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INTRODUCTION

In general, the role of an expert-witness in the criminal justice system has been defined as a person who has some special training or experience in a criminal behavioral area and can help the judge, lawyers and the jury arrive at the truth in the judicial process. In the past, the role has been limited to such professionals as psychiatrists, physicians, and engineers. In the last decade, however, there has been a broader acceptance of professional expert-witnesses in court cases—including criminal gang cases.

These materials are intended to assist attorneys in spotting potential issues in the adjudication of gang provisions arising under Penal Code section 186.22. This outline will focus on the determination of the gang provisions, rather than on the imposition of sentence. This outline is not designed to be a comprehensive guide to gang statutes, and it certainly does not include every recent case. Instead this article notes selected areas in which issues frequently arise in litigation under Penal Code section 186.22. The principle objective is to call attention to certain themes which cut across the various gang provisions and to assist attorneys in identifying issues.

THE CRIMINAL STREET GANG COMPONENT

The “criminal street gang” component of the gang provisions (i.e., the gang’s existence) requires proof of three essential elements: (1) that there be an “ongoing association” involving three or more participants, having a “common name or common identifying sign or symbol”; (2) that the group has as one of its “primary activities” the commission of one or more specified crimes; and (3) the group’s members either separately or as a group “have engaged in a pattern of criminal gang activity.”

The existing organizational and size characteristics required by the statute are three or more members which have a common name or identifying symbol. (Pen. Code, §186.22, subd. (e)) The California Supreme Court has discussed the “pattern of gang activity” element in a trilogy of cases. First, in People v. Gardeley, supra, 14 Cal.4th 605, the Court held that the qualifying offenses can be proven based upon the offenses the defendant is charged with committing, as well as upon past offenses, provided they occur within the washout period of three years. Thus, in Gardeley, the prosecution had established the statutorily required predicate offenses by (1) proof of defendant Gardeley’s commission of the charged offense of aggravated assault (one of the statutorily enumerated offenses), and (2) an earlier incident in which a fellow gang member had shot at an occupied dwelling (also an enumerated offense).

Then, in People v. Louen (1997) 17 Cal.4th 1, 5, the Court held that “evidence of the offense with which the defendant is charged and proof of another offense committed on the same occasion by a fellow gang member” was also sufficient to prove the statutorily required predicate offenses. There, the prosecutor established the offenses by evidence that (1) the charged crime of assault with a deadly weapon was committed by defendant Louen with a baseball bat, and (2) a separate assault with a deadly
weapon on the same victim was committed contemporaneously by the defendant's fellow gang member with a tire iron.

Penal Code section 186.22, subdivision (a) creates a separate and distinct crime chargeable as either a felony or misdemeanor. This section provides:

“Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, further, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

**GANG STRUCTURE AND ROLES**

Based on my extensive research of gangs since 1950 for my book GANGSTERS, I have developed a now widely accepted theory of the violent gang as a “near-group.” The theory, simply stated, posits that gangs vary with regard to their degree of organization. Some gangs are very cohesive, closely-knit and well organized. In contrast, gangs that fit the model of a “near-group” are very loosely structured, and membership is unclear. This factor, of gang organization, is significant in a criminal trial, since a defendant may be a core member of a gang or on the periphery depending on the degree of cohesiveness of the relevant gang.

Another factor to be considered in a trial involving a gang is the role that the participants play in the gang. In this regard, in my book GANGSTERS, I have delineated 4 basic types of gang roles: “OG’s “or “Veteranos” who are longtime core gangsters dedicated to their gang; “Gs” gangsters who comprise the general troops in the gang; “Wannabees” who are usually young interns and aspiring gangsters; and “gangsta-groupies” a relatively new category of youths who do not participate in gang activity but gravitate to and apparently enjoy hanging-out with gangsters out of their own ego needs.

