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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ULISES ORTEGA,

Defendant and Appellant.

D074576

(Super. Ct. No. 16CR-047859)

APPEAL from a judgment of the Superior Court of San Bernardino,
Michael A. Knish, Judge. Affirmed in part, reversed in part, and remanded for
resentencing.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Alan L.
Amann, Deputy Attorneys General, for Plaintiff and Respondent.

Evading a traffic stop by City of Ontario police, Ulises Ortega lapped a residential block in gang territory several times before fleeing his vehicle on foot and discarding a firearm in someone's backyard. A jury convicted Ortega of evading a police officer with wanton disregard for public safety (Veh. Code, § 2800.2, subd. (a)) and being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)).¹ It found the gang enhancement allegations attached to both counts true. (§ 186.22, subd. (b)(1)(A).)

Ortega challenges only his gang enhancements on appeal. He argues there was insufficient evidence he fled from the police or possessed a firearm "with the specific intent to promote, further, or assist in any criminal conduct by gang members," as the statute requires. (§ 186.22, subd. (b)(1).) He also contends the gang expert related case-specific hearsay to the jury, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Because we agree with his first claim, we do not reach the second. We order the trial court to strike the gang enhancements and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Around noon on Labor Day 2016, City of Ontario Police Department Traffic Officer Jeffrey Mirtich was on motorcycle patrol when he saw an SUV traveling 69 miles per hour in a 40-mile-per-hour zone. Mirtich initiated a traffic stop, but Ortega, the driver of the SUV, did not stop. As Mirtich followed, Ortega ran multiple stop signs and proceeded to lap a residential area four or five times at speeds of 35 to 40 miles per hour in a 25-mile-per-hour zone. The pursuit lasted about 10 minutes and covered a two or

¹ Further statutory references are to the Penal Code unless otherwise indicated.

three-mile area. When he reached 316 West Park Street, Ortega abruptly stopped the vehicle and fled on foot. Mirtich got a good look at his face and his black baseball cap. He watched the female passenger slide over to the driver's seat of the SUV but pursued Ortega rather than detain the vehicle.

Although the female passenger of the vehicle was never identified, Tara S., girlfriend of OVS member David "Bam Bam" Olivares turned out to be the registered owner of the SUV.² Her fingerprints were later found on various items in the vehicle.

Hearing police sirens outside his home on West Park Street, teenager Joseph Z. awoke. As he opened his front door, he saw Ortega run by and drop something in his front yard. Joseph had known Ortega his entire life; they used to be neighbors, and Ortega's mother used to babysit for him. The discarded object turned out to be a silver revolver; Joseph retrieved it and brought it inside. He then returned outside and contacted Mirtich and the backup officers. By this point there were 20 to 30 bystanders congregating, and the SUV had been reparked a short distance away. Joseph led the officers through his home and showed them the revolver.

Police set up a perimeter and deployed a helicopter and search dog but could not locate Ortega. Only one bystander was willing to identify Ortega by name; after pulling up a booking photo, Mirtich identified Ortega as the driver of the SUV. The next day,

² The prosecution's gang expert testified about Tara's relationship status with Bam Bam by detailing his Facebook research. On appeal, Ortega argues this testimony related case-specific hearsay, in violation of *Sanchez, supra*, 63 Cal.4th 665. Because we decide the appeal on alternative grounds, we limit our discussion of facts pertinent to that claim.

Joseph met Detective Donald Sharp at the Ontario police station to explain what he had seen. At trial, he explained that he had grown up in the neighborhood and was involved with the 12th Street gang's tagging crew. He knew the hand sign for the Ontario Varrio Sur gang (OVS)—a one-handed "O"—but could not identify any distinctive OVS clothing or hats. Although Joseph's stepfather used to be an OVS member, he testified he would not know if someone was in the gang unless they specifically admitted being a member. He did not know if Ortega was a member of OVS.

Ortega was arrested a month later three hours north in Sanger, a town south of Fresno. In December 2016, the San Bernardino District Attorney charged him by amended information with two counts: (1) evading a police officer with wanton disregard for public safety (Veh. Code, § 2800.2, subd. (a)), and (2) possession of a firearm by a felon (§ 29800, subd. (a)(1)). As to both counts, it was alleged that Ortega committed the offenses "for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members." (§ 186.22, subd. (b)(1).) The information further alleged that Ortega had served a prior prison term. (§ 667.5, subd. (b).)

