, supra,* 31 Cal.App.4th at p. 1371.) Thus, it is permissible for the expert to testify about what a gang member might typically expect, but he or she may not give his or her own opinion as to whether the defendant's involvement in the commission of the offenses was done with the specific intent to promote, further, or assist in any criminal conduct by street gang members. This is improper expert opinion.

Expert witnesses also sometimes give opinions that can be challenged as irrelevant and unnecessary. For example, whether a defendant had the requisite specific intent is not a subject for which expert testimony is necessary. Testimony about how gangs act or what they expect in a given situation is admissible, but for an expert to go beyond that and testify that these actions or expectations show a particular intent does nothing more than to inform the jury of the expert's beliefs about the suspects' knowledge and intent. His opinion about these matters is irrelevant and unnecessary. (*Killebrew, supra,* 103 Cal.App.4th at p. 658.) In addition, these are issues to be decided by the jury. An expert's opinion regarding subjective intent improperly braces an ultimate fact for the trier of fact to determine.

An illustrative case is *In re Frank S.* (2006) 141 Cal.App.4th 1192, where the defendant was arrested for being in possession of a concealed knife. He told the officer that he had been attacked two days earlier and needed the knife for protection against "the

Southerners" because they believed he supported northern street gangs, among whom he had several friends. At trial, an expert witness testified that it was her belief that the defendant possessed the knife to protect himself. She said that gang members use knives for protection from rival gang members and to assault rival gang members. She stated further that possession of the knife benefitted defendant's gang by providing them with protection should they be assaulted. (*Id.,* at pp. 1195-1196.)

The Fifth District Court of Appeal held that this testimony was insufficient to support the gang enhancement. The defendant's criminal history and gang affiliations cannot solely support a finding that a crime is gang related. The Court stated that "[w]hile evidence established the minor has an affiliation with the Nortenos, membership alone does not prove a specific intent to use the knife to promote, further, or assist in criminal conduct by gang members. [Citations.]" (*Id.,* at p. 1199; see also *People v. Martinez* (2004) 116 Cal.App.4th 753, 761-762 [appellant's criminal history and gang affiliations cannot solely support a finding that a crime is gang-related under section 186.22].)

V. FRAMING THE ARGUMENT

Hopefully, defense counsel will have objected to an improper expert opinion, whether it be because there was an insufficient foundation, it was unreliable hearsay, or it embraced an ultimate issue of fact for the jury to decide. If so, the argument can be cleanly presented on its own merits. If not, the issue must obviously be framed as an ineffective assistance of counsel argument since in the absence of a timely and specific objection on the ground

sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed. (Evid. Code sec. 353; *People v. Clark* (1992) 3 Cal.4th 41, 125-126; *People v. Bury* (1996) 41 Cal.App.4th 1194, 1201.)

VI. CONCLUSION

When a witness is qualified as an expert in a particular field, many jurors may view him or her as being cloaked in mantel of credibility. Often, it appears that defense counsel puts up very little resistance to such witnesses, sometimes leading to some very questionable testimony. For this reason, it is important to carefully review the testimony given by gang experts and challenge it whenever possible.