This latter group of less culpable youths, are too often caught in the net of a violent gang incident, identified as co-conspirators, and become subject to the overkill punishment of imprisonment that is meted out to the more involved gangsters. As an expert-witness, after careful analysis of a defendant, I can make these distinctions in my reports and testimony—and this information is of aid to the judicial process in rendering a just decision on a defendant’s guilt or innocence in a gang crime.

In brief, the foregoing categorizations of gang structure and gang roles are significant in a trial in determining the level of culpability of a youth in a gang incident. It is apparent that OGs are likely to be
leaders more involved in a violent criminal incident than peripheral Wannabees or groupies who in many cases have limited or no criminal responsibility.

**GANG CULTURE**

It is useful for all of the participants in a criminal trial to know and understand various aspects of the gang culture. A knowledgeable gang expert-witness can bring into play in the criminal justice system information that can aid in reaching judicious decisions.

Following are a few examples of the gang’s culture that are relevant in understanding a gangster’s motives and behavior.

All gangsters are motivated to present themselves as tough, super-macho individuals. In my book gangsters, I refer to this as “masoch-madness.” In this context, being “dissed” or disrespected as a man is often the precipitator of gang violence. Being “dissed”, usually occurs with some attack on the gangster’s masculinity by calling him a “puss” or a “faggot.” Implying that a gangster has feminine characteristics is sufficient grounds in the gang culture for a violent--even homicidal retaliation. The disrespectful epithets used in a violent gang incident are often significant factors in determining motives in a criminal case.

Another factor of gang culture that is significant in the judicial process is an awareness that gang violence, including drive-by shootings, are not necessarily premeditated acts. They are, often, in the context of “near group” theory, spontaneous, in the moment acts, that do not constitute premeditated violence. Sometimes an aspiring gangster will commit a bizarre spontaneous violent act for the purpose of what I have referred to as “putting in work” -- in order to acquire his credentials or status in the gang. This behavior is not a premeditated or rational act of violence, and to some extent mitigate the culpability of an offender. In cases involving a gang homicide, they are more likely to call for a charge of 2nd degree murder rather than 1st degree murder.

A myth about gang culture is that “homies are down for each other”, “never snitch on a homie,” and are obligated to “watch each other’s back” for protection. Experienced police officers know that gangsters are not necessarily “family” and will inform or “give-up a homie” when it serves their self-interest. Gangsters are often very willing to “snitch” on their “bro” in self-defense. This issue can be a significant
factor in acquiring information that can aid the judicial process. It is my experience, that most gangsters, when interviewed one-on-one will inform and reveal information vital to the just resolution of a criminal case.

These are only a few of the myths and realities of gang culture that can be helpful to all of the participants in the criminal justice system. A realistic knowledge of gang organization and culture is invaluable in the true service of justice in a criminal gang case.

“IMPERFECT SELF-DEFENSE” AND “VICTIM-PRECIPITATED HOMICIDE”

These are two basic legal and sociological concepts, among several, that I have found most valuable, for various reasons in my testimony in gang cases. They are concepts that relate to the inchoate nature of gang violence, and help to explain criminal gang behavior.

“Imperfect Self-Defense” as defined by California Law (CALJIC 5.17) is a relevant law that can be utilized in gang cases. It implies that a violent offense committed by a gangster who believes he is in imminent danger in a gang situation is less culpable for his behavior. The law, under the heading “HONEST BUT UNREASONABLE BELIEF IN NECESSITY TO DEFEND--MANSLAUGHTER” states, in part: “A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of [first degree] murder.” In brief, in some cases this law can be utilized not to exonerate a gang defendant--but to plead a case to a lower level of responsibility.

Many, if not most gang situations can be better understood in the context of the widely accepted sociological theory I have alluded to as “Victim-Precipitated-Homicide.” Simply stated, this theory pertains to the fact that in a violent gang interaction it is often difficult to ascertain who will wind-up as the perpetrator and who will become the victim. The individual who is the initial victim of a violent act, often in self-defense, winds up as the assailant.