Ontario Police Officer Brennan Falconieri served as an expert on criminal street gangs in general, and OVS in particular. Early during trial, he explained that the entire city of Ontario was considered south side Ontario territory. The gang had three tiers, the

lowest being OVS.³ Tattoos or clothing (particularly baseball caps for certain teams) indicated gang membership. Younger members were discouraged from getting visible gang tattoos that would be easily identified by law enforcement. Members could elevate their status through narcotics sales, gun possession, stealing vehicles, intimidating witnesses, assaults on other gang members, or even robbery and murder—i.e., activities that help "make money for the gang, bolster their reputation, [and] keep their gang ongoing [*sic*]."

After sitting at counsel's table and listening to each of the prosecution's witnesses, Falconieri offered his opinion on Ortega's gang membership and whether his crimes were gang crimes. He believed Ortega was an OVS member based on his prior self-identification to law enforcement, clothing and baseball caps, association with Bam Bam for narcotics sales in OVS territory, cell phone pictures of OVS members getting gang tattoos and throwing gang signs, and the fact he had a moniker, "Radar." He did not find Ortega's lack of gang tattoos dispositive.

Turning to the charges, Falconieri assumed the black cap Mirtich saw Ortega wear was gang-related based on similar caps Ortega wore in pictures stored on his phone. Although Falconieri could not say that OVS directed Ortega to evade police or discard his firearm, he believed the crimes were designed to bolster or benefit the gang's reputation. They happened on a holiday in broad daylight in a residential area, when

³ At trial, the prosecution presented evidence that OVS was a criminal street gang within the meaning of section 186.22, subdivision (f). Ortega does not challenge this element on appeal.

people were home. Ortega circled the neighborhood four or five times, passing by West Sunkist Avenue, a major street for gang activity. Ortega's actions showed that OVS was not afraid of police contact, confident in silencing witnesses, and armed. He opined that Ortega committed his offenses in association with OVS by driving a vehicle that belonged to Tara, an OVS associate.

When presented with a hypothetical as to whether someone in Ortega's shoes would have intended to benefit OVS, Falconieri replied that he would. Such an individual would be "committing that crime to bolster, benefit the gang's reputation"—by having a known OVS member lap the neighborhood despite sirens, he would "promot[e] the gang" and elevate his status within it. Moreover, his actions would "benefit the gang by . . . not getting caught," allowing him to remain "one more soldier on the street for the gang." Acknowledging Ortega did not make gang signs or tag gang symbols as he fled, Falconieri stated such actions were unnecessary for someone known in the community and also counterproductive for someone whose objective was to escape. But Falconieri conceded the time of day was happenstance; the only person to briefly glimpse Ortega with a gun was Joseph; and that it was possible for a person to be armed and evading arrest for personal reasons, not to benefit OVS. He also agreed that not all crimes committed by gang members are gang crimes, as gang members sometimes commit crimes for their own benefit.

At the close of the prosecution's case-in-chief, defense counsel moved for a judgment of acquittal. (§ 1118.1.) The trial court denied the motion, finding sufficient

evidence on both counts and attached gang enhancements to present to the jury. On June 6, 2017, the jury convicted Ortega as charged and found both gang allegations true.

Waiving trial on the prison prior, Ortega admitted having served a prior prison term. The court imposed a total sentence of seven years, eight months in state prison, calculated as (1) the two-year middle term on count 1, plus a three-year consecutive term on the gang enhancement; (2) an eight-month consecutive term on count 2, plus a one-year consecutive term on the gang enhancement (both calculated as one-third the middle terms); and (3) a one-year consecutive term for the prison prior.

DISCUSSION

The jury determined Ortega committed counts 1 and 2 for the benefit of a criminal street gang within the meaning of section 186.22 subdivision (b)(1). Ortega contends the evidence was insufficient to sustain the jury's findings. Because we conclude the prosecution did not meet its burden to prove that Ortega evaded police or possessed a firearm "with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1)), the gang enhancements must be stricken.

A.

Section 186.22 was enacted in 1988 as part of the California Street Terrorism Enforcement and Prevention Act "to combat the scourge of gang-related crimes and violence affecting the state." (§ 186.20 et seq. (Stats. 1988, ch. 1256, § 1); *People v. Franklin* (2016) 248 Cal.App.4th 938, 948 (*Franklin*)). It provides enhanced punishment (specifically, a consecutive term of two, three, or four years) for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association

with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1)(A).)

"Not every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*)). "There are two 'prongs' to the gang enhancement under section 186.22, subdivision (b)(1), both of which must be established by the evidence." (*Franklin, supra*, 248 Cal.App.4th at p. 948.) "The first prong requires proof that the underlying felony was 'gang-related,' that is, the defendant committed the charged offense 'for the benefit of, at the direction of, or in association with any criminal street gang.'" (*Ibid.*, quoting § 186.22, subd. (b)(1).) "The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' ' " (*Franklin*, at p. 948, quoting § 186.22, subd. (b)(1); see *People v. Rios* (2013) 222 Cal.App.4th 542, 564 (*Rios*) [distinguishing "the gang-related prong" from "the specific intent prong"].) Like the defendant in *Rios*, Ortega lumps the two prongs together in his analysis, variously arguing the prosecution failed to prove specific intent or that his crimes benefited the gang. (*Rios*, at p. 565.) Like the *Rios* court, we focus on the specific intent prong alone to conclude insufficient evidence supports the gang findings. (*Id.* at p. 575.)⁴

⁴ To be sure, evidence on the "gang-related" prong is weak. The gang expert believed Ortega committed his crimes "in association with" OVS because he was driving a vehicle registered to Tara, the girlfriend of an OVS member, at the time he evaded police and possessed a firearm. The expert agreed Tara was an OVS *associate*, not a member. The parties do not explore how committing a crime in association with a nonmember like Tara equates to committing a crime in association with OVS. Relying on *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*) and *Franklin, supra*, 248

"Like a conviction unsupported by substantial evidence, a true finding on a gang enhancement without sufficient support in the evidence violates a defendant's federal and state constitutional rights and must be reversed." (*Franklin, supra*, 248 Cal.App.4th at p. 947.) "In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Albillar, supra*, 51 Cal.4th at pp. 59–60.)

Although we draw all reasonable inferences in favor of the verdict, we may not affirm a finding that is the product of speculation, conjecture, or surmise. (*Franklin, supra*, 248 Cal.App.4th at p. 947; *People v. Perez* (2017) 18 Cal.App.5th 598, 607 (*Perez*)). "[E]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*Franklin*, at p. 948.) Inferences must be "of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt" that the inferred facts are true. (*Ibid.*)

"A cottage industry of gang experts has grown to meet the perceived need to assist jurors in understanding all things gang related. While a gang expert is prohibited from

Cal.App.4th 938, Ortega instead focuses on whether his crimes were "for the benefit of" OVS. (§ 186.22, subd. (b)(1).) The People simply repeat the expert's testimony to claim association was shown. Accordingly, we assume without deciding that there is sufficient evidence Ortega committed his crimes in association with OVS and focus on the specific intent prong in evaluating Ortega's sufficiency of the evidence claim.

opining on a defendant's specific intent when committing a crime, the prosecution can ask hypothetical questions based on the evidence presented to the jury whether the alleged crime was committed to benefit a gang and whether the hypothetical perpetrator harbored the requisite specific intent." (*Perez, supra*, 18 Cal.App.5th at p. 607, citing *People v. Vang* (2011) 52 Cal.4th 1038, 1045–1046 (*Vang*).) "While an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the 'hypothetical question must be rooted in facts shown by the evidence.'" (*Franklin, supra*, 248 Cal.App.4th at p. 949.)

"Rarely is the perpetrator's intent proven by direct evidence; usually it must be inferred from the facts and circumstances surrounding the case." (*Perez, supra*, 18 Cal.App.5th at p. 607.) For example, specific intent may be established by evidence "that the defendant intended to and did commit the charged felony with known members of a gang." (*Albillar, supra*, 51 Cal.4th at p. 68.) From such evidence "the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Ibid.* [scienter established where three gang members intended to attack the victim and assisted each other in raping her]; see *Vang, supra*, 52 Cal.4th at p. 1041 [scienter established where multiple gang members acted in concert to attack someone who previously associated with the gang].)