In one of the cases I described earlier, the defendant and his partner in a 1st degree murder case, after being initially attacked by several enemy gangsters acquired the upper hand and gained control of the situation. Now in charge, and fearing the deadly possibility that if the others who ultimately became their victims were released from their control, they would return to kill them. The two individuals, who were convicted of first degree murder, in terms of gang rules and regulations, believed it was incumbent on them to eliminate their perceived enemies. Although this does not exonerate them from the commission of a homicide--it can reduce their culpability in the framework of the criminal justice system.
THE USE OF EXPERT TESTIMONY

Evidence Code section 720, subdivision (a), provides, in relevant part: “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates.” Expert testimony on criminal street gangs has been deemed appropriate for establishing most of the requirements of Penal Code section 186.22.

Case law recognizes that police officers may testify as experts about the sociology, psychology, customs and methods of operations of street gangs. This includes testifying about the gang’s composition and size, their primary activities, and an individual defendant’s membership in or association with the gang. The courts have also sanctioned gang expert testimony on whether and how a crime was committed to benefit or promote a gang. In fact, the gang expert may testify to opinions which comment on the ultimate issues to be resolved by the trier of fact.

However, a gang expert is prohibited from testifying about whether an individual had specific knowledge or possessed a certain specific intent. (People v. Killebrew, supra, 103 Cal.App.4th 644, 658.) In Killebrew, the defendant was convicted of conspiring to possess a handgun, even though he did not have a handgun in his possession. A police officer testified as an expert on gangs to establish not only defendant’s membership, but also his subjective knowledge and intent to possess the handgun. He was allowed to testify that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun. The court held the testimony about subjective knowledge and intent was inadmissible. Further the evidence was insufficient to establish that defendant was involved in a conspiracy to possess the handgun.

Additionally, the fact that the prosecution has presented the opinion of an expert on an issue does not ipso facto constitute sufficient evidence to prove that issue. (People v. Basset (1968) 69 Cal.2d 122, 141.) “Expert evidence is really an argument of an expert to the court and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions.” (People v. Martin (1948) 87 Cal.App.2d 581, 584.) Therefore, “any material that forms the basis of an expert’s opinion must be reliable . . . for the law does not accord the expert’s opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.” (People v. Gardeley, supra, 14 Cal.4th 605, 618.)

In Gardeley, the Supreme Court addressed the type of matter on which an expert may rely in formulating their opinion. It may be premised on material that is not admitted into evidence—or on material that is not ordinarily admissible, such as hearsay—as long as that material is reliable and of a type that is reasonably relied upon by experts in the particular field in forming their opinions.

But “conclusional testimony that gang members have previously engaged in the enumerated offenses, based on nonspecific hearsay and arrest information which does not specify exactly who, when, where and under what circumstances gang crimes were committed, does not amount to substantial evidence.” (In re Jose T. (1991) 230 Cal.App.3d 1455, 1462.) Likewise, “vague, secondhand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred.” (In re
In Nathaniel C., supra, 228 Cal.App.3d at p. 1003.) In Nathaniel C., the expert, a South San Francisco police officer, had no personal knowledge of the predicate offense and only repeated what San Bruno police told him they believed about the shooting.

In People v. Thomas (2005) 130 Cal.App.4th 1202, the court held that a gang expert can base his opinion on conversations with gang members and the contents of those conversations can be admitted without violating Crawford v. Washington (2004) 514 U.S. 36 [124 S.Ct. 1354]. The court found no error under Crawford because the statements were not admitted for their truth, and Crawford did not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions.

**CONCLUSION**

These are only some of the legal and sociological arguments that can be effectively employed by a gang expert-witness in a criminal trial.

My brief discussion of some of the general issues that pertain to gangs reveals that there are many myths about gangs that significantly affect the criminal justice process. Although the foregoing gang concepts do not necessarily produce “slam-dunk” clear decisions in a criminal case --they are reasonable issues to be presented in the prosecution or defense of a gangster who has committed a violent act. Testimony on the realities of the gang phenomenon by an expert-witness, can be helpful in the rendering of a more equitable decision in a criminal trial involving gang behavior.