Here, Ortega did not evade police or possess a firearm with a known gang member; the circumstantial evidence at best suggested he was driving a car belonging to a gang *associate*—i.e., the girlfriend of an OVS member. He then left the car and its unidentified female passenger to flee on foot and immediately discarded his firearm in

Joseph's yard. "[I]n a case such as this, where the defendant acts alone, the combination of the charged offense and gang membership alone is insufficient to support an inference on the specific intent prong of the gang enhancement. Otherwise, the gang enhancement would be used merely to punish gang membership." (*Rios, supra*, 222 Cal.App.4th at pp. 573–574.)⁵ Although evidence that a gang member steals a car or carries a weapon by itself may not be sufficient to support a reasonable inference of specific intent (*ibid.*), evidence a gang member flashes a steady stream of gang signs while evading police could. (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 110 (*Margarejo*)). As we explain, our facts are closer to *Rios* and *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*) than *Margarejo*. Viewing the record as a whole, the evidence was insufficient to support a reasonable finding that Ortega committed his crimes with the requisite specific intent.

B.

The prosecution relied on the testimony of its gang expert, Brian Falconieri, to establish the gang allegations. As detailed above, Falconieri relied on circumstantial evidence to conclude Ortega was an OVS member.⁶ He could not say that OVS directed

⁵ The People appear to misread *Rios* in arguing, "the fact appellant committed those offenses *as* a gang member is itself sufficient to raise an inference of the required intent, particularly since the intent prong of section 186.22(b)(1) does not require the participation of a second gang member." But *Rios* makes clear that in a single-actor case, something more than the defendant's gang membership and the charged offense is required to show that he or she committed his crimes with the requisite specific intent. (*Rios, supra*, 222 Cal.App.4th at p. 574.)

Ortega to evade police or discard his firearm, and he acknowledged that gang members sometimes commit crimes for personal reasons. Nevertheless, he opined that *Ortega* had acted with the specific intent to benefit OVS. Noting the incident happened in broad daylight in a residential area controlled by OVS, he opined that Ortega intended to benefit OVS by showing the community that gang members were not afraid of law enforcement or witnesses and that they carried firearms. According to Falconieri, this was the type of crime designed to keep the community silent. He also believed Ortega intended to benefit OVS because evading capture would permit him to continue as "one more soldier on the street for the gang."

In our view, the gang expert's testimony was speculative at best. Ortega was in OVS territory, but the entire city of Ontario was OVS territory, and Ortega circled an area he used to live in and presumably knew. Whereas Falconieri viewed Ortega's "multiple laps" as "promoting the gang," he conceded it was "possible" Ortega was simply trying to shake Officer Mirtich off his trail. He also agreed the time of day was "probably" dependent on when Ortega happened to get caught speeding. The pursuit itself was, relatively speaking, slow-speed and short; Mirtich estimated Ortega was traveling 35 to 40 miles per hour, and the entire chase lasted 10 minutes.

⁶ At trial, there was conflicting evidence as to whether Ortega was a gang member as opposed to merely an OVS associate. But as Ortega recognizes, this distinction is "not particularly important" to the sufficiency-of-the-evidence inquiry. We will assume for purposes of our analysis that there was sufficient evidence to support a reasonable finding that Ortega was, in fact, a member of OVS.

Once Ortega got out of the car, he did not flash gang signs or tag gang symbols on the cement wall as he fled on foot. To the extent Falconieri claimed such signs were unnecessary given Ortega's reputation, Joseph's testimony undercut that claim. He knew about OVS through his stepfather, knew Ortega his entire life, and even knew Ortega's nickname was Radar, but he did not know whether Ortega was an OVS member. Even assuming Ortega was a known OVS member, Joseph was the only one to see him armed, as he discarded the firearm almost immediately after stepping outside the vehicle. This undercut the expert's view that Ortega was trying to intimidate the community by flaunting his gun possession. As to whether the community was silenced, Officer Henderson testified that the crimes occurred in a high-crime area where people may have had other reasons not to come forward. Joseph did come forward the next day to identify Ortega and denied fearing retaliation or adverse consequences from testifying at trial.

Falconieri testified that OVS "can't make any money for the gang if all the gang's members are in prison" and that going to prison was "not a trophy" in a gang member's career. But there was no nonspeculative basis to conclude that Ortega evaded police or possessed a firearm so he could help OVS commit more crimes as a foot soldier. It is not enough to speculate that defendant's crimes facilitate future criminal activity for the gang. (See *Rios, supra*, 222 Cal.App.4th at p. 574 [rejecting expert testimony that gang members use firearms to intimidate witnesses absent evidence defendant had so used the gun he transported; also rejecting that gang members use stolen cars as a getaway vehicle or for driveby shootings absent such evidence].)

Although Falconieri agreed that a person might have reasons to be armed and evade arrest, he ventured that Ortega's actions were intended to benefit the gang because he was "a gang member in a gang neighborhood." However, a crime is not "gang related simply because the perpetrator is a gang member with a criminal history." (*Perez, supra*, 18 Cal.App.5th at p. 607.) "The gang enhancement cannot be sustained based solely on defendant's status as a member of the gang and his subsequent commission of crimes." (*Ochoa, supra*, 179 Cal.App.4th at p. 663.)

In short, Falconieri's view—that Ortega acted with the specific intent to promote, further, or assist in criminal conduct by gang members—was only *one* possible motive or reason for Ortega's actions. "The prosecution, however, was required to prove this fact beyond a reasonable doubt." (*People v. Ramon* (2009) 175 Cal.App.4th 843, 853.) It is at least as likely on our record that Ortega was simply caught speeding and decided to evade police because getting caught with a firearm would result in criminal charges. No gang signs were flashed; no slogans were yelled. There is no indication what Ortega was doing driving Tara's car in that part of Ontario that day. He discarded his weapon almost immediately after fleeing on foot. "[S]ome substantive factual evidentiary basis, not speculation, must support an expert witnesses opinion." (*Ochoa, supra*, 179 Cal.App.4th at p. 661.) The prosecution's showing fell short.

C.

Time and again, courts have vacated gang enhancements as lacking sufficient evidence despite similar gang expert testimony on specific intent. In *Rios*, there was insufficient evidence that the defendant, an admitted gang member, stole a car and

possessed a loaded gun in it with the requisite intent. (*Rios, supra*, 222 Cal.App.4th at p. 574.) The defendant was not in gang territory when he stole the car, did not call out a gang name, display gang signs or otherwise state his gang affiliation. (*Ibid.*) The car theft victims were not rival gang members and had not noticed the defendant's gang tattoos or clothing. (*Ibid.*) "[A]lthough there was evidence that auto thefts and illegal gun possession were among the primary activity of the Norteño gang in Salinas, that evidence alone was insufficient to support the inference that defendant stole the Chrysler and possessed the gun with the specific intent to promote, further, or assist in any criminal conduct by gang members." (*Ibid.*)

There was likewise insufficient evidence in *Frank S., supra*, 141 Cal.App.4th 1192 that a minor stopped by police while riding a bicycle was carrying a small knife with the requisite specific intent. The court characterized as insufficient a gang expert's bare testimony that having a knife benefited the Norteños gang because "it helps provide them with protection should they be assaulted." (*Id.* at pp. 1195–1196, 1199.) "While evidence established the minor has an affiliation with the Norteños, membership alone does not prove a specific intent to use the knife to promote, further, or assist in criminal conduct by gang members." (*Id.* at p. 1199.)

In *In re Daniel C.* (2011) 195 Cal.App.4th 1350 (*Daniel C.*), there was insufficient evidence that a juvenile gang member who grabbed a whiskey bottle after his companions left the store and hit a store clerk with it intended to promote, further, or assist in criminal conduct by gang members. Although a gang expert had testified that the robbery furthered gang interests by intimidating the community, "nothing in the

record indicates that appellant or his companions did anything while in the supermarket to identify themselves with any gang, other than wearing clothing with red on it. No gang signs or words were used, and there was no evidence that [the clerk] or any of the other persons who witnessed the crime knew that gang members or affiliates were involved. Therefore, the crime could not have enhanced respect for the gang members or intimidated others in their community, as suggested by [the expert]." (*Id.* at p. 1363.)

Similarly, *Perez* vacated gang enhancements as to a gang member who fired shots while attending a college party outside gang territory. (*Perez, supra*, 18 Cal.App.5th at p. 614.) Rejecting expert testimony that the tattooed defendant "fired gunshots to intimidate the college students and to further the gang's reputation," the court noted that there was "no evidence any of the college students knew of defendant's gang affiliation." (*Id.* at pp. 613, 614.) "Missing was all evidence typical of crimes committed for the benefit of the gang and intended to promote, further, or assist the commission of crimes by gang members—gang colors, gang clothing, gang accruements, gang signs, gang epithets, help by other gang members." (*Id.* at pp. 613–614.) "The evidence consist[ed] only of a gang member committing a violent crime alone," and that was not enough to support the gang enhancement. (*Id.* at p. 614.)

As in each of these cited cases, there was insufficient evidence here to support a finding that Ortega committed his felonies "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) The gang expert's opinion on this requirement rested on speculation and guesswork and " ' "is no better than the facts on which it is based." ' " (*Daniel C., supra*, 195 Cal.App.4th at

p. 1364.) On facts somewhat similar to *Rios* and *Frank S.*, we conclude insufficient evidence supports a reasonable inference of specific intent.

The People offer a single case to claim otherwise. In *Margarejo*, the court found sufficient evidence to support the gang enhancement as to a defendant who led police on a 17- or 18-minute car chase while flashing a steady stream of gang signs at pedestrians and the police. (*Margarejo, supra*, 162 Cal.App.4th at pp. 105, 110.) One pursuing officer testified that in his 22 years of law enforcement experience, the defendant's conduct "was a first." (*Id.* at p. 109.) Another opined the defendant's actions declared to the public at large that although he was being chased by police, the Highland Park gang remained in charge. (*Ibid.*) This was sufficient to support a finding of specific intent:

"We can discover mental state only from how people act and what they say. Here, Margarejo acted like he wanted to help his gang. His actions did his own escape no good. When fleeing at high speed, it is better to keep both hands on the wheel and to avoid creating a striking impression in the mind of every witness along the way. Logically, Margarejo must have had another purpose in staging this show. The message he broadcast—the *only* message he broadcast—was the gang message." (*Id.* at p. 110.)

Rejecting the defendant's claim that he was evading police to avoid arrest on an outstanding warrant, the court reasoned that this explanation did not account for his "continuous and systematic" stream of gang signs. (*Ibid.*)

There was likewise sufficient evidence of specific intent as to his firearm possession. Instead of throwing the gun away, the defendant left the gun with a fellow gang member and "apparently took pains to keep the gun within the gang." (*Margarejo, supra*, 162 Cal.App.4th at p. 111.) From this, "[t]he jury fairly could infer his goal was to

preserve the gun for the gang's future use" and that "this gun was a gang gun" intended for gang crimes. (*Ibid.* [distinguishing minor's knife possession in *Frank S.*, *supra*, 141 Cal.App.4th 1192 on the ground "Margarejo transferred his illegal weapon to a fellow gang member, thus suggesting the weapon was a gang weapon"].)

Suffice to say, we reach a different conclusion on very different evidence. Ortega did not flash a steady stream of gang signs at pedestrians while evading police. Joseph knew that OVS used a hand symbol "O" but never saw Ortega make it. Although he had known Ortega his entire life and had a stepfather in the OVS gang, he did not know whether Ortega was an OVS member. Ortega discarded his gun immediately after getting out of the vehicle in Joseph's yard. Joseph was affiliated with the 12th Street gang, not OVS, so Ortega did not "[take] pains" to leave his weapon with a gang member. *Margarejo* only highlights the evidence supporting specific intent that is lacking here.

D.

Perhaps recognizing the evidentiary infirmity, the People urge that reversal should not foreclose retrial on the gang enhancements. They argue Ortega's claim "is rooted in evidentiary error, which does not trigger double jeopardy." In their view, Ortega's failure to object to Falconieri's opinion testimony requires us to "presume for purposes of insufficient evidence review that those opinions were competent—that is, that they were not speculative or conjectural, but, at a minimum, sufficiently substantiated by the evidence to at least merit admission at trial."

Although the People disclaim doing so, they appear to be mingling distinct concepts. Ortega is not challenging the erroneous *admission* of evidence but rather its *sufficiency*. We assume the competence of Falconieri's testimony but nevertheless agree with Ortega that it lacks sufficient *weight* to support the jury's gang findings. As the People's own case authority makes clear, double jeopardy principles preclude retrial when the evidence is insufficient, even if it does not preclude retrial when evidentiary errors are found. (*United States v. DiFrancesco* (1980) 449 U.S. 117, 131; *Lockhart v. Nelson* (1988) 488 U.S. 33, 39 (*Nelson*); *Burks v. United States* (1978) 437 U.S. 1, 18 (*Burks*); see *People v. Eroshevich* (2014) 60 Cal.4th 583, 591 ["the defendant may not be retried if the judgment is reversed because, as a matter of law, the evidence was insufficient to support a conviction"].)⁷

"Unlike a reversal for trial error, which 'does not constitute a decision to the effect that the government has failed to prove its case' [citation], a reversal based on evidentiary insufficiency 'means that the government's case was so lacking that it should not have been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.' "

⁷ "The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.'" (*Monge v. California* (1998) 524 U.S. 721, 727–728 (*Monge*).)

(*People v. Seel* (2004) 34 Cal.4th 535, 544; see *id.* at p. 550 [where appellate court found insufficient evidence of deliberation or premeditation in attempted murder, the Double Jeopardy Clause precluded retrial of that allegation].)

The People aver that it is "unfair to the prosecution" to permit Ortega to claim for the first time on appeal that the expert testimony was speculative and conjectural and insufficient to support the gang enhancements.⁸ To the contrary, the People had every opportunity to prove their case but failed to carry their burden. "[W]hen a defendant's conviction has been overturned due to a failure of proof at trial, . . . the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." (*Burks, supra*, 437 U.S. at p. 16.) "In holding the evidence insufficient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beyond a reasonable doubt." (*Id.* at p. 16, fn. 10.)⁹

⁸ Irrespective of any failure to object, defense counsel did urge jurors during her closing argument to disregard Falconieri's opinions as "unreliable," stating "an expert is only as good as the process they use."

⁹ *Nelson* does not suggest otherwise. In that case, a defendant received an enhanced sentence as a habitual offender for having four or more prior felony convictions. (488 U.S. at pp. 35–36.) The sentence was vacated in habeas proceedings because one of the four submitted priors turned out to be inadmissible (as pardoned). (*Id.* at p. 37.) Nevertheless, the prosecution could seek to resentence the defendant as a habitual offender by interposing a different prior felony conviction. (*Ibid.*) Because the reversal was based solely on trial error, not evidentiary insufficiency, double jeopardy served no bar. Ortega does not argue that the gang expert's testimony was inadmissible; he argues it did not amount to substantial evidence. Moreover, later Supreme Court cases have explained that double jeopardy considerations do not apply to noncapital sentencing proceedings. (*Monge, supra*, 524 U.S. at p. 724.) A failure of proof at sentencing cannot be analogized to a reversal for insufficient evidence of guilt. (*Id.* at p. 729.)

It is no surprise that every court faced with the question before us has simply stricken gang enhancements lacking substantial evidence without addressing the possibility of retrial. (*Perez, supra*, 18 Cal.App.5th at pp. 614, 627; *Rios, supra*, 222 Cal.App.4th at p. 546; *Franklin, supra*, 248 Cal.App.4th at p. 952; *Ochoa, supra*, 179 Cal.App.4th at p. 665; *Frank S., supra*, 141 Cal.App.4th at p. 1200; *Daniel C., supra*, 195 Cal.App.4th at p. 1365; *People v. Ramon, supra*, 175 Cal.App.4th at p. 858.) Double jeopardy principles require that approach here.¹⁰

¹⁰ Because the gang enhancements must be stricken for insufficiency of the evidence, we do not reach Ortega's *Sanchez* challenge that the gang expert impermissibly relied on case-specific hearsay to connect Tara with an OVS member named Bam Bam. (*Perez, supra*, 18 Cal.App.5th at p. 614, fn. 4.)

DISPOSITION

The true findings on the gang enhancements (§ 186.22, subd. (b)(1)) in counts 1 and 2 are stricken, and the case is remanded for resentencing on the remaining convictions. Upon resentencing, the clerk of the superior court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

DATO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

GUERRERO, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.



02/01/2019

KEVIN J. LANE, CLERK

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